

FIRST REGULAR SESSION

# HOUSE BILL NO. 525

## 92ND GENERAL ASSEMBLY

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INTRODUCED BY REPRESENTATIVE BYRD.

Read 1<sup>st</sup> time February 20, 2003, and copies ordered printed.

STEPHEN S. DAVIS, Chief Clerk

1615L.011

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### AN ACT

To repeal sections 351.055, 351.268, 351.315, 351.320, 351.385, and 351.455, RSMo, and to enact in lieu thereof seven new sections relating to the rights of shareholders, officers, and directors of corporations.

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*Be it enacted by the General Assembly of the state of Missouri, as follows:*

Section A. Sections 351.055, 351.268, 351.315, 351.320, 351.385, and 351.455, RSMo, are repealed and seven new sections enacted in lieu thereof, to be known as sections 351.055, 351.056, 351.268, 351.315, 351.320, 351.385, and 351.455, to read as follows:

351.055. The articles of incorporation shall set forth:

- (1) The name of the corporation;
- (2) The address, including street and number, if any, of its initial registered office in this state, and the name of its initial registered agent at such address;
- (3) The aggregate number of shares which the corporation shall have the authority to issue, and the number of shares of each class, if any, that are to have a par value and the par value of each share of each such class, and the number of shares of each class, if any, that are to be without par value and also a statement of the preferences, qualifications, limitations, restrictions, and the special or relative rights including convertible rights, if any, in respect of the shares of each class;
- (4) The extent, if any, to which the preemptive right of a shareholder to acquire additional shares is limited or denied;
- (5) The name and place of residence of each incorporator;
- (6) Either (a) the number of directors to constitute the first board of directors and a

**EXPLANATION — Matter enclosed in bold faced brackets [thus] in this bill is not enacted and is intended to be omitted in the law. Matter in boldface type in the above law is proposed language.**

15 statement to the effect that thereafter the number of directors shall be fixed by, or in the manner  
16 provided in, the bylaws of the corporation, and that any changes shall be reported to the secretary  
17 of state within thirty calendar days of such change, or (b) the number of directors to constitute  
18 the board of directors, except that the number of directors to constitute the board of directors  
19 must be stated in the articles of incorporation if the corporation is to have less than three  
20 directors.

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22 The persons to constitute the first board of directors may, but need not, be named;

23 (7) The number of years the corporation is to continue, which may be any number or  
24 perpetual;

25 (8) The purposes for which the corporation is formed;

26 (9) If the incorporators, the directors pursuant to subsection 1 of section 351.090 or the  
27 shareholders pursuant to subsection 2 of section 351.090 choose to do so, a provision eliminating  
28 or limiting the personal liability of a director to the corporation or its shareholders for monetary  
29 damages for breach of fiduciary duty as a director, provided that such provision shall not  
30 eliminate or limit the liability of a director (a) for any breach of the director's duty of loyalty to  
31 the corporation or its shareholders, (b) for acts or omissions not in subjective good faith or which  
32 involve intentional misconduct or a knowing violation of law, (c) pursuant to section 351.345  
33 or (d) for any transaction from which the director derived an improper personal benefit. No such  
34 provision shall eliminate or limit the liability of a director for any act or omission occurring prior  
35 to the date when such provision becomes effective. **A person challenging the applicability of**  
36 **such a provision shall plead facts challenging such applicability with particularity and on**  
37 **motion for summary judgment shall have the burden of proving that the provision does not**  
38 **apply.** All references in this subdivision to a director shall also be deemed to refer (e) to a  
39 member of the governing body of a corporation which is not authorized to issue capital stock and  
40 (f) to such other person or persons, if any, who, pursuant to a provision of the articles of  
41 incorporation in accordance with this chapter, exercise or perform any of the powers or duties  
42 otherwise conferred or imposed upon the board of directors by this chapter;

43 (10) Any other provisions, not inconsistent with law, which the incorporators, the  
44 directors pursuant to subsection 1 of section 351.090 or the shareholders pursuant to subsection  
45 2 of section 351.090 may choose to insert.

**351.056. Every corporation may in its articles of incorporation confer upon the**  
2 **holders of any bonds, debentures, or other obligations issued or to be issued by the**  
3 **corporation the power to vote in respect to the corporate affairs and management of the**  
4 **corporation to the extent and in the manner provided in the articles of incorporation and**  
5 **may confer upon such holders of bonds, debentures, or other obligations the same right of**

6 **inspection of its books, accounts, and other records, and any other rights which the**  
7 **shareholders of the corporation have or may have by reason of this chapter or of the**  
8 **corporation's articles of incorporation. If the articles of incorporation so provide, such**  
9 **holders of bonds, debentures, or other obligations shall be deemed to be shareholders and**  
10 **their bonds, debentures, or other obligations shall be deemed to be shares of stock for the**  
11 **purpose of any provision of this chapter which requires the vote of shareholders as a**  
12 **prerequisite to any corporate action, and the articles of incorporation may divest the**  
13 **holders of capital stock, in whole or in part, of their right to vote on any corporate matter**  
14 **whatsoever, except as set forth in section 351.093.**

351.268. 1. In addition to the provisions of sections 351.265 and 351.267 regarding the  
2 adjournment of shareholders meetings at which a quorum is not present, unless the bylaws  
3 provide to the contrary, a meeting may be otherwise successively adjourned to a specified date  
4 not longer than ninety days after such adjournment or to another place. Notice need not be given  
5 of the adjourned meeting if the time and place thereof are announced at the meeting at which the  
6 adjournment is taken. At the adjourned meeting the corporation may transact any business which  
7 might have been transacted at the original meeting. If the adjournment is for more than ninety  
8 days, or if after the adjournment a new record date is fixed for the adjourned meeting, a notice  
9 of the date and place of the adjourned meeting shall be given to each shareholder of record  
10 entitled to vote at the meeting.

11 2. A shareholder's meeting may be successively postponed by resolution of the board of  
12 directors, unless otherwise provided in the bylaws, to a specified date up to a date ninety days  
13 after such postponement or to another place, provided notice of the date and place of the  
14 postponed meeting, which may be by public notice, is given to each shareholder of record  
15 entitled to vote at the meeting [prior to the date previously scheduled for such meeting].

16 3. For purposes of this chapter, "adjournment" means a delay in the date, which may also  
17 be combined with a change in the place, of a meeting after the meeting has been convened;  
18 "postponement" means a delay in the date, which may be combined with a change in the place,  
19 of the meeting before it has been convened, but after the time and place thereof have been set  
20 forth in a notice delivered or given to shareholders; and public notice shall be deemed to have  
21 been given if a public announcement is made by press release reported by a national news service  
22 or in a publicly available document filed with the United States Securities and Exchange  
23 Commission.

351.315. 1. A corporation shall have three or more directors, except that a corporation  
2 may have one or two directors provided the number of directors to constitute the board of  
3 directors is stated in the articles of incorporation. Any corporation may elect its directors for one  
4 or more years, not to exceed three years, the time of service and mode of classification to be

5 provided for by the articles of incorporation or the bylaws of the corporation; but, there shall be  
6 an annual election for such number or proportion of directors as may be found upon dividing the  
7 entire number of directors by the number of years composing a term. At the first annual meeting  
8 of shareholders and at each annual meeting thereafter the shareholders entitled to vote shall elect  
9 directors to hold office until the next succeeding annual meeting, except as herein provided.  
10 Each director shall hold office for the term for which he is elected or until his successor shall  
11 have been elected and qualified.

12       2. **The articles of incorporation may confer upon holders of any class or series of**  
13 **stock the right to elect one or more directors who shall serve for such term and shall have**  
14 **such voting powers as shall be stated in the articles of incorporation. The terms of office**  
15 **and voting powers of the directors elected in the manner so provided in the articles of**  
16 **incorporation may be greater than or less than those of any other director or class of**  
17 **directors. If the articles of incorporation provide that directors elected by the holders of**  
18 **a class or series of stock shall have more or less than one vote per director on any matter,**  
19 **every reference in this chapter to a majority or other proportion of directors shall refer to**  
20 **a majority or other proportion of the votes of such directors.**

21       3. At a meeting called expressly for that purpose, directors may be removed in the  
22 manner provided in this section. Such meeting shall be held at the registered office or principal  
23 business office of the corporation in this state or in the city or county in this state in which the  
24 principal business office of the corporation is located. Unless the articles of incorporation or the  
25 bylaws provide otherwise, one or more directors or the entire board of directors may be removed,  
26 with or without cause, by a vote of the holders of a majority of the shares then entitled to vote  
27 at an election of directors. If the articles of incorporation or bylaws provide for cumulative  
28 voting in the election of directors, if less than the entire board is to be removed, no one of the  
29 directors may be removed if the votes cast against [his] **such director's** removal would be  
30 sufficient to elect [him] **such director** if then cumulatively voted at an election of the entire  
31 board of directors, or, if there be classes of directors, at an election of the class of directors of  
32 which [he] **such director** is a part. Whenever the holders of the shares of any class are entitled  
33 to elect one or more directors by the provisions of the articles of incorporation, the provisions  
34 of this section shall apply, in respect of the removal of a director or directors so elected, to the  
35 vote of the holders of the outstanding shares of that class and not to the vote of the outstanding  
36 shares as a whole.

37       3. The corporation shall give written notice to the secretary of state of the number of  
38 directors of the corporation as fixed by any method. The notice shall be given within thirty days  
39 of the date when the number of directors is fixed, and similar notice shall be given whenever the  
40 number of directors is changed.

351.320. **1.** Unless otherwise provided in the articles of incorporation or bylaws of the corporation, vacancies on the board and newly created directorships resulting from any increase in the number of directors to constitute the board of directors may be filled by a majority of the directors then in office, although less than a quorum, or by a sole remaining director, until the next election of directors by the shareholders of the corporation; except that, if shareholders elect directors by class pursuant to section 351.315, a director elected by the board pursuant to this section to fill a vacancy or to a newly created directorship need not be presented for election by shareholders until the class to which the director has been so elected by the board is presented for election by the shareholders.

**2. Whenever the holders of any class or classes of stock or series thereof are entitled to elect one or more directors by the articles of incorporation, vacancies and newly created directorships of such class or classes or series may be filled by a majority of the directors elected by such class or classes or series thereof then in office.**

351.385. Each corporation shall have power:

(1) To have succession by its corporate name for the period limited in its articles of incorporation or perpetually where there is no such limitations;

(2) To sue and be sued, complain and defend in any court of law or equity;

(3) To have a corporate seal which may be altered at pleasure and to use the same by causing it or a facsimile thereof to be impressed or affixed or in any manner reproduced;

(4) To purchase, take, receive, lease, or otherwise acquire, own, hold, improve, use and otherwise deal in, sell, convey, mortgage, pledge, lease, exchange, transfer and otherwise dispose of all or any part of its real or personal property, or any interest therein, or other assets, wherever situated; and to hold for any period of time, real estate acquired in payment of a debt, by foreclosure or otherwise, or real estate exchanged therefor;

(5) To be a general or limited partner;

(6) To purchase, take, receive, subscribe for, or otherwise acquire, own, hold, vote, use, employ, sell, mortgage, loan, pledge, or otherwise dispose of, and otherwise use and deal in and with, shares or other interests in, or obligations of, other domestic or foreign corporations, associations, partnerships, or individuals, or direct or indirect obligations of the United States or of any other government, state, territory, governmental district or municipality or of any instrumentality thereof;

(7) To make contracts and guarantees, including but not limited to guarantees of the capital stock, bonds, other securities, evidences of indebtedness and other debts and obligations issued by any other corporation of this or any other state, or issued by any state or other political subdivision thereof; to incur liabilities; to borrow money at such rates of interest as the corporation may determine without regard to the restrictions of any usury law of this state; to

24 issue its notes, bonds, and other obligations; to issue notes or bonds, secured or unsecured, which  
25 by their terms are convertible into shares of stock of any class, upon such terms and conditions  
26 and at such rates or prices as may be provided in such notes or bonds and the indenture or  
27 mortgage under which they are issued; and to secure any of its obligations by mortgage, pledge,  
28 or deed of trust of all or any of its property, franchises, and income;

29 (8) To invest its surplus funds from time to time and to lend money and to take and hold  
30 real and personal property as security for the payment of funds so invested or loaned;

31 (9) To conduct its business, carry on its operations, and have offices within and without  
32 this state, and to exercise in any other state, territory, district, or possession of the United States,  
33 or in any foreign country, the powers granted by this chapter;

34 (10) To elect or appoint directors, officers and agents of the corporation, define their  
35 duties and fix their compensation, and to indemnify directors, officers and employees to the  
36 extent and in the manner permitted by law;

37 (11) To make and alter bylaws, not inconsistent with its articles of incorporation or with  
38 the laws of this state, for the administration and regulation of the affairs of the corporation, and  
39 to adopt emergency bylaws and exercise emergency powers as permitted by law;

40 (12) To transact any lawful business in aid of the United States in the prosecution of war,  
41 to make donations to associations and organizations aiding in war activities, and to lend money  
42 to the state or federal government for war purposes;

43 (13) To cease its corporate activities and surrender its corporate franchise;

44 (14) To have and exercise all powers necessary or convenient to effect any or all of the  
45 purposes for which the corporation is formed;

46 (15) To make contributions to any corporation organized for civic, charitable,  
47 benevolent, scientific or educational purposes, or to any incorporated or unincorporated  
48 association, community chest or community fund, not operated or used for profit to its members  
49 but operated for the purposes of raising funds for and of distributing funds to other civic,  
50 charitable, benevolent, scientific or educational organizations or agencies;

51 **(16) To renounce, in its articles of incorporation or by action of its board of**  
52 **directors, any interest or expectancy of the corporation in, or in being offered an**  
53 **opportunity to participate in, specified business opportunities or specified classes or**  
54 **categories of business opportunities that are presented to the corporation, or one or more**  
55 **of its officers, directors, or stockholders.**

351.455. 1. If a shareholder of a corporation which is a party to a merger or  
2 consolidation [shall file with such corporation, prior to or] **and, in the case of a shareholder**  
3 **owning voting stock, is entitled to vote** at the meeting of shareholders at which the plan of  
4 merger or consolidation is submitted to a vote[,] **shall file with such corporation prior to or**

5 **at such meeting** a written objection to such plan of merger or consolidation, and shall not vote  
6 in favor thereof, and such shareholder, within twenty days after the merger or consolidation is  
7 effected, shall make written demand on the surviving or new corporation for payment of the fair  
8 value of his **or her** shares as of the day prior to the date on which the vote was taken approving  
9 the merger or consolidation, the surviving or new corporation shall pay to such shareholder, upon  
10 surrender of his **or her** certificate or certificates representing said shares, the fair value thereof.  
11 Such demand shall state the number and class of the shares owned by such dissenting  
12 shareholder. Any shareholder failing to make demand within the twenty day period shall be  
13 conclusively presumed to have consented to the merger or consolidation and shall be bound by  
14 the terms thereof.

15 2. If within thirty days after the date on which such merger or consolidation was effected  
16 the value of such shares is agreed upon between the dissenting shareholder and the surviving or  
17 new corporation, payment therefor shall be made within ninety days after the date on which such  
18 merger or consolidation was effected, upon the surrender of his **or her** certificate or certificates  
19 representing said shares. Upon payment of the agreed value the dissenting shareholder shall  
20 cease to have any interest in such shares or in the corporation.

21 3. If within such period of thirty days the shareholder and the surviving or new  
22 corporation do not so agree, then the dissenting shareholder may, within sixty days after the  
23 expiration of the thirty day period, file a petition in any court of competent jurisdiction within  
24 the county in which the registered office of the surviving or new corporation is situated, asking  
25 for a finding and determination of the fair value of such shares, and shall be entitled to judgment  
26 against the surviving or new corporation for the amount of such fair value as of the day prior to  
27 the date on which such vote was taken approving such merger or consolidation, together with  
28 interest thereon to the date of such judgment. The judgment shall be payable only upon and  
29 simultaneously with the surrender to the surviving or new corporation of the certificate or  
30 certificates representing said shares. Upon the payment of the judgment, the dissenting  
31 shareholder shall cease to have any interest in such shares, or in the surviving or new  
32 corporation. Such shares may be held and disposed of by the surviving or new corporation as  
33 it may see fit. Unless the dissenting shareholder shall file such petition within the time herein  
34 limited, such shareholder and all persons claiming under [him] **such shareholder** shall be  
35 conclusively presumed to have approved and ratified the merger or consolidation, and shall be  
36 bound by the terms thereof.

37 4. The right of a dissenting shareholder to be paid the fair value of [his] **such**  
38 **shareholder's** shares as herein provided shall cease if and when the corporation shall abandon  
39 the merger or consolidation.

40 5. **When the remedy provided for in this section is available with respect to a**

41 **transaction and the shareholder has exercised the right to appraisal pursuant to subsection**  
42 **1 of this section, such remedy shall be the exclusive remedy of the shareholder as to that**  
43 **transaction, except in the case of fraud or lack of authorization for the transaction.**