SUMMARY OF PROPOSED BILL TO AMEND CHAPTER 55 TO MAKE UPDATING CHANGES

The North Carolina Business Corporation Act, Chapter 55 of the General Statutes (the "NCBCA"), is based upon the Model Business Corporation Act (the "Model Act"). Periodically, a committee of the American Bar Association adopts revisions to the Model Act. The Business Organizations Committee (the "Committee") of the Business Law Section of the North Carolina Bar Association periodically reviews these revisions to the Model Act to recommend whether conforming changes are appropriate for the NCBCA. The Committee has recommended certain changes, summarized below, in response to Model Act amendments. The bill drafted by the Committee would:

- ***permit a corporation's board of directors to delegate to officers the authority to issue rights, options, warrants and shares.*** The bill (i) clarifies the authority of a board of directors to authorize one or more officers to designate recipients of equity compensation awards and determine, within limits established by the board (or, if applicable, by the shareholders), of such awards and the terms thereof, provided that the designated officers may not make awards to themselves or to any other persons specified by the board, and (ii) restores to the NCBCA language clarifying that a board of directors may delegate to officers the authority to authorize the issuance of shares within prescribed limits. Changes with respect to the authority to grant equity compensation awards would permit North Carolina corporations the same flexibility as Delaware corporations—the changes effected by this section of the bill are conceptually identical to Section 157(c) of the Delaware General Corporation Law, which has been included in Delaware's statutes for some time. Prior to 2005 amendments, the NCBCA included language specifically sanctioning the delegation by the board of directors to an officer of the ability to authorize the issuance of shares within limits prescribed by the board. The removal of that language was an unintended consequence of a 2005 amendment intended to increase the ability of the board to delegate authority. (Sections 1 and 2.)

- ***conform provisions of the NCBCA to the Model Act regarding the holding of shareholders meetings by means of electronic remote communication.*** Although North Carolina amended the NCBCA in 2001 to allow shareholders, to the extent authorized by the board of directors, to attend meetings of North Carolina corporations "by electronic or other means of remote communication," amendments to include that concept in the Model Act in 2010 contain additional features and provide more comprehensive guidance that would be useful for North Carolina corporations, including (i) allowing the board of directors to limit participation by remote communication to certain classes or series of shareholders, (ii) imposing an obligation on the corporation to implement reasonable security measures to (A) verify that each person participating via remote communication is a shareholder and (B) provide a reasonable opportunity to shareholders to participate in such a meeting. If the board of directors has authorized participation by remote communication, the notice of a shareholder meeting must include a description of the means of remote communication to be used. The added provisions do not eliminate the requirement that corporations hold meetings at a physical location—they merely enable remote participation by shareholders to the extent authorized by the board of directors. (Sections 3, 4, 5 and 6.)

- ***clarify that "force-the-vote" provisions in merger agreements, and other agreements providing for a corporate transaction requiring shareholder approval, are effective.*** "Force the vote" provisions—provisions included in an agreement for a transaction requiring shareholder approval that obligate the corporation to submit the matter for shareholder approval even if the board later determines that it can no longer recommend that the shareholders approve the matter—have become standard in merger agreements for publicly traded corporations. It is uncertain whether such provisions are effective against a North Carolina corporation. Clarity would avoid unnecessary, expensive litigation and unintended consequences. Force-the-vote provisions are typically seen as potentially beneficial to both sides of a merger agreement and permit the target's shareholders the opportunity to take the bird in the hand. (Sections 7, 8, 9, 11, 13 and 14.)

- ***permit "short form" mergers among 90% owned subsidiaries***. Under the NCBCA, where a parent corporation holds 90% of each class of outstanding stock of a subsidiary corporation, the parent and subsidiary corporations may merge without a vote of the board of directors or shareholders of the subsidiary and, where the parent is the surviving corporation of the merger and its articles of incorporation are not being amended in connection with the merger, without a vote of the shareholders of the parent corporation. This simplified merger approval process for 90% owned subsidiaries is commonly referred to as a "short form" merger. The bill adopts Model Act provisions that permit 90% owned subsidiaries (sister corporations) to merge with each other under the short-form process (that is, with the only required approval being of the board of directors of the common parent corporation). Under the current NCBCA, the same transaction could effectively be completed under the short-form process if the parent interposed a shell intermediate holding company between it and the 90% owned subsidiaries and the subsidiaries then merged with the shell holding company. The change effected by the bill would allow that transaction to be effected directly and more efficiently. (Section 10.)

- ***create a bright-line safe harbor for asset sales not requiring shareholder approval***. Under the NCBCA, shareholder approval is required of sales of assets outside the usual and regular course of business, when the assets sold constitute "all or substantially all" of the assets of the corporation. The term "substantially all" is not defined in the NCBCA and leads to uncertainty as to whether certain significant asset sales are required to be approved by shareholders. The consequences of failing to obtain shareholder approval, if such approval were ultimately determined to be required, leads corporations to apply an overly conservative definition of "all or substantially all," resulting in inefficiency and unnecessary expense in connection with significant asset sales. Moreover, where the delay of obtaining shareholder approval is unacceptable to the purchaser of significant corporate assets, this uncertainty may prevent the completion of an advantageous corporate transaction. The bill, which adopts the substance of a Model Act amendment, provides that a sale in which the corporation retains a continuing business that accounts for 25% of total assets and 25% of income from continuing operations before taxes or revenues from continuing operations, in each case of the corporation and its subsidiaries on a consolidated basis, is conclusively deemed be a sale of less than "all or substantially all" of the assets and thus would not require shareholder approval. (Section 12.)