

## **CHAPTER 10-35**

### **PUBLICLY TRADED CORPORATIONS**

**10-35-01. Citation.** This chapter may be cited as the "North Dakota Publicly Traded Corporations Act".

**10-35-02. Definitions.** For purposes of this chapter, unless the context otherwise requires:

1. "Beneficial owner", "owns beneficially", and similar terms have the same meaning as in the rules and regulations of the commission under section 13 of the Exchange Act.
2. "Commission" means the United States securities and exchange commission.
3. "Exchange Act" means the Securities Exchange Act of 1934, as amended [15 U.S.C. 78a et seq.].
4. "Executive officer" has the same meaning as in the rules and regulations of the commission under the Exchange Act.
5. "Poison pill" means a security created or issued by a publicly traded corporation that precludes or limits a person or group of persons from owning beneficially or of record, or from exercising, converting, transferring, or receiving, the security on the same terms as other shareholders or which is intended to have the effect of diluting disproportionately from the shareholders generally the interest of the person or group of persons in the corporation or a successor to the corporation or otherwise discouraging the person or group of persons from acquiring beneficial ownership of shares of the corporation or a successor to the corporation. For the purposes of this subsection:
  - a. A security may constitute a poison pill whether or not it trades separately or together with other securities of the corporation and whether or not it is evidenced by a separate certificate or by a certificate for other securities of the corporation.
  - b. "Poison pill" includes any form of security created or issued by a corporation, or any agreement or arrangement entered into by a corporation, regardless of the name by which it is known, that is designed or intended to operate as or that has the effect of what is commonly referred to, either on July 1, 2007, or at any time thereafter, as a "poison pill" or "shareholder rights plan".
  - c. A security is not a poison pill if it would otherwise be a poison pill solely because it contains restrictions on ownership or acquisition of shares of the corporation that are necessary:
    - (1) To maintain the tax status of the corporation; or
    - (2) For the corporation to comply with a statute, rule, or regulation that regulates a business in which the corporation is engaged.
  - d. "Security" includes:
    - (1) An investment contract, warrant, option right, conversion right, or any other form of right or obligation;
    - (2) A "security" within the meaning of that term in the Exchange Act, the Securities Act of 1933, as amended [15 U.S.C. 77a et seq.], the rules

and regulations of the commission, or judicial interpretations under any of the foregoing;

- (3) Any other ownership interest or right to acquire an ownership interest;
  - (4) Any other instrument commonly known as a "security"; and
  - (5) Any instrument or contract right created or issued by a publicly traded corporation, whether or not the instrument or contract right is a security under any other provision of law.
6. "Publicly traded corporation" or "corporation" means a corporation as defined in section 10-19.1-01:
- a. That becomes governed by chapter 10-19.1 after July 1, 2007; and
  - b. The articles of which state that the corporation is governed by this chapter.
7. "Publicly traded corporation franchise fee" means the fee imposed by subsection 3 of section 10-35-28.
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 publicly traded 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.
9. "Required vote" means approval of a provision of the articles or bylaws, at a time when the publicly traded corporation has a class of voting shares registered under the Exchange Act, by at least the affirmative vote of both:
- a. A majority of the directors in office who are not executive officers of the corporation; and
  - b. Two-thirds of the voting power of the outstanding shares entitled to vote generally for the election of directors that are not owned beneficially or of record by directors or executive officers of the corporation.

#### **10-35-03. Application and effect of chapter.**

- 1. This chapter applies only to a publicly traded corporation meeting the definition of a "publicly traded corporation" in section 10-35-02 during such time as its articles state that it is governed by this chapter.
- 2. The existence of a provision of this chapter does not of itself create any implication that a contrary or different rule of law is or would be applicable to a corporation that is not a publicly traded corporation. This chapter does not affect any statute or rule of law as it applies to a corporation that is not a publicly traded corporation.
- 3. A provision of the articles or bylaws of a publicly traded corporation may not be inconsistent with any provision of this chapter.
- 4. The computation of a percentage of shares owned beneficially or of record by a person or group of persons for purposes of this chapter or chapter 10-19.1 shall be

based on the number of outstanding shares of the publicly traded corporation shown most recently in a filing by the corporation with the commission under the Exchange Act.

**10-35-04. Application of chapter 10-19.1.**

1. Chapter 10-19.1 applies generally to all publicly traded corporations, except that the provisions of this chapter control over any inconsistent provision of chapter 10-19.1.
2. A publicly traded corporation is a "publicly held corporation" as that term is used in chapter 10-19.1.
3. The definitions in section 10-19.1-01 apply to the use in this chapter of the terms defined in that section.

**10-35-05. Amendment of the bylaws.**

1. Any shareholder of a publicly traded corporation may propose the adoption, amendment, or repeal of a bylaw.
2. Subdivision c of subsection 3 of section 10-19.1-31 shall not apply to a publicly traded corporation except that a provision of the articles or bylaws authorized by section 10-35-14 may apply to a proposal to adopt, amend, or repeal a bylaw.

**10-35-06. Board of directors.**

1. The articles or bylaws of a publicly traded corporation may not fix a term for directors longer than one year.
2. The articles or bylaws of a publicly traded corporation may not stagger the terms of directors into groups whose terms end at different times.
3. The size of the board of a publicly traded corporation may not be changed at a time when:
  - a. The board has notice that there will be a contested election of directors at the next regular or special meeting of the shareholders; or
  - b. The shareholders do not have the right to nominate candidates for election at the next regular meeting of the shareholders under a provision of the articles or bylaws adopted pursuant to section 10-35-07.
4. The board of a publicly traded corporation must elect one of its members as the chair of the board who shall preside at meetings of the board and perform such other functions as may be provided in the articles or bylaws or by resolution of the board. The chair of the board may not serve as an executive officer of the corporation.

**10-35-07. Nomination of directors.**

1. A publicly traded corporation may not require a shareholder or beneficial owner of shares to provide notice of an intention to nominate a candidate for election as a director except as provided in a provision of the articles or bylaws that satisfies the requirements of this section.
2. A provision of the articles or bylaws of a publicly traded corporation requiring a shareholder or beneficial owner to provide notice of an intention to nominate a candidate for election as a director may not require the notice to include more than:
  - a. The name of the shareholder or beneficial owner;

- b. A statement that the shareholder or beneficial owner is the beneficial owner of one or more shares in the corporation and reasonable evidence of that ownership; and
  - c. The number of candidates the shareholder or beneficial owner intends to nominate.
- 3. Any deadline fixed by the articles or bylaws for submission by a shareholder or beneficial owner of a notice of intention to nominate a candidate for election as a director may not be earlier than:
  - a. In the case of a meeting held within five business days before or after the anniversary of the previous year's regular meeting, ninety days before the anniversary date of the prior regular meeting; or
  - b. In the case of a meeting not held within five business days before or after the anniversary of the previous year's regular meeting ninety days before the date of the meeting.
- 4. A provision of the articles or bylaws requiring a shareholder or beneficial owner to provide notice of an intention to nominate a candidate for election as a director must provide a period of at least twenty days during which the shareholder or beneficial owner may submit the notice to the public corporation.
- 5. The adoption or amendment of a bylaw requiring advance notice of nominations may not take effect in the one hundred twenty-day period before the next meeting of shareholders, unless the adoption or amendment of the bylaw has been approved by the shareholders.

**10-35-08. Access to corporation's proxy statement.**

- 1. If a qualified shareholder provides notice of an intention to nominate one or more candidates for election to the board of directors that satisfies both section 10-35-07 and this section, the publicly traded corporation must:
  - a. Include the name of each nominee and a statement not longer than five hundred words without counting the information required under subdivisions a through e of subsection 2 supplied by the qualified shareholder in support of each nominee in the corporation's proxy statement; and
  - b. Make provision for a shareholder to vote on each nominee on the form of proxy solicited on behalf of the corporation.
- 2. The publicly traded corporation may not require the notice from the qualified shareholder to include more than:
  - a. The name of the person or the names of the members of the group;
  - b. A statement that the person or group satisfies the definition of a qualified shareholder in subsection 8 of section 10-35-02 and reasonable evidence of the required ownership of shares by the person or group;
  - c. A statement that the person or group does not have knowledge that the candidacy or, if elected, board membership of any of its nominees would violate controlling state or federal law or rules other than rules regarding director independence of a national securities exchange or national securities association applicable to the corporation;

- d. The information regarding each nominee that is required to be included in the corporation's proxy statement by the rules and regulations adopted by the commission under the Exchange Act;
  - e. A statement from each nominee that the nominee consents to be named in the corporation's proxy statement and form of proxy and, if elected, to serve on the board of directors of the corporation, for inclusion in the corporation's proxy statement; and
  - f. The supporting statement permitted by subdivision a of subsection 1.
3. If the qualified shareholder does not own at least five percent of the outstanding shares of the publicly traded 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.

**10-35-09. Election of directors.**

- 1. After a quorum is established at a meeting of the shareholders of a publicly traded corporation at which directors are to be elected, the polls must be opened for the election of directors before the meeting may be recessed or adjourned. If the polls have not been previously closed, the polls close for the election of directors upon the first recess or adjournment of the meeting.
- 2. Except as provided in subsection 3, if the articles of a publicly traded corporation provide that the shareholders do not have the right to cumulate their votes in an election of directors:
  - a. Each share in the corporation entitled to vote on the election of directors shall be entitled to vote noncumulatively for or against, or to abstain with respect to, each candidate for election.
  - b. To be elected, a candidate must receive the affirmative vote of at least a majority of the votes cast for or against the candidate's election.
  - c. An individual who is not elected under subdivision b may not be appointed by the board of directors to fill a vacancy on the board at any time thereafter unless the individual is subsequently elected as a director by the shareholders.
  - d. If a director who was a candidate for reelection is not elected under subdivision b, the director may continue to serve under subdivision b of subsection 1 of section 10-19.1-35 for not longer than ninety days after the date of the first public announcement of the results of the election.
  - e. If no directors are elected under subdivision b, the current directors continue to serve under subdivision b of subsection 1 of section 10-19.1-35, and another meeting of the shareholders for the election of directors must be held not later than eighty-nine days after the date of the first public announcement of the results of the election.
- 3. Subsection 2 does not apply to an election of directors by a voting group if there are more candidates for election by the voting group than the number of directors to be elected by the voting group and one or more of the candidates has been properly nominated by the shareholders. An individual is not counted as a candidate for election under this subsection if the board of directors reasonably determines before the notice of meeting is given that the individual's candidacy does not create a bona fide election contest. The determination of the number of candidates for purposes of this subsection shall be made as of:

- a. The expiration of the time fixed by the articles or bylaws for advance notice by a shareholder of an intention to nominate directors; or
  - b. Absent such a provision at a time publicly announced by the board of directors which is not more than fourteen days before notice is given of the meeting at which the election is to occur.
- 4. A publicly traded corporation may not compensate an individual, directly or indirectly, as a result of the fact, in whole or in part, that the individual is not elected or reelected as a director, and without regard to whether the compensation would be paid to the individual as a director or officer or on any other basis.
- 5. The shareholders of a publicly traded corporation may act by consent in a record to elect directors, but the consent will be in lieu of a regular meeting of shareholders only if:
  - a. The shareholders are not entitled to vote cumulatively for the election of directors;
  - b. The election by consent takes effect within the one hundred twenty-day period before the anniversary of the most recent regular meeting; and
  - c. The full board is elected by the consent.

**10-35-10. Reimbursement of proxy expenses.**

- 1. A shareholder of a publicly traded corporation who nominates one or more candidates for election as directors who are not nominated by management or the board of directors must be reimbursed by the corporation for the reasonable actual costs of solicitation of proxies incurred by the shareholder in an amount equal to the shareholder's total reasonable actual costs of solicitation multiplied by a fraction, the numerator of which is the number of candidates nominated by the shareholder who are elected, and the denominator of which is the total number of candidates nominated by the shareholder.
- 2. As used in this section, "actual costs of solicitation" means amounts paid to third parties relating to the solicitation, including lawyers, proxy solicitors, public relations firms, printers, the United States postal service, and media outlets.

**10-35-11. Supermajority provisions prohibited.** Neither the articles nor the bylaws of a publicly traded corporation may provide a quorum or voting requirement:

- 1. For the board or a committee of the board that is greater than a majority of the number of directors that would constitute the full board or committee assuming there are no vacancies; 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.

**10-35-12. Regular meeting of shareholders.**

- 1. Unless directors are elected by consent in lieu of a regular meeting as provided in subsection 5 of section 10-35-09, a publicly traded corporation must hold a meeting of shareholders annually for the election of directors and the conduct of such other business as may be properly brought before the meeting by the board or the shareholders.

2. The articles or bylaws of a publicly traded corporation must state the latest date in each calendar year by which the regular meeting of shareholders must be held. The date so fixed by the articles or bylaws may not be later than one hundred eighty days after the end of the prior fiscal year of the corporation.
3. Any shareholder of a publicly traded corporation may demand a regular meeting of shareholders under subsection 2 of section 10-19.1-71 or apply for an order of court directing the holding of a regular meeting of shareholders under section 10-19.1-72.1, in each case without regard to the percentage of the voting power held by the shareholder.
4. An amendment of the bylaws of a publicly traded corporation that changes the latest date by which the regular meeting of shareholders must be held may not take effect until after the regular meeting has been held for the year during which the amendment is adopted, unless the amendment has been approved by the shareholders.
5. The committee of the board of a publicly traded corporation that has authority to set the compensation of executive officers must report to the shareholders at each regular meeting of shareholders on the compensation of the corporation's executive officers. The shareholders that are entitled to vote for the election of directors shall also be entitled to vote on an advisory basis on whether they accept the report of the committee.

**10-35-13. Call of special meeting of shareholders.**

1. A publicly traded corporation shall hold a special meeting of shareholders upon the demand of its shareholders as provided in section 10-19.1-72, except that, regardless of the purpose for the meeting, the shareholders demanding the meeting must own beneficially ten percent or more of the voting power of all shares entitled to vote on each issue proposed to be considered at the special meeting.
2. The articles or bylaws of a publicly traded corporation may not restrict:
  - a. The period during which shareholders may call a special meeting of shareholders; or
  - b. The business that may be conducted at a special meeting.

**10-35-14. Shareholder proposals of business at a regular meeting.**

1. A publicly traded corporation may not require a shareholder or beneficial owner to provide notice of an intention to propose a matter for consideration or a vote at a regular meeting of shareholders except as provided in a provision of the article or bylaws that satisfies the requirements of this section.
2. A provision of the articles or bylaws requiring a shareholder or beneficial owner to provide notice of an intention to propose a matter for consideration or a vote by the shareholders may not require the notice to include more than:
  - a. The name of the shareholder or beneficial owner;
  - b. A statement that the shareholder or beneficial owner is the beneficial owner of one or more shares in the corporation and reasonable evidence of that ownership; and
  - c. The general nature of the business to be proposed.

3. Any deadline fixed by the articles or bylaws for submission by a shareholder or beneficial owner of a notice of intention to propose a matter for consideration or a vote by the shareholders may not be earlier than:
  - a. In the case of a meeting held within five business days before or after the anniversary of the previous year's regular meeting, ninety days before the anniversary date of the prior regular meeting; or
  - b. In the case of a meeting not held within five business days before or after the anniversary of the previous year's regular meeting, ninety days before the date of the meeting.
4. A provision of the articles or bylaws requiring a shareholder or beneficial owner to provide notice of an intention to propose a matter for consideration or a vote by the shareholders must provide a period of at least twenty days during which the shareholder or beneficial owner may submit the notice to the publicly traded corporation.
5. The adoption or amendment of a bylaw requiring advance notice of business to be proposed by a shareholder or beneficial owner may not take effect in the one hundred twenty-day period before the next regular meeting of shareholders, unless the adoption or amendment of the bylaw has been approved by the shareholders.
6. This section does not apply to the proposal by a shareholder or beneficial owner of an amendment of the articles of a publicly traded corporation.

**10-35-15. Shareholder proposals of amendment of the articles.**

1. A proposal of an amendment of the articles of a publicly traded corporation by a shareholder or shareholders under subsection 2 of section 10-19.1-19 need not include more than:
  - a. The name of the shareholder or the names of the members of the group of shareholders;
  - b. A statement of the number of shares of each class owned beneficially or of record by the shareholder or group of shareholders and reasonable evidence of that ownership; and
  - c. The text of the proposed amendment.
2. The articles or bylaws of a publicly traded corporation may not impose any requirements on the proposal of an amendment of the articles by a shareholder.
3. An amendment proposed by a shareholder or shareholders pursuant to subsection 1 and approved by the shareholders does not need to be approved by the board to be adopted and become effective.

**10-35-16. Requirements for convening shareholder meetings.**

1. If the articles or bylaws of a publicly traded 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. If a proxy is given authority by a shareholder of a publicly traded corporation to vote on less than all items of business considered at a meeting of shareholders, the shareholder is considered to be present and entitled to vote by the proxy on all items of business to be considered at the meeting for purposes of determining the existence of a quorum under section 10-19.1-76. A proxy who is given authority by a shareholder who abstains with respect to an item of business is considered to have authority to vote on the item of business for purposes of this subsection.

**10-35-17. Approval of certain issuances of shares.**

1. An issuance by a publicly traded 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 which 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 publicly traded 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.

**10-35-18. Preemptive rights.** Unless otherwise provided in the articles, a shareholder of a publicly traded corporation does not have the preemptive rights provided in section 10-19.1-65.

**10-35-19. Conduct and business of shareholder meetings.**

1. There must be a presiding officer at every meeting of the shareholders of a publicly traded corporation. The presiding officer must be appointed in the manner provided in the articles or bylaws or, in the absence of such a provision, by the board before the meeting or by the shareholders at the meeting. If the articles or bylaws are silent on the appointment of a presiding officer and the board and the shareholders fail to designate a presiding officer, the president is the presiding officer.
2. Except as otherwise provided in the articles or bylaws or, in the absence of such a provision, by the board before the meeting, the presiding officer determines the order of business and has the authority to establish rules for the conduct of the meeting.
3. The order of business and rules for the conduct of a meeting and any action by the presiding officer must:
  - a. Be reasonable;
  - b. Be fair to all of the shareholders; and
  - c. May not favor or disadvantage the proponent of any action to be taken at the meeting.
4. The presiding officer may announce at the meeting when the polls close for each matter voted upon. If no announcement is made, the polls close upon the final adjournment of the meeting, except as provided in subsection 1 of section 10-35-09. After the polls close, ballots, proxies, and votes may not be accepted, and changes and revocations of ballots, proxies, or votes may not be made.

**10-35-20. Action by shareholders without a meeting.**

1. An action required or permitted to be taken at a meeting of the shareholders of a publicly traded corporation may be taken without a meeting by one or more records signed by shareholders who own voting power equal to the voting power that would be required to take the same action at a meeting of the shareholders at which all shareholders were present.
2. Action may not be taken by a publicly traded corporation by ballot of its shareholders without a meeting.

**10-35-21. Financial statements.** Section 10-19.1-85 does not apply to a publicly traded corporation.

**10-35-22. Duration of poison pills limited.**

1. If a publicly traded corporation adopts, creates, or issues a poison pill without a vote of its shareholders authorizing that action, the poison pill must expire or be redeemed and will otherwise be of no further force or effect not later than the earlier of:
  - a. One year after the date of its adoption, creation, or issuance; or
  - b. Ninety days after the first public announcement that a number of shares have been tendered into an offer to purchase any and all shares of the corporation,

which number of shares tendered represents at least a majority of the outstanding shares of each class or series of shares entitled to vote generally for the election of directors when added to those shares owned beneficially or of record by the person or group of persons making the offer or by any affiliates of that person or group of persons.

2. If authorized by a vote of its shareholders, a publicly traded corporation may:
  - a. Adopt, create, or issue a poison pill that will be in effect for a period not longer than the shorter of:
    - (1) Two years; and
    - (2) The period set forth in subdivision b of subsection 1; or
  - b. Extend the period during which a poison pill adopted, created, or issued pursuant to subsection 1 will be in effect to not longer in the aggregate than the period set forth in subdivision a.
3. A publicly traded corporation may not adopt, create, or issue a poison pill without the approval of its shareholders until after it has held a regular meeting of shareholders after its most recent prior poison pill has expired or been redeemed and otherwise ceased to be of any force or effect. The date of the regular meeting of shareholders must:
  - a. Comply with section 10-35-12;
  - b. Be at least ninety days after the date on which the prior poison pill expired, was redeemed, or otherwise ceased to be of any force or effect; and
  - c. If the corporation has an advance notice requirement adopted pursuant to section 10-35-07, give the shareholders the full period of time required by subsection 4 of section 10-35-07 in which to provide notice to the corporation of an intention to nominate candidates for election at the meeting.

**10-35-23. Protection of power of current directors over poison pill.** A poison pill adopted, created, or issued by a publicly traded corporation, with or without the approval of its shareholders, may not include a provision that limits in any way the power of the board of directors, as it may be constituted at any point in time, to take any action at any time with respect to the poison pill, including without limitation what is commonly referred to as a "dead hand", "no hand", or "slow hand" provision.

**10-35-24. Minimum share ownership triggering level for poison pills.** A poison pill adopted, created, or issued by a publicly traded corporation, with or without the approval of its shareholders, may not provide that beneficial ownership or announcement of an intention to seek beneficial ownership by a person or group of persons of shares equal to less than twenty percent of the total number of outstanding shares of all classes and series of shares of the corporation will result, either immediately or after the passage of a period of time, in:

1. A distribution or distribution date for rights certificates or other securities as defined in subdivision d of subsection 5 of section 10-35-02;
2. The person or group of persons becoming what is commonly referred to as an "acquiring person" or "adverse person" or otherwise having the status of a person intended to be diluted or subject to dilution by the poison pill;
3. What is commonly referred to as a "flip-in" or "flip-over" event or the poison pill otherwise being triggered or becoming operative; or

4. The poison pill otherwise having a dilutive, discriminatory, or other adverse effect on the person or group of persons.

**10-35-25. Optional restrictions or prohibitions on poison pills.**

1. A provision of the articles or bylaws of a publicly traded corporation may restrict or prohibit the corporation from adopting, creating, or issuing a poison pill. Such a provision may provide for the effect it has on a poison pill in force at the time of the provision's adoption.
2. A provision of the articles or bylaws adopted pursuant to subsection 1 at a time when a publicly traded corporation has a poison pill in effect must be adopted by the affirmative vote of a majority of the outstanding shares entitled to vote on adoption of the provision. In every other instance, a provision of the articles or bylaws adopted pursuant to subsection 1 must be adopted by the affirmative vote of a majority of the votes cast by holders of shares entitled to vote on adoption of the provision.

**10-35-26. Adoption of antitakeover provisions.**

1. The articles or bylaws of a publicly traded corporation may not contain an antitakeover provision unless it has been approved by the required vote.
2. As used in this section:
  - a. Except as provided in subdivision b, "antitakeover provision" means a provision that:
    - (1) Would block an acquisition by any person or group of persons of beneficial ownership of any shares of the corporation or a change in control of the corporation absent compliance with the provision;
    - (2) Restricts the price that may be paid by any person or group of persons in an acquisition of beneficial ownership of any shares of the corporation;
    - (3) Restricts the terms of a transaction after the occurrence of a change in control of the corporation or limits the price that may be paid in such a transaction, when it may be conducted, or how it must be approved by the directors or shareholders;
    - (4) Requires an approval of the directors or shareholders in addition to, or in a different manner from, whatever approvals are required under this chapter and chapter 10-19.1 for a transaction involving an acquisition by any person or group of persons of beneficial ownership of any shares of the corporation or a change in control of the corporation;
    - (5) Requires the approval of a nongovernmental third party for an acquisition by any person or group of persons of beneficial ownership of any shares of the corporation or a transaction that would involve a change in control of the corporation;
    - (6) Requires the corporation, directly or indirectly, to take an action that it would not have been required to take if it had not been the subject of an acquisition by any person or group of persons of beneficial ownership of any of its shares or a transaction that would involve a change in control of the corporation;
    - (7) Limits, directly or indirectly, the power of the corporation if it is the subject of an acquisition by any person or group of persons of beneficial ownership of any of its shares or a transaction that would involve a

change in control of the corporation to take an action that the corporation would have had the power to take, without that limit, if the acquisition of beneficial ownership or transaction had not occurred;

- (8) Changes or limits the voting rights of any shares of the corporation following a transaction involving an acquisition by any person or group of persons of beneficial ownership of any shares of the corporation or a change in control of the corporation;
  - (9) Would give any beneficial or record owner of shares of the corporation a direct right of action against a person or group of persons with respect to the acquisition by the person or group of persons of beneficial ownership of any shares in the corporation or control of the corporation; or
  - (10) Is designed or intended to operate as, or that has the effect of, what is commonly referred to, either on July 1, 2007, or at any time thereafter, as a "business combination", "control share acquisition", "control share cash out", "freeze out", "fair price", "disgorgement", or other "antitakeover" provision.
- b. "Antitakeover provision" does not include a provision in the terms of a class or series of shares:
    - (1) If the shares are issuable upon the exercise of a poison pill, but only so long as the shares of the class or series are not issued by the corporation except pursuant to the exercise of a poison pill; or
    - (2) Which 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.
  - c. "Control" has the same meaning as in the rules and regulations of the commission under the Exchange Act.

**10-35-27. Liberal construction.** The provisions of this chapter and of chapter 10-19.1 must be liberally construed to protect and enhance the rights of shareholders in publicly traded corporations.

**10-35-28. Annual report - Franchise fee.**

- 1. Instead of filing an annual report under section 10-19.1-146, each publicly traded corporation shall file under this section, within the time provided in section 10-35-29, an annual report setting forth:
  - a. The name of the publicly traded corporation;
  - b. A statement that it is a publicly traded corporation;
  - c. The name of the publicly traded corporation's registered agent and the address of the registered office of the publicly traded corporation;
  - d. The address of the principal executive office of the publicly traded corporation;
  - e. A brief statement of the character of the business, if any, in which the publicly traded corporation is actually engaged in this state; and
  - f. The names and respective business addresses of the executive officers and directors of the publicly traded corporation.

2. The annual report must be submitted on forms prescribed by the secretary of state. The information provided must be given as of the date of the execution of the report. The annual report must be signed as provided in subsection 52 of section 10-19.1-01, the articles or the bylaws, or by a resolution approved by the affirmative vote of the required proportion or number of the directors. If the publicly traded corporation is in the hands of a receiver or trustee, it must be signed on behalf of the publicly traded corporation by the receiver or trustee. The secretary of state may destroy all annual reports provided for in this section after they have been on file for six years.
3. Instead of the fees provided for annual report filings in section 10-19.1-147, the secretary of state shall collect a franchise fee with the annual report from every publicly traded corporation for each calendar year in an amount equal to sixty dollars for each ten thousand shares of authorized capital stock of the publicly traded corporation.
  - a. In the case of a publicly traded corporation that has not been a publicly traded corporation during an entire twelve-month calendar year, the amount of the publicly traded corporation franchise fee due, as provided in this section, shall be prorated on a monthly basis for the portion of the year during which the publicly traded corporation was a publicly traded corporation. For this purpose, any portion of a month shall be regarded as a whole month.
  - b. In no case shall the publicly traded corporation franchise fee imposed by this section be more than eighty thousand dollars or less than sixty dollars.
  - c. If a publicly traded corporation changes during a calendar year the number of shares of its authorized capital stock, the total annual publicly traded corporation franchise fee payable as provided in this section shall be arrived at by adding together the franchise fees calculated as set forth in this section as prorated for the several periods of the year during which each distinct authorized amount of shares of capital stock was in effect.
  - d. For the purpose of computing the franchise fee imposed by this section, the authorized capital stock of a publicly traded corporation shall be considered to be the total number of shares of all classes and series that the public corporation is authorized to issue, whether or not the number of shares that may be outstanding at any one time is a lesser number.
  - e. Except as provided in this subsection, the publicly traded corporation franchise fee shall be in addition to any other taxes or fees imposed by this state on the publicly traded corporation.

**10-35-29. Filing of annual report and payment of publicly traded corporation franchise fee.**

1. Except for the first annual report and publicly traded corporation franchise fee, the annual report and publicly traded corporation franchise fee must be delivered to the secretary of state before December second of each year. The first annual report and payment of the publicly traded corporation franchise fee must be delivered before the date provided in the year following the calendar year in which the statement described in subdivision b of subsection 6 of section 10-35-02 takes effect.
2. An annual report and publicly traded corporation franchise fee in a sealed envelope postmarked by the United States postal service before the date provided in subsection 1, or an annual report in a sealed packet with a verified shipment date by any other carrier service before the date provided in subsection 1, is compliance with this requirement. When the filing date falls on Saturday, Sunday, or other holiday as

defined in section 1-03-01, a postmark or verified shipment date on the next business day is compliance with this requirement.

3. The secretary of state must file the annual report if the annual report conforms to the requirements of section 10-35-28 and the publicly traded corporation franchise fee has been paid.
  - a. If the annual report does not conform or adequate payment has not been made, the secretary of state must notify the publicly traded corporation of any necessary corrections or payment.
  - b. If the annual report is corrected and filed with the payment before the date provided in subsection 1, or within thirty days after the publicly traded corporation was notified of corrections or payment by the secretary of state, then the penalties provided in section 10-35-31 for failure to file an annual report within the time provided do not apply.
4. The secretary of state may extend the annual report filing date provided in subsection 1 for a period not to exceed eleven months after the filing date provided in subsection 1 if a written application for an extension is delivered before the date provided in subsection 1.

**10-35-30. Collection of publicly traded corporation franchise fee - Preferred debt.**

The publicly traded corporation franchise fee shall be a debt due from the publicly traded corporation to the state for which an action at law may be maintained after the same shall have been in arrears for a period of one month. The publicly traded corporation franchise fee shall also be a preferred debt in case of insolvency.

**10-35-31. Penalties - Administrative dissolution.**

1. The secretary of state shall charge and collect additional fees for late filing of the annual report and payment of the publicly traded corporation franchise fee as follows:
  - a. Within ninety days after the date provided in subsection 1 of section 10-35-29, two hundred fifty dollars.
  - b. Ninety days after the date provided in subsection 1 of section 10-35-29, the publicly traded corporation becomes not in good standing. The secretary of state shall notify the publicly traded corporation that its certificate of incorporation is not in good standing and that it may be dissolved as provided in subsection 2.
    - (1) The secretary of state shall mail the notice of impending dissolution to the last registered agent at the last registered office of record.
    - (2) If the publicly traded corporation files its annual report after the notice is mailed, together with the publicly traded corporation franchise fee and a late filing penalty of one thousand dollars, then the secretary of state shall restore its certificate of incorporation to good standing.
2. A publicly traded corporation that fails to file its annual report or to pay the publicly traded corporation franchise fee due within one year after the date provided in subsection 1 of section 10-35-29 ceases to exist as a corporation and is considered involuntarily dissolved by operation of law.
  - a. The secretary of state shall note the dissolution of the certificate of incorporation of the publicly traded corporation on the records of the secretary

of state and shall give notice of the action to the dissolved publicly traded corporation.

- b. Notice by the secretary of state must be mailed to the last registered agent at the last registered office of record.
3. A publicly traded corporation dissolved for failure to file an annual report or to pay a publicly traded corporation franchise fee due may be reinstated within one year following the dissolution by:
  - a. Filing a past-due annual report with the publicly traded corporation franchise fee due;
  - b. Paying a late filing penalty of one thousand dollars; and
  - c. Paying a reinstatement fee of one hundred thirty-five dollars.
4. Reinstatement under this subsection does not affect the rights or liabilities arising during the time from the dissolution to the reinstatement.
5. Fees paid to the secretary of state according to this chapter are not refundable if an annual report submitted to the secretary of state cannot be filed because it lacks information required by section 10-35-28 or the annual report lacks sufficient payment as required by section 10-35-28 or as required by this section.

**10-35-32. Secretary of state - Powers - Enforcement - Penalty - Appeal.**

1. The secretary of state has the power and authority reasonably necessary to efficiently administer this chapter and to perform the duties imposed thereby.
2. The secretary of state may propound to any publicly traded corporation that is subject to this chapter and to any officer, director, or employee thereof, any interrogatory reasonably necessary and proper to ascertain whether the publicly traded corporation has complied with all provisions of this chapter applicable to the publicly traded corporation.
  - a. The interrogatory must be answered within thirty days after mailing or within any additional time as may be fixed by the secretary of state. The answer to the interrogatory must be full and complete and must be made in writing and under oath.
  - b. If the interrogatory is directed:
    - (1) To an individual, it must be answered by that individual; or
    - (2) To a publicly traded corporation, it must be answered by the president, vice president, secretary, or assistant secretary of the publicly traded corporation.
  - c. The secretary of state is not required to file any record to which the interrogatory relates until the interrogatory has been answered, and not then if the answers disclose the record is not in conformity with this chapter.
  - d. The secretary of state shall certify to the attorney general, for action the attorney general may deem appropriate, any interrogatory and answers thereto, which discloses a violation of this chapter.
  - e. Each officer, director, or employee of a publicly traded corporation who fails or refuses within the time provided by subdivision a to answer truthfully and fully



an interrogatory propounded to that person by the secretary of state is guilty of an infraction.

- f. An interrogatory propounded by the secretary of state and the answers are not open to public inspection. The secretary of state may not disclose any facts or information obtained from the interrogatory or answers except insofar as permitted by law or insofar as required for evidence in any criminal proceedings or other action by this state.
3. If the secretary of state rejects any record required by this chapter to be approved by the secretary of state before the record may be filed, then the secretary of state shall give written notice of the rejection to the person that delivered the record, specifying the reasons for rejection.
  - a. Within thirty days after the service of the notice of denial, the publicly traded corporation may appeal to the district court in the judicial district serving Burleigh County by filing with the clerk of court a petition setting forth a copy of the record sought to be filed and a copy of the written rejection of the record by the secretary of state.
  - b. The matter must be tried de novo by the court. The court shall either sustain the action of the secretary of state or direct the secretary of state to take the action the court determines proper.
4. If the secretary of state dissolves a publicly traded corporation pursuant to subsection 2 of section 10-35-31, then the publicly traded corporation may appeal to the district court in the judicial district serving Burleigh County by filing with the clerk of court a petition, including:
  - a. A copy of the publicly traded corporation's articles of incorporation; and
  - b. A copy of the notice of dissolution given by the secretary of state.
5. The district court shall try the matter de novo. The court shall sustain the action of the secretary of state or direct the secretary of state to take the action the court determines proper.
6. If the court order sought is one for reinstatement of a publicly traded corporation that has been dissolved as provided in subsection 2 of section 10-35-31, then together with any other actions the court deems proper, any such order which reverses the decision of the secretary of state shall require the publicly traded corporation to:
  - a. File all past-due annual reports;
  - b. Pay the publicly traded corporation franchise fees to the secretary of state for each annual report as provided in subsection 3 of section 10-35-28; and
  - c. Pay the reinstatement fee to the secretary of state as provided in subsection 3 of section 10-35-31.
7. Appeals from all final orders and judgments entered by the district court under this section in review of any ruling or decision of the secretary of state are treated as other civil actions.

**10-35-33. Funds received.** Ten percent of the fees received by the secretary of state for filing records of a publicly traded corporation as provided for in section 10-19.1-147 or this chapter must be deposited in the secretary of state's general services operating fund to pay the cost to administer this chapter.