Article 9.

Shareholder Protection Act.

**§ 55-9-01. Short title and definitions.**

(a) The provisions of this Article shall be known and may be cited as The North Carolina Shareholder Protection Act.

(b) In this Article:

(1) "Business combination" includes any merger, consolidation, or conversion of a corporation with or into any other corporation or any unincorporated entity, or the sale or lease of all or any substantial part of the corporation's assets to, or any payment, sale or lease to the corporation or any subsidiary thereof in exchange for securities of the corporation of any assets (except assets having an aggregate fair market value of less than five million dollars ($5,000,000)) of any other entity.

(2) "Common stock" means the shares of capital stock of the corporation that were not entitled to preference over any other shares, either in payment of dividends or in dissolution, at the time that the other entity acquired in excess of ten percent (10%) of the voting shares.

(3) "Continuing director" means a person who was a member of the board of directors of the corporation elected by the public shareholders prior to the time that the other entity acquired in excess of ten percent (10%) of the voting shares of the corporation, or a person recommended to succeed a continuing director by a majority of the continuing directors.

(4) "Exchange Act" means the act of Congress known as the Securities Exchange Act of 1934, as the same has been or hereafter may be amended from time to time.

(5) "Other consideration to be received" means, for the purposes of G.S. 55-9-03(1) and G.S. 55-9-03(2), the corporation's common stock retained by its existing public shareholders in the event of a business combination with the other entity in which the corporation is the surviving corporation.

(6) "Other entity" includes any domestic or foreign corporation, person or other form of entity and any such entity with which it or its "affiliate" or "associate" has an agreement, arrangement or understanding, directly or indirectly, for the purpose of acquiring, holding, voting or disposing of capital stock of the corporation, or which is its "affiliate" or "associate", as those terms are defined in the General Rules and Regulations under the Exchange Act, together with the successors and assigns of such persons in any transaction or series of transactions not involving a public offering of the corporation's capital stock within the meaning of the Securities Act of 1933, as amended.

(7) "Voting shares" means shares of the corporation's capital stock entitled to vote in the election of directors. (1987, c. 88, s. 1; c. 124, s. 1; 1989, c. 265, s. 1; 1999-369, s. 1.5; 2001-387, s. 16.)

**§ 55-9-02. Voting requirement.**

Notwithstanding any other provisions of the North Carolina Business Corporation Act, the affirmative vote of the holders of ninety-five percent (95%) of the voting shares of a corporation, considered for the purposes of this section as one class, shall be required for the adoption or

authorization of a business combination with any other entity if, as of the record date for the determination of shareholders entitled to notice thereof and to vote thereon, the other entity is the beneficial owner, directly or indirectly, of more than twenty percent (20%) of the voting shares of the corporation, considered for the purposes of this section as one class. (1987, c. 88. s. 1; 1989, c. 265, s. 1.)

**§ 55-9-03. Exception to voting requirement.**

The voting requirement of G.S. 55-9-02 shall not be applicable to a business combination if each of the following conditions is met:

(1) The cash, or fair market value of other consideration, to be received per share by the holders of the corporation's common stock in such business combination bears the same or a greater percentage relationship to the market price of the corporation's common stock immediately prior to the announcement of such business combination by the corporation as the highest per share price (including brokerage commissions and/or soliciting dealers' fees) which such other entity has theretofore paid for any of the shares of the corporation's common stock already owned by it bears to the market price of the corporation's common stock immediately prior to the commencement of acquisition of the corporation's common stock by such other entity, directly or indirectly;

(2) The cash, or fair market value of other consideration, to be received per share by holders of the corporation's common stock in such business combination (i) is not less than the highest per share price (including brokerage commissions and/or soliciting dealers' fees) paid by such other entity in acquiring any of its holdings of the shares of the corporation's common stock and (ii) is not less than the earnings per share of the corporation's common stock for the four full consecutive fiscal quarters immediately preceding the record date for the solicitation of votes on such business combination, multiplied by the then price/earnings multiple, if any, of such other entity as customarily computed and reported in the financial community;

(3) After the other entity has acquired a twenty percent (20%) interest and prior to the consummation of such business combination: (i) the other entity shall have taken steps to ensure that the corporation's board of directors included at all times representation by continuing directors proportionate to the outstanding shares of the corporation's common stock held by persons not affiliated with the other entity (with a continuing director to occupy any resulting fractional board position); (ii) there shall have been no reduction in the rate of dividends payable on the corporation's common stock, except as may have been approved by a unanimous vote of its directors; (iii) the other entity shall have not acquired any newly issued shares of the corporation's capital stock, directly or indirectly, from the corporation, except upon conversion of any convertible securities acquired by the other entity prior to obtaining a twenty percent (20%) interest or as a result of a pro rata stock dividend or stock split; and (iv) the other entity shall not have acquired any additional shares of the corporation's outstanding common stock, or securities convertible into common stock, except as part of the transaction which resulted in the other entity acquiring its twenty percent (20%) interest;

(4) The other entity shall not have (i) received the benefit, directly or indirectly, except proportionately with other shareholders, of any loans, advances, guarantees, pledges, or other financial assistance or tax credits provided by the corporation or (ii) made any major change in the corporation's business or equity capital structure unless by a unanimous vote of the directors, in either case prior to the consummation of the business combination; and

(5) A proxy statement responsive to the requirements of the Exchange Act shall be mailed to the public shareholders of the corporation for the purpose of soliciting shareholder approval of the business combination and shall contain prominently in the forepart thereof any recommendations as to the advisability or inadvisability of the business combination which the continuing directors, or any of them, may choose to state and, if deemed advisable by a majority of the continuing directors, an opinion of a reputable investment banking firm as to the fairness (or not) of the terms of the business combination to the remaining public shareholders of the corporation, which investment banking firm shall be selected by a majority of the continuing directors and shall be paid by the corporation a reasonable fee for its services upon receipt of such opinion. (1987, c. 88, s. 1; 1989, c. 265, s. 1.)

**§ 55-9-04. General.**

(a) The provisions of this Article shall also apply to a business combination with an other entity which at any time has been the beneficial owner, directly or indirectly, of more than twenty percent (20%) of the outstanding voting shares, considered for the purposes of this section as one class, notwithstanding that the other entity has reduced its percentage of shares below twenty percent (20%) if, as of the record date for the determination of shareholders entitled to notice of and to vote on the business combination, the other entity is an "affiliate" of the corporation.

(b) For the purposes of the Article, an other entity shall be deemed the beneficial owner of any shares of the corporation's capital stock which the other entity has the right to acquire pursuant to any agreement, or upon exercise of any conversion rights, warrants or options, or otherwise (whether the right to acquire shares is exercisable immediately or only after the passage of time); and, further, the outstanding shares of any class of capital stock of the corporation shall include shares deemed beneficially owned through the application of the foregoing, but shall not include any other shares which may be issuable pursuant to any agreement, or upon exercise of any conversion rights, warrants or options, or otherwise.

(c) A majority of the continuing directors shall have the power and duty to determine for the purposes of this Article on the basis of information known to them whether (i) an other entity beneficially owns more than twenty percent (20%) of the voting shares; (ii) an other entity is an "affiliate" or "associate" of another; (iii) an other entity has an agreement, arrangement or understanding with another; and (iv) the assets to be acquired by the corporation, or any subsidiary thereof, have an aggregate fair market value of less than five million dollars ($5,000,000).

(d) Nothing contained in this Article shall be construed to relieve any other entity from any fiduciary obligation imposed by law. This Article shall be broadly construed so as to be applicable to any transaction reasonably calculated to avoid the application of the provisions hereof including, without limitation, any merger or other recapitalization, initiated by or for the benefit of an other entity that owns more than twenty percent (20%) of the voting shares, which would reincorporate a

corporation under the laws of another state or which would reorganize a corporation as an unincorporated entity. (1987, c. 88, s. 1; 1989, c. 265, s. 1; 1999-369, s. 1.6.)

**§ 55-9-05. Exemptions.**

The provisions of G.S. 55-9-02 shall not be applicable to any corporation that shall be made the subject of a business combination by an other entity if: (i) the corporation was not a public corporation (as defined in G.S. 55-1-40(18a)) at the time such other entity acquired in excess of ten percent (10%) of the voting shares; (ii) on or before September 30, 1990 (or such earlier date as may be irrevocably established by resolution of the board of directors), the board of directors of a corporation to which G.S. 55-9-02 was not applicable on July 1, 1990, (other than a corporation described in G.S. 55-9-05(iii)) adopted a bylaw stating that the provisions of this Article shall not be applicable to the corporation; (iii) in the case of a corporation to which G.S. 55-9-02 was not applicable on July 1, 1990, as the result of adoption by its board of directors under G.S. 55-9-05(ii) of a bylaw providing that G.S. 55-9-02 not apply to such corporation, the board of directors of such corporation shall not have rescinded such bylaw on or before September 30, 1990 (or such earlier date as may be irrevocably established by resolution of the board of directors); (iv) in the case of a corporation (including its predecessors) which becomes a public corporation for the first time after July 1, 1990, such corporation adopts a bylaw within 90 days of becoming a public corporation stating that the provisions of this Article shall not be applicable to it; (v) in the case of a newly formed corporation after April 23, 1987, the initial articles of incorporation of the corporation shall provide that the provisions of this Article shall not be applicable; (vi) such business combination was the subject of an existing agreement of the corporation on April 23, 1987; or (vii) on or after September 1, 2000, and on or before December 31, 2000, the board of directors of a corporation to which G.S. 55-9-02 was applicable on September 1, 2000, adopts a bylaw stating that the provisions of this Article shall not be applicable to the corporation. Neither the adoption or failure to adopt a bylaw of the type set forth in G.S. 55-9-05(ii), (iv), or (vii) of this section nor the rescission or failure to rescind a bylaw of the type referred to in G.S. 55-9-05(iii) shall constitute grounds for any cause of action, at law or in equity, against the corporation or any of its directors. (1987, c. 88, s. 1; 1989, c. 265, s. 1; 1989 (Reg. Sess., 1990), c. 1024, s. 12.15; 2000-140, s. 44.)