

Explanation of Proposed Amendments to House Bill No. 1340

The attached amendment to House Bill No. 1340 makes both substantive and editorial changes to the bill. The substantive changes are as follows:

Sections 10-35-07, 10-35-14, and 10-35-16: Sections 10-35-07 and 10-35-14 permit a public corporation to require a shareholder to give the corporation advance notice if the shareholder plans to nominate directors or propose business at a regular meeting. When a regular meeting is held at the same time as the previous year's regular meeting, application of an advance notice requirement is fairly easy. But when the date of a regular meeting is moved from its usual time, compliance with an advance notice requirement becomes more difficult. To protect shareholders from a situation in which the date of a regular meeting is moved in a way that makes it difficult to comply with an advance notice requirement, House Bill No. 1340 requires the corporation to announce the date of the meeting. The attached amendment takes the provisions on announcement of a moved meeting date out of sections 10-35-07 and 10-35-14 and replaces them with a single provision in section 10-35-16.

Section 10-35-08: This section gives certain 5% owners the right to have director nominees included in the corporation's proxy statement. It follows the approach of a proposal made by the SEC several years ago which has not yet been adopted. Several changes to the section are made by the amendment:

- The definition of "qualified shareholder" is moved to the definitions section of chapter 10-35.
- The language of subsection 2 is conformed to the definition of "qualified shareholder" in subsection 8 of section 10-35-02.
- The length of time shares must be owned is changed from one year to two years. This change conforms the section to the SEC proposal in this regard and will reduce the number of situations in which the section applies.
- A requirement is added that evidence be provided of ownership of the required 5% of shares.
- The requirement that the shares be owned on the date of the meeting is clarified.

Section 10-35-15: This section relates to the right of shareholders under chapter 10-19.1 to propose amendments to the articles of incorporation. The amendment adds a requirement that a shareholder proposing an amendment provide the corporation with evidence of the shareholder's ownership of the required shares. This change is similar to one of the changes made to section 10-35-08 and tracks similar requirements in sections 10-35-07 and 10-35-14.

Sections 10-35-11 and 10-35-17: A new provision requiring shareholder approval before a public corporation issues 20% or more of its shares is added by the amendment. The Model Business Corporation Act imposes this requirement on all corporations. The

New York Stock Exchange also imposes this requirement, but publicly traded corporations that are not listed on the NYSE may not be subject to it. The current text of section 10-35-17 is moved to section 10-35-11 to make room for the new requirement without the need to add a new section that would require renumbering existing sections 10-35-18 and following.

Section 10-35-24: House Bill No. 1340 permits a public corporation to adopt a poison pill but imposes certain limitations on what the terms of the poison pill may be. The amendment lowers the permitted triggering threshold for poison pills from 25% to 20%. This will permit a corporation to adopt a poison pill that will be more effective because it will stop potential acquirors at a lower ownership level.

PROPOSED AMENDMENTS TO HOUSE BILL NO. 1340

Page 1, line 14, replace "securities and exchange commission" with "Securities and Exchange Commission"

Page 3, after line 6, insert

- "8. "Qualified shareholder" means a person or group of persons acting together that satisfies the following requirements:
- a. The person or group owns beneficially in the aggregate more than five percent of the outstanding shares of the public corporation that are entitled to vote generally for the election of directors; and
 - b. The person or each member of the group has beneficially owned the shares that are used for purposes of determining the ownership threshold in subdivision a continuously for at least two years."

Page 3, line 7, replace "8." with "9."

Page 5, line 10, replace "The date" with "Any deadline"

Page 5, line 17, remove "the later of:"

Page 5, remove lines 18 through 22

Page 5, line 23, replace "(2) Ninety" with "ninety"

Page 6, line 13, replace "shareholder" with "person"

Page 6, line 13, remove the fourth "of" appearing at the end of the line

Page 6, line 14, remove "shareholders"

Page 6, line 15, replace "shareholder" with "person"

Page 6, line 15, remove "of shareholders"

Page 6, line 16, replace "3" with "8 of section 10-35-02 and reasonable evidence of the required ownership of shares by the person or group"

Page 6, line 17, replace "shareholder" with "person"

Page 6, line 17, remove "of shareholders"

Page 6, line 30, remove """Qualified shareholder" means a person or group of persons acting together that"

Page 6, remove line 31

Page 7, remove lines 1 through 11

Page 7, after line 11, insert:

“ If the qualified shareholder does not own at least five percent of the outstanding shares of the public corporation entitled to vote generally for the election of directors on the date of the meeting, the qualified shareholder is not entitled to nominate the candidates named in the notice provided under subsection 1.”

Page 9, line 13, replace “**Director supermajority**” with “**Supermajority**”

Page 9, line 14, remove the first “for”

Page 9, line 14, remove “greater”

Page 9, line 14, remove the second “for” and immediately thereafter insert “: 1. For”

Page 9, line 15, after second “board” insert “that is greater”

Page 9, line 16, after “vacancies” insert “; or

2. For shareholders that is greater than a majority of the voting power of the shares entitled to vote on the item of business or, in the case of a class or series entitled to vote as a separate group, a majority of the voting power of the outstanding shares of the class or series”

Page 11, line 5, replace “The date” with “Any deadline”

Page 11, line 12, remove “the later of:”

Page 11, remove lines 13 through 17

Page 11, line 18, replace “(2) Ninety” with “ninety”

Page 12, line 7, after “shareholders” insert “and reasonable evidence of that ownership”

Page 12, line 14, replace “**Quorum at**” with “**Requirements for convening**”

Page 12, line 15, after “1.” insert “If the articles or bylaws of a public corporation have a provision for advance notice authorized by section 10-35-07 or 10-35-14, a regular meeting of shareholders of the corporation may not be convened unless the corporation has announced the date of the meeting in the body of a public filing, and not solely in an exhibit or attachment to a filing, regardless of whether the exhibit or attachment has been incorporated by reference into the body of the filing, with the commission under the Exchange Act at least

twenty-five days before the deadline in the articles or bylaws for a shareholder to give the advance notice.

2.”

Page 12, line 17, remove “for”

Page 12, line 18, remove “purposes of section 10-19.1-76”

Page 12, line 19, after “meeting” insert “for purposes of determining the existence of a quorum under section 10-19.1-76”

Page 12, line 20, remove “2.”

Page 12, line 22, replace “section” with “subsection”

Page 12, line 23, remove “Shareholder supermajority provisions prohibited. Neither the articles nor”

Page 12, remove lines 24 through 27

Page 12, after line 27, insert:

“Approval of certain issuances of shares.

1. An issuance by a public corporation of shares, or other securities convertible into or rights exercisable for shares, in a transaction or a series of integrated transactions, requires approval of the shareholders if the voting power of the shares that are issued or issuable as a result of the transaction or series of integrated transactions will exceed twenty percent of the voting power of the shares of the corporation that were outstanding immediately before the transaction.
2. Subsection 1 does not apply to:
 - a. A public offering solely for cash, cash equivalents or a combination of cash and cash equivalents; or
 - b. A bona fide private financing, solely for cash, cash equivalents or a combination of cash and cash equivalents, of:
 - (1) Shares at a price equal to at least the greater of the book or market value of the corporation’s common shares; or
 - (2) Other securities or rights if the conversion or exercise price is equal to at least the greater of the book or market value of the corporation’s common shares.
3. For purposes of this section:
 - a. The voting power of shares issued and issuable as a result of a transaction or series of integrated transactions shall be the greater of:
 - (1) The voting power of the shares to be issued; or

- (2) The voting power of the shares that would be outstanding after giving effect to the conversion of convertible shares and other securities and the exercise of rights to be issued.
- b. A series of transactions is integrated if consummation of one transaction is made contingent on consummation of one or more of the other transactions.
- c. “Bona fide private financing” means a sale in which:
 - (1) A registered broker-dealer purchases the shares, other securities, or rights from the public corporation with a view to their private sale to one or more purchasers; or
 - (2) The corporation sells the shares, other securities, or rights to multiple purchasers, and no one purchaser or group of related purchasers acquires, or has the right to acquire, more than five percent of the voting power of shares issued or issuable in the transaction or series of integrated transactions.”

Page 13, line 4, replace “meting” with “meeting”

Page 15, line 13, replace “twenty-five” with “twenty”

Page 15, line 24, replace “**prohibition**” with “**restrictions or prohibitions**”

Page 15, line 24, remove “**adoption of**”

Page 15, line 25, replace the first “The” with “A provision of the”

Page 15, line 26, after “:” insert “Such a provision may provide for the effect it has on a poison pill in force at the time of the provision’s adoption.”

Page 16, line 14, replace “corporations” with “corporation”

Page 16, line 23, replace “corporations” with “corporation”

Page 17, line 24, remove “that” and immediately thereafter insert “:”
(1) If the shares”

Page 17, line 26, after “pill” insert “; or”

Page 17, after line 26, insert:

- “(2) That serves to protect dividend, interest, sinking fund, conversion, exchange, or other rights of the shares, or to protect against the issuance of additional securities that would be on a parity with or superior to the shares.”

Page 18, line 4, replace “10-25-29” with “10-35-29”

Page 21, line 21, replace “free” with “fee”

Page 22, line 6, replace “must” with “may”

Page 22, line 17, replace the first “and” with “any”

Page 23, line 20, replace “and” with “any”

Renumber accordingly.