

SECOND REGULAR SESSION

SENATE BILL NO. 931

91ST GENERAL ASSEMBLY

INTRODUCED BY SENATOR KLARICH.

Read 1st time January 14, 2002, and 1,000 copies ordered printed.

TERRY L. SPIELER, Secretary.

3681S.021

AN ACT

To repeal sections 347.143, 351.055, 351.182, 351.385, 351.400 and 351.455, RSMo, relating to business organizations, and to enact in lieu thereof nine new sections relating to the same subject.

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

Section A. Sections 347.143, 351.055, 351.182, 351.385, 351.400 and 351.455, RSMo, are repealed and nine new sections enacted in lieu thereof, to be known as sections 347.143, 351.055, 351.056, 351.182, 351.247, 351.385, 351.400, 351.431 and 351.455, to read as follows:

347.143. 1. A limited liability company may be dissolved involuntarily by a decree of the circuit court for the county in which the registered office of the limited liability company is situated in an action filed by the attorney general when it is established that the limited liability company:

(1) Has procured its articles of organization through fraud;

(2) Has exceeded or abused the authority conferred upon it by law;

(3) Has carried on, conducted, or transacted its business in a fraudulent or illegal manner; or

(4) By the abuse of its powers contrary to the public policy of the state, has become liable to be dissolved.

2. On application by or for a member, the circuit court for the county in which the registered office of the limited liability company is located may decree dissolution of a limited liability company whenever:

(1) The members are deadlocked in the management of the affairs of the limited

EXPLANATION--Matter enclosed in bold-faced brackets [thus] in this bill is not enacted and is intended to be omitted in the law.

liability company and the members are unable to break the deadlock; or

(2) It is not reasonably practicable to carry on the business in conformity with the operating agreement.

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 particularity, and on motion for summary judgment shall have the burden of proving that the provision does not apply. All references in this subdivision to a director shall also be deemed to refer (e) to a member of the governing body of a corporation which is not authorized to issue capital stock and (f) 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.

351.056. Every corporation may in its articles of incorporation confer upon the holders of any bonds, debentures, or other obligations issued or to be issued by the corporation the power to vote in respect to the corporate affairs and management of the corporation to the extent and in the manner provided in the articles of incorporation and may confer upon such holders of bonds, debentures or other obligations the same right of inspection of its books, accounts and other records, and also any other rights, which the shareholders of the corporation have or may have by reason of this chapter or of its articles of incorporation. If the articles of incorporation so provide, such holders of bonds, debentures or other obligations shall be deemed to be shareholders, and their bonds, debentures or other obligations shall be deemed to be shares of stock, for the purpose of any provision of this chapter which requires the vote of shareholders as a prerequisite to any corporate action and the articles of incorporation may divest the holders of capital stock, in whole or in part, of their right to vote on any corporate matter whatsoever, except as set forth in section 351.093.

351.182. 1. Subject to any provisions in the articles of incorporation, every corporation may create and issue, whether or not in connection with the issue and sale of any shares of stock or other securities of the corporation, rights or options entitling the holders thereof to purchase from the corporation any shares of its capital stock of any class or classes, such rights or options to be evidenced by or in such instrument or instruments as is approved by the board of directors. If, at the time the corporation issues rights or options, there is insufficient authorized and unissued shares to provide the shares needed if and when the rights or options are exercised, the granting of the rights or options shall not be invalid solely by reason of the lack of sufficient authorized but unissued shares.

2. The terms upon which any such shares may be purchased from the corporation upon the exercise of any such right or option, shall be as stated in the articles of incorporation, or in

a resolution adopted by the board of directors providing for the creation and issue of such rights or options, and, in every case, shall be set forth or incorporated by reference in the instrument or instruments evidencing such rights or options. Such terms may include, but not be limited to:

- (1) The duration of such rights or options, which may be limited or unlimited;
- (2) The price or prices at which any such shares may be purchased from the corporation upon the exercise of any such right or option;
- (3) The holders by whom such rights or options may be exercised;
- (4) The conditions to or which may preclude or limit the exercise, transfer or receipt of such rights or options, or which may invalidate or void such rights or options, including without limitation conditions based upon a specified number or percentage of outstanding shares, rights, options, convertible securities, or obligations of the corporation as to which any person or persons or their transferees own or offer to acquire; and
- (5) The conditions upon which such rights or options may be redeemed.

Such terms may be made dependent upon facts ascertainable outside the documents evidencing the rights, or the resolution providing for the issue of the rights or options adopted by the board of directors, if the manner in which the facts shall operate upon the exercise of the rights or options is clearly and expressly set forth in the document evidencing the rights or options, or in the resolution. In the absence of actual fraud in the transaction, the judgment of the directors as to the consideration for the issuance of such rights or options and the sufficiency thereof and the terms of such rights or options shall be conclusive. In case the shares of stock of the corporation to be issued upon the exercise of such rights or options shall be shares having a par value, the price or prices so to be received therefor shall not be less than the par value thereof. In case the shares of stock so to be issued shall be shares of stock without par value, the consideration therefor shall be determined in the manner provided in section 351.185. Nothing contained in subsection 1 of section 351.180 shall be deemed to limit the authority of the board of directors to determine, in its sole discretion, the terms of the rights or options issuable pursuant to this section.

3. The board of directors may, by a resolution adopted by the board, authorize one or more officers of the corporation to do one or both of the following:

- (1) Designate officers and employees of the corporation or of any of its subsidiaries to be recipients of such rights or options created by the corporation; and**
- (2) Determine the number of such rights or options to be received by such officers and employees;**

provided, however that the resolution so authorizing such officer or officers shall specify the total number of rights or options such officer or officers may so award. The board of directors may not authorize an officer to designate himself or herself as a recipient of any such rights or options.

351.247. 1. An agreement authorized by this section shall be:

(1) Set forth in the articles of incorporation or bylaws and approved by all persons who are shareholders at the time of the agreement, or in a written agreement that is signed by all persons who are shareholders at the time of the agreement and is made known to the corporation;

(2) Subject to amendment only by all persons who are shareholders at the time of the amendment, unless the amendment seeks to add, alter or delete a provision or provisions of the agreement not inconsistent with one or more provisions of this chapter; and

(3) Valid for the term set forth in the agreement, or if no such term is so set forth, for ten years.

2. An agreement among the shareholders of a corporation that complies with this section is effective among the shareholders and the corporation even though it is inconsistent with one or more other provisions of this chapter in that it:

(1) Eliminates the board of directors or restricts the discretion or powers of the board of directors;

(2) Governs the authorization or making of distributions whether or not in proportion to ownership of shares, subject to limitations set forth in section 351.220;

(3) Establishes who shall be directors or officers of a corporation, or their terms of office or manner of selection or removal;

(4) Governs, in general or in regard to specific matters, the exercise or division of voting power by or between the shareholders and directors or by or among any of them, including use of weighted voting rights or director proxies;

(5) Establishes the terms and conditions of any agreement for the transfer or use of property or the provision of services between the corporation and any shareholder, director, officer, or employee of the corporation or among any of them;

(6) Transfers to one or more shareholders or other persons all or part of the authority to exercise the corporate powers or to manage the business and affairs of the corporation, including the resolution of any issue about which there exists a deadlock among directors or shareholders;

(7) Requires dissolution of the corporation at the request of one or more of the shareholders or upon the occurrence of a specified event or contingency; or

(8) Otherwise governs the exercise of the corporate powers or the management of the business and affairs of the corporation or the relationship among the shareholders, the directors and the corporation, or among any of them and is not contrary to public policy.

3. The existence of an agreement authorized by this section shall be noted

conspicuously on the front or back of each certificate for outstanding shares, or in the case of uncertificated shares, on any required information statement. If at the time of the agreement the corporation has shares outstanding represented by certificates, the corporation shall recall the outstanding certificates and issue substitute certificates that comply with this subsection. The failure to note the existence of the agreement on the certificate or required information statement shall not affect the validity of the agreement or any action taken pursuant to it. Any purchaser of shares who, at the time of purchase, did not have knowledge of the existence of the agreement shall be entitled to rescission of the purchase. A purchaser shall be deemed to have knowledge of the existence of the agreement if its existence is noted on the certificate or required information statement for the shares in compliance with this subsection and, if the shares are not represented by a certificate, any required information statement is delivered to the purchaser at or prior to the time of purchase of the shares. An action to enforce the right of rescission authorized by this subsection must be commenced within ninety days after the discovery of the existence of the agreement or two years after the time of purchase of the shares whichever is earlier.

4. An agreement authorized by this section shall cease to be effective when shares of the corporation are listed on a national securities exchange or regularly traded in a market maintained by one or more members of a national or affiliated securities association. If the agreement ceases to be effective for any reason, the board of directors may, if the agreement is contained or referred to in the corporation's articles of incorporation or bylaws, adopt an amendment to the articles of incorporation or bylaws, without shareholder action, to delete the agreement and any reference to it.

5. An agreement authorized by this section that limits the discretion or powers of the board of directors shall relieve the directors of, and impose upon the person or persons in whom such discretion or powers are vested, liability for acts or omissions imposed by law on directors to the extent that the discretion or powers of the directors are limited by the agreement.

6. The existence or performance of an agreement authorized by this section shall not be a ground for imposing personal liability on any shareholder for the acts or debts of the corporation as if it were a partnership or if it results in failure to observe the corporate formalities otherwise applicable to the matters governed by the agreement.

7. Incorporators or subscribers for shares may act as shareholders with respect to an agreement authorized by this section if no shares have been issued when the

agreement is made.

8. The provisions of section 351.845, regardless of the articles of incorporation, authorize the action contemplated therein and sections 351.850, 351.855, 351.860 and 351.865 shall be incorporated by reference in any agreement among shareholders authorized by this section.

9. This section shall apply to all agreements entered into either prior to or after the effective date of this section.

351.385. Each corporation shall have power:

(1) To have succession by its corporate name for the period limited in its articles of incorporation or perpetually where there is no such limitations;

(2) To sue and be sued, complain and defend in any court of law or equity;

(3) To have a corporate seal which may be altered at pleasure and to use the same by causing it or a facsimile thereof to be impressed or affixed or in any manner reproduced;

(4) To purchase, take, receive, lease, or otherwise acquire, own, hold, improve, use and otherwise deal in, sell, convey, mortgage, pledge, lease, exchange, transfer and otherwise dispose of all or any part of its real or personal property, or any interest therein, or other assets, wherever situated; and to hold for any period of time, real estate acquired in payment of a debt, by foreclosure or otherwise, or real estate exchanged therefor;

(5) To be a general or limited partner;

(6) To purchase, take, receive, subscribe for, or otherwise acquire, own, hold, vote, use, employ, sell, mortgage, loan, pledge, or otherwise dispose of, and otherwise use and deal in and with, shares or other interests in, or obligations of, other domestic or foreign corporations, associations, partnerships, or individuals, or direct or indirect obligations of the United States or of any other government, state, territory, governmental district or municipality or of any instrumentality thereof;

(7) To make contracts and guarantees, including but not limited to guarantees of the capital stock, bonds, other securities, evidences of indebtedness and other debts and obligations issued by any other corporation of this or any other state, or issued by any state or other political subdivision thereof; to incur liabilities; to borrow money at such rates of interest as the corporation may determine without regard to the restrictions of any usury law of this state; to issue its notes, bonds, and other obligations; to issue notes or bonds, secured or unsecured, which by their terms are convertible into shares of stock of any class, upon such terms and conditions and at such rates or prices as may be provided in such notes or bonds and the indenture or mortgage under which they are issued; and to secure any of its obligations by mortgage, pledge, or deed of trust of all or any of its property, franchises, and income;

(8) To invest its surplus funds from time to time and to lend money and to take and hold real and personal property as security for the payment of funds so invested or loaned;

(9) To conduct its business, carry on its operations, and have offices within and without this state, and to exercise in any other state, territory, district, or possession of the United States, or in any foreign country, the powers granted by this chapter;

(10) To elect or appoint directors, officers and agents of the corporation, define their duties and fix their compensation, and to indemnify directors, officers and employees to the extent and in the manner permitted by law;

(11) To make and alter bylaws, not inconsistent with its articles of incorporation or with the laws of this state, for the administration and regulation of the affairs of the corporation, and to adopt emergency bylaws and exercise emergency powers as permitted by law;

(12) To transact any lawful business in aid of the United States in the prosecution of war, to make donations to associations and organizations aiding in war activities, and to lend money to the state or federal government for war purposes;

(13) To cease its corporate activities and surrender its corporate franchise;

(14) To have and exercise all powers necessary or convenient to effect any or all of the purposes for which the corporation is formed;

(15) To make contributions to any corporation organized for civic, charitable, benevolent, scientific or educational purposes, or to any incorporated or unincorporated association, community chest or community fund, not operated or used for profit to its members but operated for the purposes of raising funds for and of distributing funds to other civic, charitable, benevolent, scientific or educational organizations or agencies;

(16) To renounce, in its articles of incorporation or by action of its board of directors, any interest or expectancy of the corporation in, or in being offered an opportunity to participate in, specified business opportunities or specified classes or categories of business opportunities that are presented to the corporation or one or more of its officers, directors or stockholders.

351.400. **1. Pursuant to the provisions of subsection 2 of this section,** a sale, lease, or exchange or other disposition [other than by mortgage, deed of trust or pledge,] of all, or substantially all, the property and assets, with or without the goodwill, of a corporation, [if not made in the usual and regular course of its business,] may be made upon such terms and conditions and for such consideration, which may consist, in whole or in part, of money or property, real or personal, including shares of any other corporation, domestic or foreign, as may be authorized in the following manner:

(1) The board of directors may adopt a resolution recommending such sale, lease or exchange or other disposition and directing the submission thereof to a vote at a meeting of shareholders entitled to vote thereat, which may be either an annual or a special meeting, except that such proposed sale, lease or exchange need not be adopted by the board of directors and may be directly submitted to any annual or special meeting of shareholders;

(2) Written or printed notice stating that the purpose, or one of the purposes, of such meeting is to consider the sale, lease or exchange, or other disposition of all, or substantially all, of the property and assets of the corporation shall be given to each shareholder of record entitled to vote at such meeting within the time and in the manner provided by this chapter for the giving of notice of meetings of shareholders; if such meeting be an annual meeting, such purpose may be included in the notice of such annual meeting;

(3) At such meeting the shareholders may authorize such sale, lease or exchange, or other disposition and fix, or may authorize the board of directors to fix, any or all of the terms and conditions thereof and the consideration to be received by the corporation therefor. Such authorization shall require the affirmative vote of the holders of at least two-thirds of the outstanding shares entitled to vote at such meeting;

(4) After such authorization by a vote of shareholders, the board of directors nevertheless, in its discretion, may abandon such sale, lease, exchange, or other disposition of assets, subject to the rights of third parties under any contracts relating thereto, without further action or approval by shareholders.

2. Notwithstanding the provisions of subsection 1 of this section, a corporation may, on the terms and conditions determined by the board of directors, and without the approval of shareholders, unless the articles of incorporation otherwise provide:

(1) Sell, lease, exchange, or otherwise dispose of any or all of the corporation's assets in the usual and regular course of business;

(2) Mortgage, pledge, or dedicate to the repayment of indebtedness, whether with or without recourse, or otherwise encumber any or all of the corporation's assets, whether or not in the usual and regular course of business;

(3) Transfer any or all of the corporation's assets to one or more corporations or other entities all of the shares or interests of which are owned by the corporation;

(4) Distribute assets pro rata to the holders of one or more classes or series of the corporation's shares; or

(5) Sell, lease, exchange, or otherwise dispose of all or substantially all of its property if:

(a) The corporation is insolvent and a sale of cash or its equivalent is deemed advisable by the board of directors to meet the liabilities of the corporation; or

(b) The corporation was incorporated for the purpose of liquidating such property and assets.

3. Assets shall be deemed to be less than substantially all of a corporation's property if the fair value of the assets as of the date of the most recent available financial information does not exceed two-thirds of the fair value of all of the assets of the corporation, and the annual revenues of the corporation for the most recent

fiscal year for which such financial information is available represented or produced by such assets do not exceed two-thirds of the total revenues of the corporation for that period. This subsection is intended merely to create an irrebuttable presumption with respect to transactions described in this subsection and shall not create any inference that the sale of assets exceeding the amounts described in this subsection is the sale of substantially all of the property of the corporation.

4. As used in subsection 2 of this section, the term "insolvent" means the corporation would not be able to pay its debts as they become due in the usual course of business, or the corporation's total assets would be less than the sum of its total liabilities.

351.431. After the plan of merger or consolidation is approved as provided in section 351.425, unless the plan of merger or consolidation provides otherwise, and at any time before issuance of the certificate of merger or consolidation as provided in section 351.435, the plan of merger or consolidation may be abandoned, subject to any contractual rights, without further shareholder action, in accordance with the procedure set forth in the plan for merger or consolidation or, if none set forth, in the manner determined by the board of directors.

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 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 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 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 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 shares as herein provided shall cease if and when the corporation shall abandon the merger or consolidation.

5. When the remedy provided for pursuant to this section is available with respect to a transaction, it 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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