

GENERAL ASSEMBLY OF NORTH CAROLINA
1993 SESSION

CHAPTER 552
HOUSE BILL 539

AN ACT TO AMEND THE NORTH CAROLINA BUSINESS CORPORATION ACT AND TO AMEND G.S. 54-139 RELATING TO FOREIGN COOPERATIVE CORPORATIONS AS RECOMMENDED BY THE GENERAL STATUTES COMMISSION AND TO MAKE OTHER AMENDMENTS TO THE BUSINESS CORPORATION ACT.

The General Assembly of North Carolina enacts:

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

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

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

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

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

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

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

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

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

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

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

(a) ~~If a corporation, domestic or foreign, fails or refuses~~ The knowing failure or refusal of a domestic or foreign corporation to answer truthfully and fully within the time prescribed in this Chapter interrogatories propounded by the Secretary of State in accordance with the provisions of this Chapter, the Secretary of State may suspend its articles of incorporation or its certificate of authority to do business. Chapter shall constitute grounds for administrative dissolution under G.S. 55-14-20 or for revocation under G.S. 55-15-30, as the case may be.

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

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

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

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

"§ 55-1-41. Notice.

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

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

(c) Written notice by a domestic or foreign corporation to its shareholder is effective when deposited in the United States mail with postage thereon prepaid and correctly addressed to the shareholder's address shown in the corporation's current record of shareholders.

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

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

(1) When received;

- (2) Five days after its deposit in the United States mail, as evidenced by the ~~postmark~~, postmark or otherwise, if mailed with at least first-class postage thereon prepaid and correctly addressed;
 - (3) On the date shown on the return receipt, if sent by registered or certified mail, return receipt requested, and the receipt is signed by or on behalf of the addressee.
- (f) Oral notice is effective when actually communicated to the person entitled thereto.
- (g) If this Chapter prescribes notice requirements for particular circumstances, those requirements govern. If articles of incorporation or bylaws prescribe notice requirements not inconsistent with this section or other provisions of this Chapter, those requirements govern."

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

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

- (1) The names and addresses of the individuals who are to serve as the initial directors;
- (2) Provisions not inconsistent with law regarding (i) the purpose or purposes for which the corporation is organized; (ii) managing the business and regulating the affairs of the corporation; (iii) defining, limiting, and regulating the powers of the corporation, its board of directors, and shareholders; (iv) a par value for authorized shares or classes of shares; (v) the imposition of personal liability on shareholders for the debts of the corporation to a specified extent and upon specified conditions; (vi) any limitation on the duration of the corporation; and
- (3) A provision limiting or eliminating the personal liability of ~~each~~any director arising out of an action whether by or in the right of the corporation or otherwise for monetary damages for breach of any duty as a director. No such provision shall be effective with respect to (i) acts or omissions that the director at the time of such breach knew or believed were clearly in conflict with the best interests of the corporation, (ii) any liability under G.S. 55-8-33, (iii) any transaction from which the director derived an improper personal benefit, or (iv) acts or omissions occurring prior to the date the provisions became effective. As used herein, the term 'improper personal benefit' does not include a director's reasonable compensation or other reasonable incidental benefit for or on account of his service as a director, officer, employee, independent contractor, attorney, or consultant of the corporation. A provision permitted by this Chapter in the articles of incorporation, bylaws, or a contract or resolution indemnifying or agreeing to indemnify a director against personal liability shall be fully effective whether or not there is a provision in the articles of incorporation limiting or eliminating personal liability."

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

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

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

Sec. 8. G.S. 55-6-30(d) reads as rewritten:

"(d) Notwithstanding the foregoing provision of this section, shareholders of a corporation incorporated ~~prior to July 1, 1990~~ before July 1, 1990, other than a public corporation, shall have a preemptive right to acquire the unissued shares of the corporation, to the extent provided in (and subject to the limitations of) subdivisions (b) (1)-(6) and subsection (c) of this section, except to the extent the articles of incorporation expressly provide otherwise."

Sec. 9. G.S. 55-7-20 reads as rewritten:

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

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

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

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

(d) If the corporation refuses to allow a ~~shareholder, his agent, or attorney~~ shareholder or his representative to inspect the shareholders' list before or at the meeting (or copy the list as permitted by subsection (b)), the superior court of the county where a corporation's principal office (or, if none in this State, its registered office) is located, on application of the shareholder, after notice is given to the corporation, may summarily order the inspection or copying at the corporation's expense and may postpone the meeting for which the list was prepared until the inspection or copying is complete.

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

Sec. 10. G.S. 55-8-06 reads as rewritten:

"§ 55-8-06. Staggered terms for directors.

If the number of directors is fixed at nine or more directors, the articles of incorporation or bylaws adopted by the shareholders may provide for staggering their terms by dividing the total number of directors into ~~two-two, or three,~~ three, or four groups, with each group containing ~~one-half one-half, or one-third one-third, or one-fourth~~ of the total, as near as may be. In that event, the terms of directors in the first group expire at the first annual shareholders' meeting after their election, the terms of the second group expire at the second annual shareholders' meeting after their election, ~~and the terms of the third group, if any, expire at the third annual shareholders' meeting after their election,~~ and the terms of the fourth group, if any, expire at the fourth annual shareholders' meeting after their election. At each annual shareholders' meeting held thereafter, directors shall be chosen for a term of ~~two-two, years or three-three,~~ years or four years, as the case may be, to succeed those whose terms expire."

Sec. 11. G.S. 55-8-30(d) reads as rewritten:

"(d) A director is not liable for any action taken as a director, or any failure to take any action, if he performed the duties of his office in compliance with this section. The duties of a director weighing a change of control situation shall not be any different, nor the standard of care any higher, than otherwise provided in this section."

Sec. 12. G.S. 55-8-50(b) reads as rewritten:

"(b) Definitions in this Part:

- (1) 'Corporation' includes any domestic or foreign ~~predecessor entity of a corporation in a merger or other transaction in which the predecessor's existence ceased upon consummation of the transaction.~~ corporation absorbed in a merger which, if its separate existence had continued, would have had the obligation or power to indemnify its directors, officers, employees, or agents, so that a person who would have been entitled to receive or request indemnification from such corporation if its separate existence had continued shall stand in the same position under this Part with respect to the surviving corporation.
- (2) 'Director' means an individual who is or was a director of a corporation or an individual who, while a director of a corporation, is or was serving at the corporation's request as a director, officer, partner, trustee, employee, or agent of another foreign or domestic corporation, partnership, joint venture, trust, employee benefit plan, or other enterprise. A director is considered to be serving an employee benefit plan at the corporation's request if his duties to the corporation also impose duties on, or otherwise involve services by, him to the plan or to participants in or beneficiaries of the plan. 'Director' includes, unless the context requires otherwise, the estate or personal representative of a director.
- (3) 'Expenses' means expenses of every kind incurred in defending a proceeding, including counsel fees.
- (4) 'Liability' means the obligation to pay a judgment, settlement, penalty, fine (including an excise tax assessed with respect to an employee

benefit plan), or reasonable expenses incurred with respect to a proceeding.

- (4a) 'Officer', 'employee', or 'agent' includes, unless the context requires otherwise, the estate or personal representative of a person who acted in that capacity.
- (5) 'Official capacity' means: (i) when used with respect to a director, the office of director in a corporation; and (ii) when used with respect to an individual other than a director, as contemplated in G.S. 55-8-56, the office in a corporation held by the officer or the employment or agency relationship undertaken by the employee or agent on behalf of the corporation. 'Official capacity' does not include service for any other foreign or domestic corporation or any partnership, joint venture, trust, employee benefit plan, or other enterprise.
- (6) 'Party' includes an individual who was, is, or is threatened to be made a named defendant or respondent in a proceeding.
- (7) 'Proceeding' means any threatened, pending, or completed action, suit, or proceeding, whether civil, criminal, administrative, or investigative and whether formal or informal."

Sec. 13. G.S. 55-8-03(b) reads as rewritten:

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

Sec. 14. G.S. 55-11-03(g) reads as rewritten:

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

- (1) The articles of incorporation of the surviving corporation will not differ (except for amendments enumerated in G.S. 55-10-02) from its articles before the merger;
- (2) Each shareholder of the surviving corporation whose shares were outstanding immediately before the effective date of the merger will hold the same ~~number of~~ shares, with identical designations, preferences, limitations, and relative rights, immediately after the effective date of the merger;
- (3) The number of voting shares outstanding immediately after the merger, plus the number of voting shares issuable as a result of the merger (either by the conversion of securities issued pursuant to the merger or the exercise of rights and warrants issued pursuant to the

merger), will not exceed by more than twenty percent (20%) the total number of voting shares of the surviving corporation outstanding immediately before the merger; and

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

Sec. 15. G.S. 55-14-20 reads as rewritten:

"§ 55-14-20. Grounds for administrative dissolution.

The Secretary of State may commence a proceeding under G.S. 55-14-21 to dissolve administratively a corporation if:

- (1) The corporation does not pay within 60 days after they are due any penalties, fees, or other payments due under this Chapter;
- (2) The corporation does not deliver its annual report to the Secretary of State within 60 days after it is due;
- (3) The corporation is without a registered agent or registered office in this State for 60 days or more;
- (4) The corporation does not notify the Secretary of State within 60 days that its registered agent or registered office has been changed, that its registered agent has resigned, or that its registered office has been discontinued; or
- (5) The corporation's period of duration stated in its articles of incorporation ~~expires~~; expires; or
- (6) The corporation knowingly fails or refuses to answer truthfully and fully within the time prescribed in this Chapter interrogatories propounded by the Secretary of State in accordance with the provisions of this Chapter."

Sec. 16. G.S. 55-15-01(a) reads as rewritten:

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

Sec. 17. G.S. 55-15-08 is amended by adding a new subsection to read:

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

Sec. 18 . G.S. 55-15-30(a) reads as rewritten:

"(a) The Secretary of State may commence a proceeding under G.S. 55-15-31 to revoke the certificate of authority of a foreign corporation authorized to transact business in this State if:

- (1) The foreign corporation does not deliver its annual report to the Secretary of State within 60 days after it is due;
- (2) The foreign corporation does not pay within 60 days after they are due any penalties, fees, or other payments due under this Chapter;
- (3) The foreign corporation is without a registered agent or registered office in this State for 60 days or more;
- (4) The foreign corporation does not inform the Secretary of State under G.S. 55-15-08 or G.S. 55-15-09 that its registered agent or registered office has changed, that its registered agent has resigned, or that its registered office has been discontinued within 60 days of the change, resignation, or discontinuance;
- (5) An incorporator, director, officer, or agent of the foreign corporation signed a document he knew was false in any material respect with intent that the document be delivered to the Secretary of State for filing;
- (6) The Secretary of State receives a duly authenticated certificate from the secretary of state or other official having custody of corporate records in the state or country under whose law the foreign corporation is incorporated stating that it has been dissolved or disappeared as the result of a merger;
- (7) The corporation is exceeding the authority conferred upon it by this ~~Chapter~~-Chapter; or
- (8) The corporation knowingly fails or refuses to answer truthfully and fully within the time prescribed in this Chapter interrogatories propounded by the Secretary of State in accordance with the provisions of this Chapter."

Sec. 19. G.S. 55-16-02 is amended by adding new subsections to read:

"(h) A qualified shareholder of a corporation that has the power to elect, appoint, or designate a majority of the directors of another domestic or foreign corporation or of a domestic or foreign nonprofit corporation, shall have the inspection rights provided in this section with respect to the records of that other corporation.

(i) Notwithstanding the provisions of this section or any other provisions of this Chapter or interpretations thereof to the contrary, a shareholder of a public corporation shall have no common law rights to inspect or copy any accounting records of the corporation or any other records of the corporation that may not be inspected or copied by a shareholder of a public corporation as provided in G.S. 55-16-02(b)."

Sec. 20. G.S. 54-139 reads as rewritten:

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

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

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

Sec. 21. This act becomes effective October 1, 1993.

In the General Assembly read three times and ratified this the 24th day of July, 1993.

Marc Basnight
President Pro Tempore of the Senate

Daniel Blue, Jr.
Speaker of the House of Representatives