

ACT 223

H.B. NO. 2611-78

A Bill for an Act Relating to Corporations.

Be It Enacted by the Legislature of the State of Hawaii:

SECTION 1. Chapter 416, Hawaii Revised Statutes, is amended to read as follows:

I. By adding three new sections to be appropriately designated and to read:

“Sec. 416- Directors’ telephone meetings. Unless prohibited by the articles of association, charter, or bylaws, and subject to provisions therein relating to notice, members of the board of directors or any committee designated thereby may participate in a meeting of such board or committee by means of a conference telephone or similar communication equipment by means of which all persons participating in the meeting can hear each other at the same time, and participation by such means shall constitute presence in person at a meeting.

“Sec. 416- Equal division of directors; appointment of provisional director; qualifications; rights and powers; compensation. (a) If a corporation has an even number of directors who are equally divided and cannot agree as to the management of its affairs, so that its business can no longer be conducted to advantage or so that there is danger that its property and business will be impaired or lost, any circuit judge of the circuit where the corporation has its prin-

cial office or any circuit judge of the first circuit may, notwithstanding any provisions of the articles or bylaws and whether or not an action is pending for an involuntary dissolution of the corporation, appoint a provisional director pursuant to this section. Action for such appointment may be brought by any director or by stockholders or members holding not less than thirty-three and one-third per cent of the voting power.

(b) A provisional director shall be an impartial person, who is neither a stockholder or member nor a creditor of the corporation, nor related by consanguinity or affinity within the third degree according to the common law to any of the other directors of the corporation or to any judge of the court by which such provisional director is appointed. A provisional director shall have all the rights and powers of a director until the deadlock in the board or among the stockholders or members is broken or until such provisional director is removed by order of the court or by approval of stockholders or members holding a majority of the voting power. Such person shall be entitled to such compensation as shall be fixed by the court unless otherwise agreed with the corporation.

Sec. 416- Court's appointment of directors on petition. If a corporation has not issued shares and all the directors resign, die, or become incompetent, or in the case of a nonprofit corporation if a corporation has no members other than the directors and all the directors resign, die, or become incompetent, any circuit judge of the circuit where the corporation has its principal office or any circuit judge of the first circuit may appoint directors of the corporation upon petition of a creditor of the corporation or of the personal representative of a deceased director or of the guardian or conservator of an incompetent director."

2. By amending Section 416-4, Hawaii Revised Statutes, to read:

"Sec. 416-4 Directors, qualifications of. The directors of every corporation shall be one or more in number, and not less than one member of every board of directors shall be a resident of the State. In the absence of one such member no board of directors shall function."

3. By amending section 416-11 to read:

"Sec. 416-11 Creation by articles of incorporation. Any number of persons not less than one desiring to form a corporation shall execute articles of incorporation and acknowledge the same before any officer authorized to take acknowledgments. The articles shall contain the following particulars:

- (1) The name of the corporation, which shall include as the last word thereof the word "Limited", "Incorporated", or "Corporation" or the abbreviation "Ltd.", "Inc.", or "Corp.";
- (2) The place of its principal office in Hawaii and also the street or mailing address of the initial office;
- (3) The purposes and powers of the corporation;
- (4) The number of shares of each class of stock that the corporation is authorized to issue, the aggregate par value, if any, of each class of stock, and the par value of each share or that the shares are without par value; and, if the privilege of subsequent extension of the authorized capital stock is reserved, the limit of the extension;

- (5) The number of directors, which shall [be][†] not less than one, and the names and street or mailing addresses of the initial officers and directors;
 - (6) If the corporation is to issue initially more than one class of stock, the preferences, privileges, powers, rights, and qualifications of the shares other than common shares having full voting rights;
 - (7) Any other lawful provisions which may be desired by the corporation for the purpose of defining, limiting, or regulating the powers of the corporation and the powers and duties of its board of directors.
4. By amending section 416-23 to read:

"Sec. 416-23 Amendments of charters and articles. Subject to the provisos set forth in this section, the articles of association or charter of any corporation may be amended by the vote of the holders of not less than two-thirds of all of its stock issued and outstanding and having voting power, or by such larger vote as may be required by the articles of association or charter, at a meeting duly called and held for the purpose, or, in case of a nonstock corporation, by the vote of not less than two-thirds of the members present at a meeting duly called and held for the purpose. No amendment shall be effective unless there is filed in the office of the director of regulatory agencies a verified certificate, signed by any two authorized officers of the corporation, setting forth the amendment by stating that the articles of association or charter has been amended to read as set forth in the certificate in full or by stating that any provision of the articles of association or charter, which shall be identified by the numerical or other designation thereof in the articles of association or charter or by stating the wording thereof, has been amended to read as set forth in the certificate, and certifying that the amendment was adopted by the required vote as aforesaid at a meeting duly called and held for the purpose. Any amendment so adopted shall become effective and the articles of association or charter shall be amended on the date of filing of the certificate of amendment or on such later date as specified in the certificate of amendment. Any provision of this section to the apparent contrary notwithstanding, (1) no amendment shall confer any other or greater powers or privileges than could lawfully be conferred or obtained in an original charter or articles of association; (2) no amendment changing the name of the corporation shall become effective until the director has determined that the amendment is not in conflict with section 416-12; (3) no amendment to the charter of a nonprofit corporation shall become effective until the same is allowed by the director; and (4) if an amendment would make any change which would adversely affect the rights of the holders of shares of any class, then the holders of each class of shares so affected by the amendment shall be entitled to vote as a class upon the amendment, regardless of other limitations or restrictions on the voting power of the class, and in addition to the vote otherwise required, a vote of the holders of two-thirds of each class so affected by the amendment shall be necessary to the adoption thereof. There may be filed in the office of the director at any time a copy, verified by any two officers of the corporation by authority of its board of direc-

[†]Bracketed word has been added.

tors, of the articles of association or charter of the corporation restated to include all amendments to and including the date of the verification and upon filing the restated articles of association or charter shall be and become the articles of association or charter of the corporation.”

5. By amending section 416-64 to read:

“Sec. 416-64 Increase of capital, authorization; certificate to be filed with director. No increase or extension of the capital stock of any corporation organized under the laws of the State, having authority under its articles of association or charter to increase its capital stock, shall be legal and effective unless the increase or extension has been authorized by a vote of not less than two-thirds of all of the shares of stock issued and outstanding and having voting power, at any meeting duly called and held for the purpose; and unless a verified certificate has first been filed with the director of regulatory agencies, signed by any two authorized officers of the corporation, showing that the meeting had been properly called and held; that the increase or extension had been authorized by the required vote; and showing also (1) the present authorized capital stock of the corporation; (2) the amount to which the capital stock thereof may be increased or extended under its articles of association or charter; (3) the amount of increase or extension of the capital stock duly authorized by its stockholders; and (4) in the case of stock having a par value, that not less than ten per cent of the total authorized stock as increased has been paid in, in cash or property, or that the corporation holds cash or property of a value equal to ten per cent of the total authorized stock as increased. The certificate shall be accompanied by payment of the fee required to be paid upon the amount of increase so authorized. The director shall not receive or file the certificate without the payment. The increase of capital shall become effective and the capital of the corporation shall be and become increased on the date of filing of the certificate prescribed by this section or on such later date as shall be specified in the certificate.”

6. By amending subsection (b) of section 416-65 to read:

“(b) What vote necessary. Any reduction of capital or capital stock shall require the affirmative vote of the holders of not less than two-thirds of all of the shares of stock of the corporation issued and outstanding and having voting power, provided that in case shares of any class of stock of a corporation are subject to redemption or are convertible into shares of any other class of stock of the corporation pursuant to the charter or articles of association of the corporation or in a resolution, a certified copy of which is filed in the office of the director pursuant to section 416-58, and if the provisions specify that all or any part of the shares of the class may be redeemed or converted pursuant to the determination other than by vote of stockholders as aforesaid, whether by the board of directors or by the vote of any different percentage of stockholders or of any class or classes thereof or as fixed in the charter or articles of association or in the resolution authorizing the issue of the stock, then any reduction of the capital or capital stock of the corporation by the redemption of all or any part or by the conversion of all of the shares of such class shall not require the vote of stockholders as aforesaid, but may be effected pursuant to determination made or fixed as specified in such provisions. Any reduction of the capital or capital stock of a corporation pursuant to this subsection shall be subject to subsection (g).”

7. By amending section 416-91 to read:

"Sec. 416-91 Of directors or managers; dividends. The directors or managers of any corporation may authorize the payment of dividends in cash or in property owned by the corporation only from the profits and earned surplus of the corporation and only when the corporation does not have and the payment of a dividend would not create a capital deficit; provided that the foregoing shall not be interpreted to prohibit any distribution of assets permitted by section 416-65, upon the reduction of the capital stock of a corporation, or to prohibit a distribution and division of the balance of the assets of the corporation in accordance with law, upon the dissolution of a corporation or the expiration of its charter or pursuant to a plan of complete liquidation adopted by the stockholders of the corporation (even though the distribution may be prior to the formal dissolution of the corporation under section 416-121) if all of the assets of the corporation are distributed in complete liquidation (less assets retained to meet claims) within the twelve-month period beginning on the date of the adoption of such plan. The directors or managers of any corporation may authorize the payment of dividends in shares of the authorized capital stock of the corporation only from the earned surplus or paid-in or contributed surplus or other surplus of the corporation, and the shares issued by the stock dividend shall be fully paid and non-assessable to the extent of the amount of surplus capitalized by the issuance thereof; provided that no stock dividend shall be paid by a fiduciary company without the approval of the director of regulatory agencies. In case of any dividend payment or other distribution of assets in violation of this section, the directors or managers, under whose administration the same may have taken place and who have authorized the same, shall in their individual and private capacities be jointly and severally liable to the corporation and the creditors thereof, in the event of its bankruptcy or insolvency, or in the event of its dissolution, for the loss suffered by reason of the payment or other distribution in an amount not exceeding the amount so paid or distributed.

Nothing in this chapter shall be deemed to prohibit the distribution of assets to stockholders permitted or authorized by the Federal Housing Commissioner by any corporation organized for the purpose of providing housing for rent pursuant to regulations of the Federal Housing Commissioner under the provisions of Title VIII of the National Housing Act, as amended, where the principal assets of the corporation consist of real property belonging to the United States and leased to the corporation pursuant to Title VIII of the National Housing Act as amended or supplemented from time to time."

8. By amending Section 416-81 to read:

"Sec. 416-81 Meeting called by circuit judge, when. Whenever, by reason of the death, absence, or other legal impediment of the officers of any corporation, there is no person duly authorized to call or preside at a legal meeting thereof, any circuit judge of the circuit where the corporation has its principal office or any circuit judge of the first circuit, may, on written application of any member or stockholder thereof, issue an order to any of the members or stockholders directing him or her to call a meeting of the corporation by giving such notice as is required by the bylaws of the corporation. The judge may, in the same order,

direct one of the members or stockholders to preside at the meeting, and any meeting held pursuant to the order shall be valid."

SECTION 2. Section 417-4, Hawaii Revised Statutes, is amended to read:

"Sec. 417-4 Authorization of stockholders. Either before or after the approval of the proposed agreement by the board of directors, meetings of the stockholders of each constituent corporation shall be called, and at each meeting the proposed merger or consolidation agreement shall be considered. A written notice setting forth the time, place, and purpose of meeting, and either a copy of the proposed agreement or a statement of the general terms thereof, and stating the date on which the notice is mailed, shall be mailed, postage prepaid, at least thirty days prior to the date of the meeting, to every stockholder at his last known address appearing on the books of the corporation. Before any merger or consolidation agreement becomes effective, the agreement shall be approved or authorized by the vote of the holders of not less than three-fourths of all the issued and outstanding shares of stock having voting power, even though their right to vote is otherwise restricted or denied by the charter, articles, bylaws, or resolution of the constituent corporation.

The approval of the stockholders of each constituent corporation may be given at the meeting, or any adjournment thereof which may be held, either before or after the approval of the agreement by the board of directors, and the stockholders may by resolutions approved by the vote required in the preceding paragraph adopt modifications of or amendments to the proposed agreement, and may authorize the board of directors of the corporation to make modifications or amendments of the proposed agreement as the board of directors deems proper to the extent provided for in the resolutions without further stockholders' approval. Upon the approval or authorization of the merger or consolidation, unless the approval or authorization is given by the holders of all shares owned and outstanding, the officers shall mail to each stockholder notice that the merger or consolidation agreement has been approved or authorized.

The stockholders of each constituent corporation may at the stockholders' meetings adopt proposed bylaws for the consolidated corporation, which shall be deemed to be the bylaws of the consolidated corporation upon the filing of the consolidation agreement in the office of the director of regulatory agencies as hereinafter provided, or the bylaws may be adopted at a stockholders' meeting of the consolidated corporation after the filing of the agreement."

SECTION 3. Statutory material to be repealed is bracketed. New material is underscored. In printing this Act, the revisor of statutes need not include the brackets, the bracketed material, or the underscoring.*

SECTION 4. This Act shall take effect upon its approval.

(Approved June 5, 1978.)

*Edited accordingly.