

FIRST REGULAR SESSION
HOUSE COMMITTEE SUBSTITUTE FOR
SENATE BILL NO. 395
92ND GENERAL ASSEMBLY

Reported from the Committee on Judiciary April 15, 2003, with recommendation that the House Committee Substitute for Senate Bill No. 395 Do Pass by Consent.

STEPHEN S. DAVIS, Chief Clerk

1148L.06C

AN ACT

To repeal sections 347.700, 351.055, and 351.455, RSMo, and to enact in lieu thereof three new sections relating to general and business corporations.

Be it enacted by the General Assembly of the state of Missouri, as follows:

Section A. Sections 347.700, 351.055, and 351.455, RSMo, are repealed and three new sections enacted in lieu thereof, to be known as sections 347.700, 351.055, and 351.455, to read as follows:

347.700. 1. A merger or consolidation solely between any two or more domestic corporations or one or more domestic corporations and one or more foreign corporations shall be governed by and subject to chapter 351 or 355, RSMo, as is applicable.

2. A merger or consolidation solely between any two or more domestic general partnerships or one or more domestic general partnerships and one or more foreign general partnerships shall be governed by and subject to section 358.520, RSMo.

[2.] **3.** A merger or consolidation solely between any two or more domestic limited partnerships or one or more domestic limited partnerships and one or more foreign limited partnerships shall be governed by and subject to section 359.165, RSMo.

[3.] **4.** A merger or consolidation solely between any two or more domestic limited liability companies or one or more domestic limited liability companies and one or more foreign limited liability companies shall be governed by sections 347.127 to 347.133.

[4.] **5.** A business combination involving any resident domestic corporation and any

EXPLANATION — Matter enclosed in bold faced brackets [thus] in this bill is not enacted and is intended to be omitted in the law. Matter in boldface type in the above law is proposed language.

interested shareholder of such resident domestic corporation shall be governed by and subject to section 351.459, RSMo.

[5.] 6. Subject to the provisions of this section, any merger or consolidation between one or more domestic corporations and any one or more constituent entities at least one of which is not a corporation, one or more domestic general partnerships and any one or more constituent entities at least one of which is not a general partnership, one or more domestic limited partnerships and any one or more constituent entities at least one of which is not a limited partnership, one or more domestic limited liability partnerships and any one or more constituent entities at least one of which is not a limited liability partnership, one or more domestic limited liability limited partnerships and any one or more constituent entities at least one of which is not a limited liability limited partnership, or one or more domestic limited liability companies and any one or more constituent entities at least one of which is not a limited liability company shall be governed by and subject to the provisions of sections 347.700 to 347.735.

351.055. The articles of incorporation shall set forth:

- (1) The name of the corporation;
- (2) The address, including street and number, if any, of its initial registered office in this state, and the name of its initial registered agent at such address;
- (3) The aggregate number of shares which the corporation shall have the authority to issue, and the number of shares of each class, if any, that are to have a par value and the par value of each share of each such class, and the number of shares of each class, if any, that are to be without par value and also a statement of the preferences, qualifications, limitations, restrictions, and the special or relative rights including convertible rights, if any, in respect of the shares of each class;
- (4) The extent, if any, to which the preemptive right of a shareholder to acquire additional shares is limited or denied;
- (5) The name and place of residence of each incorporator;
- (6) Either:
 - (a) The number of directors to constitute the first board of directors and a statement to the effect that thereafter the number of directors shall be fixed by, or in the manner provided in, the bylaws of the corporation, and that any changes shall be reported to the secretary of state within thirty calendar days of such change[.]; or
 - (b) The number of directors to constitute the board of directors, except that the number of directors to constitute the board of directors must be stated in the articles of incorporation if the corporation is to have less than three directors.

The persons to constitute the first board of directors may, but need not, be named;

(7) The number of years the corporation is to continue, which may be any number or perpetual;

(8) The purposes for which the corporation is formed;

(9) If the incorporators, the directors pursuant to subsection 1 of section 351.090 or the shareholders pursuant to subsection 2 of section 351.090 choose to do so, a provision eliminating or limiting the personal liability of a director to the corporation or its shareholders for monetary damages for breach of fiduciary duty as a director, provided that such provision shall not eliminate or limit the liability of a director:

(a) For any breach of the director's duty of loyalty to the corporation or its shareholders[.];

(b) For acts or omissions not in subjective good faith or which involve intentional misconduct or a knowing violation of law[.];

(c) Pursuant to section 351.345; or

(d) For any transaction from which the director derived an improper personal benefit.

No such provision shall eliminate or limit the liability of a director for any act or omission occurring prior to the date when such provision becomes effective. **On motion to dismiss, a person challenging the applicability of such a provision shall plead facts challenging such applicability with specificity, and on motion for summary judgment shall have the burden of demonstrating that a genuine dispute exists as to the applicability of the provision.**

All references in this subdivision to a director shall also be deemed to refer:

[(e)] a. To a member of the governing body of a corporation which is not authorized to issue capital stock; and

[(f)] b. To such other person or persons, if any, who, pursuant to a provision of the articles of incorporation in accordance with this chapter, exercise or perform any of the powers or duties otherwise conferred or imposed upon the board of directors by this chapter;

(10) Any other provisions, not inconsistent with law, which the incorporators, the directors pursuant to subsection 1 of section 351.090 or the shareholders pursuant to subsection 2 of section 351.090 may choose to insert.

351.455. 1. If a shareholder of a corporation which is a party to a merger or consolidation [shall file with such corporation, prior to or] **and, in the case of a shareholder owning voting stock, is entitled to vote** at the meeting of shareholders at which the plan of merger or consolidation is submitted to a vote[.] **shall file with such corporation prior to or at such meeting** a written objection to such plan of merger or consolidation, and shall not vote

in favor thereof, and such shareholder, within twenty days after the merger or consolidation is effected, shall make written demand on the surviving or new corporation for payment of the fair value of his **or her** shares as of the day prior to the date on which the vote was taken approving the merger or consolidation, the surviving or new corporation shall pay to such shareholder, upon surrender of his **or her** certificate or certificates representing said shares, the fair value thereof. Such demand shall state the number and class of the shares owned by such dissenting shareholder. Any shareholder failing to make demand within the twenty day period shall be conclusively presumed to have consented to the merger or consolidation and shall be bound by the terms thereof.

2. If within thirty days after the date on which such merger or consolidation was effected the value of such shares is agreed upon between the dissenting shareholder and the surviving or new corporation, payment therefor shall be made within ninety days after the date on which such merger or consolidation was effected, upon the surrender of his **or her** certificate or certificates representing said shares. Upon payment of the agreed value the dissenting shareholder shall cease to have any interest in such shares or in the corporation.

3. If within such period of thirty days the shareholder and the surviving or new corporation do not so agree, then the dissenting shareholder may, within sixty days after the expiration of the thirty day period, file a petition in any court of competent jurisdiction within the county in which the registered office of the surviving or new corporation is situated, asking for a finding and determination of the fair value of such shares, and shall be entitled to judgment against the surviving or new corporation for the amount of such fair value as of the day prior to the date on which such vote was taken approving such merger or consolidation, together with interest thereon to the date of such judgment. The judgment shall be payable only upon and simultaneously with the surrender to the surviving or new corporation of the certificate or certificates representing said shares. Upon the payment of the judgment, the dissenting shareholder shall cease to have any interest in such shares, or in the surviving or new corporation. Such shares may be held and disposed of by the surviving or new corporation as it may see fit. Unless the dissenting shareholder shall file such petition within the time herein limited, such shareholder and all persons claiming under [him] **such shareholder** shall be conclusively presumed to have approved and ratified the merger or consolidation, and shall be bound by the terms thereof.

4. The right of a dissenting shareholder to be paid the fair value of [his] **such shareholder's** shares as herein provided shall cease if and when the corporation shall abandon the merger or consolidation.

5. When the remedy provided for in this section is available with respect to a transaction and the shareholder has exercised the right to appraisal pursuant to

subsection 1 of this section, or the shareholder has made an affirmative election to receive the consideration offered pursuant to the plan of merger or consolidation, such remedy shall be the exclusive remedy of the shareholder as to that transaction, except in the case of fraud or lack of authorization for the transaction.

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