

Revisions to the Business Corporation Act - What Do They Mean for You?

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During this year's legislative session, our team was essential in enacting Senate Bill 622: Business Corporation Act Revisions. Collaborating with the North Carolina Bar Association (NCBA) and dedicated member companies like Smith Anderson, we were successful in modernizing the North Carolina Business Corporation Act, bolstering North Carolina's ability to attract and retain corporate headquarters and making the state more competitive with Delaware.

While it didn't garner as much attention as other bills this session, Senate Bill 622 is critical to North Carolina's competitive business climate. To ensure our members understand what this means for their business, we spoke with Smith Anderson's Dave Clement, who played a key role in the drafting and passing of this bill. Dave is a business attorney at Smith Anderson in Raleigh and serves as the chair of the Business Corporations Committee of the Business Law Section of the NCBA. Dave's NCBA committee drafted the initial version of Senate Bill 622, which eventually became law with the sponsorship of Senators Barringer and Newton and Representatives McGrady and Hall.

Q: What are the major takeaways business leaders should know about Senate Bill 622?

A: Senate Bill 622 makes significant enhancements to North Carolina corporate law, the net effect of which is to make North Carolina an even more business-friendly jurisdiction. In particular, the law has a number of provisions that make it easier to attract and retain qualified businesspersons as officers or board members of North Carolina corporations, help boards of directors carry out their duties more efficiently, and make corporate reorganizations and acquisitions quicker and more efficient. The law goes into effect October 1, 2018.

Q: How will this bill affect companies that already call North Carolina home?

A: All of the provisions included in the law are available to any business that chooses to organize itself as a North Carolina corporation and, for a few of the provisions, takes necessary action prescribed by the Act to be covered by the provision. For example, an existing North Carolina corporation that wants to take advantage of the Act's provision that allows it to limit or eliminate, in advance, the duty of a director or officer to bring specified business opportunities to the corporation would need to amend its articles of incorporation for that purpose.

For businesses that already are North Carolina corporations, the law generally provides new tools that promote efficiency. One particularly useful tool provides a procedure for North Carolina corporations to ratify and validate past corporate actions that are considered defective because they were taken without proper authorization. Prior to Senate Bill 622, certain defective corporate actions such as issuing shares in excess of a corporation's authorized capital stock arguably could not be cured and were deemed void or voidable.

While Senate Bill 622 generally does not materially restrict the way North Carolina corporations have formerly operated, at Smith Anderson we are recommending that corporations adopting or amending shareholder agreements should review the law's changes to shareholder agreements. Further, corporations that want the flexibility to retroactively change the rights of directors or officers to indemnification and advancement of expenses under their articles of incorporation or bylaws should understand the limitations on retroactive impairment that are part of the law. Corporations with non-voting shares should also be aware that the law extends appraisal rights to non-voting shares (previously only voting shares had appraisal rights).

Q: What does this law say about NC as a place to do business?

A: Many business leaders are aware that certain jurisdictions, such as Delaware, have modern corporate statutes and a reputation for being able to handle complex business disputes with experienced and able judges. They should be aware that North Carolina also has a modern corporate statute based on the Model Business Corporation Act (adopted by 32 states and the District of Columbia) and that the North Carolina Business Court has specialized judges with expertise in both substantive business law and the case management issues that arise in complex business cases. As evidenced by Senate Bill 622, which was the result of collective efforts of the North Carolina General Assembly, the North Carolina Bar Association, and the NC Chamber, North Carolina's leaders are committed to ensuring that our corporate laws keep pace to facilitate efficient business operations and keep North Carolina a great place to do business. Knowing that North Carolina's leaders are actively engaged to ensure North Carolina remains business-friendly should give businesses confidence when they make decisions to locate or relocate here.

Q: What else should NC Chamber members know about the bill?

A: For a summary of what the law does, NC Chamber members can find out more here. While the amendments do not take effect until October 1, 2018, at Smith Anderson we have recommended that North Carolina corporations and their directors and officers understand their impact as the changes provide useful tools to improve board efficiency, attract qualified individuals to serve on boards of directors and as officers, correct defective corporate actions, and facilitate corporate reorganizations and acquisitions. Additionally, corporations may wish to consult their legal advisers regarding whether any portion of the legislation should be taken into account by the corporation now even though not yet effective.

Sincerely,

Gary J. Salamido
Vice President, Government Affairs
NC Chamber

