

GENERAL ASSEMBLY OF NORTH CAROLINA

SESSION 1993

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HOUSE BILL 539*

Short Title: Business Corp. Act Amendments.

(Public)

Sponsors: Representative Kennedy.

Referred to: Courts and Justice.

March 25, 1993

A BILL TO BE ENTITLED

1 AN ACT TO AMEND THE NORTH CAROLINA BUSINESS CORPORATION ACT
2 AND TO AMEND G.S. 54-139 RELATING TO FOREIGN COOPERATIVE
3 CORPORATIONS AS RECOMMENDED BY THE GENERAL STATUTES
4 COMMISSION.
5

6 The General Assembly of North Carolina enacts:

7 Section 1. G.S. 55-1-23(c) reads as rewritten:

8 "(c) ~~The~~ Except as provided in G.S. 55-2-03(b), the fact that a document has
9 become effective under this section does not determine its validity or invalidity or the
10 correctness or incorrectness of the information contained in the document."

11 Sec. 2. G.S. 55-1-25 reads as rewritten:

12 "**§ 55-1-25. Filing duty of Secretary of State.**

13 (a) If a document delivered to the office of the Secretary of State for filing
14 satisfies the requirements of this Chapter, the Secretary of State shall file it.

15 (b) The Secretary of State files a document by stamping or otherwise endorsing
16 'Filed', together with his name and official title and the date and time of filing, on both
17 the original and the document copy. After filing a document, except as provided in G.S.
18 55-5-03 and G.S. 55-15-09, the Secretary of State shall deliver the document copy to the
19 domestic or foreign corporation or its representative.

20 (c) If the Secretary of State refuses to file a document, he shall return ~~it~~ it, by
21 personal delivery or by first-class mail postage prepaid, to the domestic or foreign
22 corporation or its representative within five days after the document was received,
23 together with a brief, written ~~explanation of~~ statement of the date and the reason for his
24 refusal.

1 (d) The Secretary of State's duty is to review and file documents that satisfy the
2 requirements of this Chapter. His filing or refusing to file a document does not:

- 3 (1) ~~Affect~~ Except as provided in G.S. 55-2-03(b), affect the validity or
4 invalidity of the document in whole or part;
5 (2) Relate to the correctness or incorrectness of information contained in
6 the document;
7 (3) Create a presumption that the document is valid or invalid or that
8 information contained in the document is correct or incorrect."

9 Sec. 3. G.S. 55-1-32 reads as rewritten:

10 **"§ 55-1-32. Penalties imposed upon corporations, officers, and directors for failure**
11 **to answer interrogatories.**

12 (a) ~~If a corporation, domestic or foreign, fails or refuses~~ The knowing failure or
13 refusal of a domestic or foreign corporation to answer truthfully and fully within the
14 time prescribed in this Chapter interrogatories propounded by the Secretary of State in
15 accordance with the provisions of this Chapter, the Secretary of State may suspend its
16 articles of incorporation or its certificate of authority to do business. Chapter is a
17 misdemeanor.

18 (b) Each officer and director of a domestic or foreign corporation, domestic or
19 foreign, corporation who knowingly fails or refuses within the time prescribed by this
20 Chapter to answer truthfully and fully interrogatories propounded to him by the
21 Secretary of State in accordance with the provisions of this Chapter shall be guilty of a
22 misdemeanor."

23 Sec. 4. G.S. 55-1-40(4) reads as rewritten:

24 "(4) 'Corporation' or 'domestic corporation' means a corporation for profit
25 or a corporation having capital stock that is incorporated under or
26 subject to the provisions of this Chapter and that is not a foreign
27 corporation except that in G.S. 55-9-01 and G.S. 55-15-21
28 'corporation' includes domestic and foreign corporations."

29 Sec. 5. G.S. 55-1-41 reads as rewritten:

30 **"§ 55-1-41. Notice.**

31 (a) Notice under this Chapter shall be in writing unless oral notice is authorized
32 in the corporation's articles of incorporation or ~~bylaws.~~ bylaws and written notice is not
33 specifically required by this Chapter.

34 (b) Notice may be communicated in person; by telephone, telegraph, teletype, or
35 other form of wire or wireless communication, or by facsimile transmission; or by mail
36 or private carrier. If these forms of personal notice are impracticable as to one or more
37 persons, notice may be communicated to such persons by publishing notice in a
38 newspaper in the county wherein the corporation has its principal place of business in
39 the State, or if it has no principal place of business in the State, the county wherein it
40 has its registered office; or by radio, television, or other form of public broadcast
41 communication.

42 (c) Written notice by a domestic or foreign corporation to its shareholder is
43 effective when deposited in the United States mail with postage thereon prepaid and

1 correctly addressed to the shareholder's address shown in the corporation's current
2 record of shareholders.

3 (d) Written notice to a domestic or foreign corporation (authorized to transact
4 business in this State) may be addressed to its registered agent at its registered office or
5 to the corporation or its secretary at its principal office shown in its most recent annual
6 report on file in the office of the Secretary of State or, in the case of a foreign
7 corporation that has not yet delivered an annual report, in its application for a certificate
8 of authority.

9 (e) Except as provided in subsection (c), written notice is effective at the earliest
10 of the following:

11 (1) When received;

12 (2) Five days after its deposit in the United States mail, as evidenced by
13 the ~~postmark~~, postmark or otherwise, if mailed with at least first-class
14 postage thereon prepaid and correctly addressed;

15 (3) On the date shown on the return receipt, if sent by registered or
16 certified mail, return receipt requested, and the receipt is signed by or
17 on behalf of the addressee.

18 (f) Oral notice is effective when actually communicated to the person entitled
19 thereto.

20 (g) If this Chapter prescribes notice requirements for particular circumstances,
21 those requirements govern. If articles of incorporation or bylaws prescribe notice
22 requirements not inconsistent with this section or other provisions of this Chapter, those
23 requirements govern."

24 Sec. 6. G.S. 55-2-02(b) reads as rewritten:

25 "(b) The articles of incorporation may set forth any provision that under this
26 Chapter is required or permitted to be set forth in the bylaws, and may also set forth:

27 (1) The names and addresses of the individuals who are to serve as the
28 initial directors;

29 (2) Provisions not inconsistent with law regarding (i) the purpose or
30 purposes for which the corporation is organized; (ii) managing the
31 business and regulating the affairs of the corporation; (iii) defining,
32 limiting, and regulating the powers of the corporation, its board of
33 directors, and shareholders; (iv) a par value for authorized shares or
34 classes of shares; (v) the imposition of personal liability on
35 shareholders for the debts of the corporation to a specified extent and
36 upon specified conditions; (vi) any limitation on the duration of the
37 corporation; and

38 (3) A provision limiting or eliminating the personal liability of ~~each~~ any
39 director arising out of an action whether by or in the right of the
40 corporation or otherwise for monetary damages for breach of any duty
41 as a director. No such provision shall be effective with respect to (i)
42 acts or omissions that the director at the time of such breach knew or
43 believed were clearly in conflict with the best interests of the
44 corporation, (ii) any liability under G.S. 55-8-33, (iii) any transaction

1 from which the director derived an improper personal benefit, or (iv)
2 acts or omissions occurring prior to the date the provisions became
3 effective. As used herein, the term 'improper personal benefit' does
4 not include a director's reasonable compensation or other reasonable
5 incidental benefit for or on account of his service as a director, officer,
6 employee, independent contractor, attorney, or consultant of the
7 corporation. A provision permitted by this Chapter in the articles of
8 incorporation, bylaws, or a contract or resolution indemnifying or
9 agreeing to indemnify a director against personal liability shall be fully
10 effective whether or not there is a provision in the articles of
11 incorporation limiting or eliminating personal liability."

12 Sec. 7. G.S. 55-4-04 reads as rewritten:

13 **"§ 55-4-04. Reserved and registered names, powers of the Secretary of State.**

14 The Secretary of State may revoke any reservation or registration of a corporate
15 name if he finds, upon a hearing not less than 20-15 days after ~~written notice has been sent~~
16 the effective date of written notice given by registered or certified mail, return receipt
17 requested, to the person or corporation who made the reservation or registration, that the
18 application ~~thereof~~ therefor or any transfer thereof was not made in good faith or that
19 any statement contained in the application for reservation or registration was false when
20 such application was filed or has thereafter become false."

21 Sec. 8. G.S. 55-7-20 reads as rewritten:

22 **"§ 55-7-20. Shareholders' list for meeting.**

23 (a) After fixing a record date for a meeting, a corporation shall prepare an
24 alphabetical list of the names of all its shareholders who are entitled to notice of a
25 shareholders' meeting. The list must be arranged by voting group (and within each
26 voting group by class or series of shares) and show the address of and number of shares
27 held by each shareholder.

28 (b) The shareholders' list must be available for inspection by any shareholder,
29 beginning two business days after notice of the meeting is given for which the list was
30 prepared and continuing through the meeting, at the corporation's principal office or at a
31 place identified in the meeting notice in the city where the meeting will be held. A
32 shareholder, ~~or his agent or attorney,~~ personally or by or with his representative, is
33 entitled on written demand to inspect and, subject to the requirements of G.S. 55-16-
34 02(c), to copy the list, during regular business hours and at his expense, during the
35 period it is available for inspection.

36 (c) The corporation shall make the shareholders' list available at the meeting, and
37 any shareholder, ~~his agent, or attorney~~ personally or by or with his representative, is
38 entitled to inspect the list at any time during the meeting or any adjournment.

39 (d) If the corporation refuses to allow a ~~shareholder, his agent, or attorney~~
40 shareholder or his representative to inspect the shareholders' list before or at the meeting
41 (or copy the list as permitted by subsection (b)), the superior court of the county where a
42 corporation's principal office (or, if none in this State, its registered office) is located, on
43 application of the shareholder, after notice is given to the corporation, may summarily

1 order the inspection or copying at the corporation's expense and may postpone the
2 meeting for which the list was prepared until the inspection or copying is complete.

3 (e) Refusal or failure to prepare or make available the shareholders' list does not
4 affect the validity of action taken at the meeting."

5 Sec. 9. G.S. 55-8-50(b) reads as rewritten:

6 "(b) Definitions in this Part:

7 (1) 'Corporation' includes any domestic or foreign predecessor entity of a
8 corporation in a merger or other transaction in which the predecessor's
9 existence ceased upon consummation of the transaction. corporation
10 absorbed in a merger which, if its separate existence had continued,
11 would have had the obligation or power to indemnify its directors,
12 officers, employees, or agents, so that a person who would have been
13 entitled to receive or request indemnification from such corporation if
14 its separate existence had continued shall stand in the same position
15 under this Part with respect to the surviving corporation.

16 (2) 'Director' means an individual who is or was a director of a corporation
17 or an individual who, while a director of a corporation, is or was
18 serving at the corporation's request as a director, officer, partner,
19 trustee, employee, or agent of another foreign or domestic corporation,
20 partnership, joint venture, trust, employee benefit plan, or other
21 enterprise. A director is considered to be serving an employee benefit
22 plan at the corporation's request if his duties to the corporation also
23 impose duties on, or otherwise involve services by, him to the plan or
24 to participants in or beneficiaries of the plan. 'Director' includes,
25 unless the context requires otherwise, the estate or personal
26 representative of a director.

27 (3) 'Expenses' means expenses of every kind incurred in defending a
28 proceeding, including counsel fees.

29 (4) 'Liability' means the obligation to pay a judgment, settlement, penalty,
30 fine (including an excise tax assessed with respect to an employee
31 benefit plan), or reasonable expenses incurred with respect to a
32 proceeding.

33 (4a) 'Officer', 'employee', or 'agent' includes, unless the context requires
34 otherwise, the estate or personal representative of a person who acted
35 in that capacity.

36 (5) 'Official capacity' means: (i) when used with respect to a director, the
37 office of director in a corporation; and (ii) when used with respect to
38 an individual other than a director, as contemplated in G.S. 55-8-56,
39 the office in a corporation held by the officer or the employment or
40 agency relationship undertaken by the employee or agent on behalf of
41 the corporation. 'Official capacity' does not include service for any
42 other foreign or domestic corporation or any partnership, joint venture,
43 trust, employee benefit plan, or other enterprise.

1 (6) 'Party' includes an individual who was, is, or is threatened to be made a
2 named defendant or respondent in a proceeding.

3 (7) 'Proceeding' means any threatened, pending, or completed action, suit,
4 or proceeding, whether civil, criminal, administrative, or investigative
5 and whether formal or informal."

6 Sec. 10. G.S. 55-8-03(b) reads as rewritten:

7 "(b) The shareholders may from time to time increase or decrease the number of
8 directors by amendment to the articles of incorporation or the bylaws, but no such
9 decrease shall be made for a corporation to which G.S. 55-7-28(e) is applicable when
10 the number of shares voting against the proposal for decrease would be sufficient to
11 elect a director by cumulative voting if such shares are entitled to be voted cumulatively
12 for the election of directors. If a board of directors has power under the articles of
13 incorporation or bylaws to fix or change the number of directors and if the shareholders
14 do not have the right to cumulate their votes for directors, the board may increase or
15 decrease the number of directors by not more than thirty percent (30%) during any 12-
16 month period."

17 Sec. 11. G.S. 55-11-03(g) reads as rewritten:

18 "(g) Action by the shareholders of the surviving corporation on a plan of merger is
19 not required if:

20 (1) The articles of incorporation of the surviving corporation will not
21 differ (except for amendments enumerated in G.S. 55-10-02) from its
22 articles before the merger;

23 (2) Each shareholder of the surviving corporation whose shares were
24 outstanding immediately before the effective date of the merger will
25 hold the same ~~number of~~ shares, with identical designations,
26 preferences, limitations, and relative rights, immediately after the
27 effective date of the merger;

28 (3) The number of voting shares outstanding immediately after the
29 merger, plus the number of voting shares issuable as a result of the
30 merger (either by the conversion of securities issued pursuant to the
31 merger or the exercise of rights and warrants issued pursuant to the
32 merger), will not exceed by more than twenty percent (20%) the total
33 number of voting shares of the surviving corporation outstanding
34 immediately before the merger; and

35 (4) The number of participating shares outstanding immediately after the
36 merger, plus the number of participating shares issuable as a result of
37 the merger (either by the conversion of securities issued pursuant to
38 the merger or the exercise of rights and warrants issued pursuant to the
39 merger), will not exceed by more than twenty percent (20%) the total
40 number of participating shares outstanding immediately before the
41 merger."

42 Sec. 12. G.S. 55-15-01(a) reads as rewritten:

1 "(a) A foreign corporation may not transact business in this State until it obtains a
2 certificate of authority from the Secretary of State ~~under this Chapter or under Chapter 55A~~
3 ~~of the General Statutes.~~ State."

4 Sec. 13. G.S. 55-15-08 is amended by adding a new subsection to read:

5 "(c) A foreign corporation authorized to transact business in this State may change
6 its registered office or registered agent by including in its annual report required by G.S.
7 55-16-22 the information and any written consent required by subsection (a) of this
8 section."

9 Sec. 14. G.S. 55-16-02 is amended by adding a new subsection to read:

10 "(h) A shareholder of a corporation that has the power to elect, appoint, or
11 designate a majority of the directors of another domestic or foreign corporation or of a
12 domestic or foreign nonprofit corporation, shall have inspection rights with respect to
13 the records of that other corporation."

14 Sec. 15. G.S. 55-17-01 reads as rewritten:

15 "**§ 55-17-01. Applicability of act.**

16 (a) The provisions of this Chapter shall apply to every corporation for profit, and,
17 so far as appropriate, to every nonprofit corporation ~~not for profit~~ having a capital stock,
18 now existing or hereafter formed, and to the outstanding and future securities thereof,
19 except to the extent the corporation is expressly excepted by this Chapter from its
20 operation or except to the extent that there is other specific statutory provision
21 particularly applicable to the corporation or inconsistent with some provisions of this
22 Chapter, in which case that other provision prevails.

23 (b) Notwithstanding the provisions of subsection (a) of this section, no nonprofit
24 corporation ~~not for profit~~ having a capital stock and formed for religious, charitable,
25 nonprofit, social, or literary purposes shall hereafter be formed under this Chapter."

26 Sec. 16. G.S. 54-139 reads as rewritten:

27 "**§ 54-139. ~~Domestication of foreign~~ Foreign cooperative corporations; limitation on**
28 **use of word 'cooperative.'**

29 (a) A foreign corporation (with or without capital stock) that can qualify as an
30 association, as defined in G.S. 54-130(2)b1 and 2, ~~may, under the provisions of Article 8,~~
31 ~~Chapter 55A, if it be a nonstock corporation, or under the provisions of Article 10, Chapter 55,~~
32 ~~if it be a stock corporation, may~~ be authorized to transact business in this State. ~~State under~~
33 the provisions of Chapter 55A of the General Statutes.

34 (b) No person other than an association organized under this Subchapter, or a
35 foreign corporation ~~domesticated~~ authorized to transact business in this State pursuant to
36 subsection (a) of this section, or an electric or telephone membership corporation
37 domesticated pursuant to G.S. 117-28, or an organization created under or governed by
38 Subchapter IV of Chapter 54 of the General Statutes, shall be entitled to organize,
39 domesticate, or transact business in this State if the corporate or other business name or
40 title of such person contains the word 'cooperative.'"

41 Sec. 17. This act becomes effective October 1, 1993.