

Second Regular Session
Sixty-third General Assembly
STATE OF COLORADO

INTRODUCED

LLS NO. R02-1013.01 Thomas Morris

HCR02-1003

HOUSE SPONSORSHIP

Madden, Scott, and Williams T.

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Teck,

THIS DOCUMENT CONTAINS EXPLANATORY COMMENTS OF MEMBERS OF THE COLORADO BAR ASSOCIATION BUSINESS LAW SECTION WHO HAVE WORKED ON COLORADO'S BUSINESS LEGISLATION FOR THE PAST TWO DECADES.

THESE COMMENTS HAVE NOT YET BEEN AUTHORIZED OR RATIFIED BY ANY AGENCY OF THE COLORADO BAR ASSOCIATION.

House Committees
Business Affairs & Labor

Senate Committees

HOUSE CONCURRENT RESOLUTION 02-1003

101 **SUBMITTING TO THE REGISTERED ELECTORS OF THE STATE OF**
102 **COLORADO AN AMENDMENT TO REPEAL SECTIONS 3, 9, 10, AND**
103 **14 OF ARTICLE XV OF THE CONSTITUTION OF THE STATE OF**
104 **COLORADO, CONCERNING MODIFICATIONS TO CORPORATE LAW**
105 **TO FACILITATE CORPORATIONS' CONDUCT OF BUSINESS IN**
106 **COLORADO.**

Resolution Summary

(Note: This summary applies to this resolution as introduced and does not necessarily reflect any amendments that may be subsequently adopted.)

In reliance on existing law contained in the "Colorado Business Corporation Act":

Shading denotes HOUSE amendment. Double underlining denotes SENATE amendment.
Capital letters indicate new material to be added to existing statute.
Dashes through the words indicate deletions from existing statute.

- Repeals the general assembly's authority to revoke corporate charters;
- Repeals the requirement that corporations hold a stockholder meeting before issuing stock;
- Repeals the requirement that foreign corporations keep a place of business and an authorized agent in the state; and
- Allows a domestic corporation that consolidates with a foreign corporation to become a foreign corporation.

1 *Be It Resolved by the House of Representatives of the Sixty-third*
2 *General Assembly of the State of Colorado, the Senate concurring*
3 *herein:*

General Comment: This Concurrent Resolution amends the Colorado Constitution to delete obsolete provisions and bring the Constitution into conformity with corporation law as it has been enacted by the General Assembly since at least the middle of the last century.

Repeal of these provisions will clarify the power of the General Assembly to regulate corporations in all regards and will acknowledge that regulation by legislation is far preferable to regulation by constitutional provision in matters such as corporation law, where the needs of the State and of its businesses and citizens can change rapidly from time to time.

The deleted provisions have never been utilized by the courts to protect rights or remedy wrongs; rather, they have been essentially ignored since their enactment. Their continued existence in the Constitution merely creates uncertainty about Colorado's well-established statutory corporate law and well-established business practices.

Their continued existence can also lead cautious advisers to counsel incorporation under the laws of other states rather than utilizing the statutes that the General Assembly has carefully crafted and nurtured. That may be particularly true of publicly-traded corporations and privately-held high-tech corporations that are based in Colorado.

These provisions, if strictly applied, would inappropriately restrict the General Assembly in its important work of keeping Colorado's corporate laws up-to-date and able to cope with the needs of the State's businesses and their shareholders. The General Assembly is not subject to these kinds of restrictions in regulating partnerships, limited liability companies, and other forms of business entities, and it should not be thus limited in regulating corporations, either.

All of these provisions can be avoided simply by incorporating in some other state and doing business in Colorado as a foreign corporation. But the result of that is that Colorado's carefully designed corporate statutes are simply made inapplicable to the businesses that do business within its borders. It is not appropriate to maintain archaic Constitutional provisions of that futility and with that adverse impact.

4 **SECTION 1** At the next election at which such question may be
5 submitted, there shall be submitted to the registered electors of the state
6 of Colorado, for their approval or rejection, the following amendment to
7 the constitution of the state of Colorado, to wit:

8 Sections 3, 9, 10, and 14 of article XV of the constitution of the
9 state of Colorado are repealed as follows:

10 **Section 3. Power to revoke, alter or annul charter.** ~~The general~~
11 ~~assembly shall have the power to alter, revoke or annul any charter of~~
12 ~~incorporation now existing and revocable at the adoption of this~~
13 ~~constitution, or any that may hereafter be created, whenever in their~~
14 ~~opinion it may be injurious to the citizens of the state, in such manner,~~
15 ~~however, that no injustice shall be done to the corporators.~~

Comment: This Section 3 purports to grant the General Assembly authority to modify or revoke the articles of incorporation of any Colorado corporation. Although the General Assembly has never sought to use this right, the mere existence of the provision creates uncertainty, an uncertainty that can be avoided merely by incorporating in another state and then doing business in Colorado as a foreign corporation. That is, the provision serves no useful purpose but induces unnecessary and cumbersome evasions.

It should be noted that the General Assembly has already properly reserved to itself the power to amend or repeal its corporation statutes at any time and to subject all corporations to those changes.

16 **Section 9. Fictitious stock, bonds - increase of stock.** ~~No~~
17 ~~corporation shall issue stocks or bonds, except for labor done, service~~
18 ~~performed, or money or property actually received, and all fictitious~~
19 ~~increase of stock or indebtedness shall be void. The stock of corporations~~
20 ~~shall not be increased except in pursuance of general law, nor without the~~
21 ~~consent of the persons holding a majority of the stock, first obtained at a~~
22 ~~meeting held after at least thirty days' notice given in pursuance of law.~~

Comment: This Section 9 negatively impacts the operation of modern, high-tech corporations in two specific ways, while doing nothing to protect the persons who deal with them.

First, its apparent restriction on issuing stock in exchange for a shareholder's promise to provide services in the future impedes just the kind of transaction on which many successful Colorado companies are founded: The inventor's promise to render services to a corporation, in exchange for stock in that corporation, while other investors put up the money that the corporation will need to take his inventions to market. Arguably, by impeding the use of promissory notes and other obligations, the provision further impedes corporations in developing their capital structures.

Second, by apparently requiring an actual "meeting" of shareholders, on not less than 30 days notice, to authorize stock increases, the section prevents corporations from acting swiftly when new financing is needed. Colorado's corporation law has for

many years provided efficient, safe procedures for taking corporate action, and this constitutional limitation adds nothing of value to the statutory plan.

1 **Section 10. Foreign corporations - place - agent.** ~~No foreign~~
2 ~~corporation shall do any business in this state without having one or more~~
3 ~~known places of business, and an authorized agent or agents in the same,~~
4 ~~upon whom process may be served.~~

Comment: This Section 10, requiring a foreign corporation to maintain a "known place of business," is at best ambiguous and lends no protection to Colorado citizenry. Colorado's corporation statutes themselves contain detailed provisions regulating the transaction of business in Colorado, requiring foreign corporations to register with the Secretary of State, and this constitutional provision adds nothing but confusion to those requirements.

5 **Section 14. Railroad or telegraph companies - consolidating**
6 ~~**with foreign companies.** If any railroad, telegraph, express or other~~
7 ~~corporation organized under any of the laws of this state, shall~~
8 ~~consolidate, by sale or otherwise, with any railroad, telegraph, express or~~
9 ~~other corporation organized under any laws of any other state or territory~~
10 ~~or of the United States, the same shall not thereby become a foreign~~
11 ~~corporation, but the courts of this state shall retain jurisdiction over that~~
12 ~~part of the corporate property within the limits of the state in all matters~~
13 ~~which may arise, as if said consolidation had not taken place.~~

Comment: This Section 14 may be read to invalidate all mergers of Colorado corporations *into* foreign corporations, although it can also be read to do far less than that. In any event, it seems that the provision has never been applied by any court to any transaction. But the mere existence of the threat has induced many publicly-held or high-tech companies to incorporate under other states' laws and then do business in Colorado as foreign corporations.

Of course, this provision is not needed in order for Colorado courts to exercise jurisdiction over assets located within the state's boundaries. They can well do that without this section on the books.

14 **SECTION 2** Each elector voting at said election and desirous of
15 voting for or against said amendment shall cast a vote as provided by law
16 either "Yes" or "No" on the proposition: "AN AMENDMENT TO REPEAL
17 SECTIONS 3, 9, 10, AND 14 OF ARTICLE XV OF THE CONSTITUTION OF THE
18 STATE OF COLORADO, CONCERNING MODIFICATIONS TO CORPORATE LAW
19 TO FACILITATE CORPORATIONS' CONDUCT OF BUSINESS IN COLORADO."

20 **SECTION 3** The votes cast for the adoption or rejection of said
21 amendment shall be canvassed and the result determined in the manner
22 provided by law for the canvassing of votes for representatives in
23 Congress, and if a majority of the electors voting on the question shall
24 have voted "Yes", the said amendment shall become a part of the state
25 constitution.