

THE HISTORY OF THE NORTH DAKOTA  
PUBLICLY TRADED CORPORATIONS ACT OF 2007  
—HOUSE BILL 1340

AL JAEGER\*

I remember the day very well. It was October 5, 2001, the day the Ralph Engelstad Arena was dedicated. From across the crowd on the plaza, former Governor Ed Schafer called out to me that he wanted to visit with me about the North Dakota Constitution. Of course, that was not the time or place. We were on our way to the inaugural hockey game!

Later, we met and he informed me about provisions in Article XII of the state's constitution and how unfavorable they were for the chartering of publicly traded corporations in North Dakota. The provisions dated back to statehood.

When the next legislative session convened in 2003, I approached members of the legislature's Joint Constitutional Revision Committee with a resolution to amend Article XII. The resolution made changes to Sections 6 and 9 of Article XII. The sponsors of Senate Concurrent Resolution No. 4013 were Senators Karen Krebsbach and Ben Tollefson and Representative William Kretschmar.<sup>1</sup> The resolution was unanimously adopted by the Legislative Assembly and slated as measure No. 1 on the June 2004 ballot.<sup>2</sup>

In an Associated Press story published June 1, 2004, William L. Guy III was quoted as saying, "It can fairly be said that this language, as it stands, is an obstacle to economic development in North Dakota. I'm sure no publicly traded company would ever incorporate under North Dakota law, if they were aware of this."<sup>3</sup> Unfortunately, the measure received only a 41.7% favorable vote in the June 8, 2004, election.<sup>4</sup> In hindsight, it appeared to be a matter of the voters not fully understanding what the changes were intended to accomplish.

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1. *S.C.R. 4013*, 2003 Leg., 58th Sess. (N.D. 2003).

2. 2003 N.D. Sess. Laws ch. 578.

3. Dale Wetzel, *Stockholder Voting Issue of Measure*, THE FORUM (Fargo, ND), June 1, 2004, at C4.

4. State of North Dakota Canvassing Board, Office of the Secretary of State, Official Abstract of Votes Cast, June 8, 2004, available at <http://www.nd.gov/sos/> (follow "Elections and Voting"; then follow "Election Results"; then follow "2004—Primary Election—June 08, 2004").

Although it was a personal disappointment, it was clear that the provisions of Article XII were still an impediment to economic development in North Dakota. Therefore, after the election, I contacted the North Dakota State Bar Association and requested their assistance. A small study group was formed. Through the group's research, it was determined that no other state had similar restrictions in their constitution. At the same time, it was decided to expand the review of Article XII to include all of its sections to determine if they needed amending as well. In addition, representatives of the state's business community became very actively involved in researching and promoting the need for a constitutional amendment.

The result was the introduction of House Concurrent Resolution No. 3055 in the 2005 legislative session.<sup>5</sup> It was sponsored by Representatives Nancy Johnson, Mary Ekstrom, George Keiser, and Senators Jerry Klein, Karen Krebsbach, and Constance Triplett.<sup>6</sup> It had the support of a broad representation of state agencies, statewide civic and business organizations, and businesses. Not only did the resolution amend Sections 1, 2, and 6, it repealed Sections 3, 4, 7, 8, 9, 11, 12, 13, 14, 15, and 17 of Article XII.<sup>7</sup> The Senate approved it on a vote of 43 to 2. The House approved it on a vote of 88 to 3. The resolution became measure No. 2 on the June 2006 ballot.

This time, the result was much different. In the election on June 13, 2006, the resolution received a 73.1% favorable vote from the state's voters.<sup>8</sup> In a way, the defeat in 2004 was a blessing. The resulting amendment to Article XII in 2006 removed a large quantity of obsolete text from the state's constitution, as well as removing the unfavorable provisions related to the chartering of publicly traded corporations in North Dakota.<sup>9</sup> The restrictive provisions referred to by Mr. Guy in 2004 no longer existed.<sup>10</sup>

Because of a casual conversation occurring during the national convention of the International Association of Commercial Administrators (IACA) in May of 2006, the Secretary of State's Office was approached

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5. *H.C.R. 3055*, 2005 Leg., 59th Sess., 2005 N.D. Laws 2172.

6. *Id.*

7. 2005 N.D. Sess. Laws ch. 623.

8. State of North Dakota Canvassing Board, Office of Secretary of State, Official Abstract of Votes Cast, June 13, 2006, *available at* <http://www.nd.gov/sos/> (follow "Elections and Voting"; then follow "Election Results"; then follow "2006—Primary Election—June 13, 2006").

9. *See* 2005 N.D. Sess. Laws ch. 623 (removing provisions that gave minority shareholders disproportionate influence on the election of board members and provisions that mandated a corporation to give any existing shareholders the preemptive right to maintain their pro-rata share of the corporation's capitalization in any new stock offering).

10. *See* Wetzel, *supra* note 3, at C4.

after the June 2006 election about the drafting of a bill providing an organizational governance option for publicly traded corporations unlike any other that currently existed. This initiative was now possible because the state's constitution had been successfully amended. North Dakota was a virgin territory because it had virtually no history of having publicly traded corporations or having the accompanying long-standing diverse, convoluted, and conflicting laws that existed in other states. As it was, only two publicly traded corporations existed that were chartered under North Dakota's laws.<sup>11</sup>

It was an exciting offer. During the previous eight legislative sessions the initiatives of the Secretary of State's office and the State Bar Association resulted in the legislature adopting laws allowing the creation of limited liability companies, limited liability partnerships, and limited liability limited partnerships. At the same time, the procedures and processes for all other existing business entities, such as both corporations and nonprofit corporations, had been improved through legislative action.

For 117 years, North Dakota had the most anti-business corporation clauses in its constitution. Now, it had an opportunity to provide the nation's business corporations with an option. For me personally, that was important. From my perspective, to be a business-friendly state is to have laws providing businesses with several organizational options from which they can choose the one best suited for their particular business. Therefore, it was consistent with the past initiatives creating business entity options to now consider a law providing a governance option for publicly traded corporations.

During the summer and fall of 2006, the Secretary of State's office, along with William L. Guy III, worked closely with the bill's author, William H. Clark, Jr., to make sure that the proposed bill contained provisions compatible and consistent with the existing procedures and processes used for all of the other business entities already registered with the Secretary of State's office. The resulting bill was House Bill 1340, which created chapter 10-35 of the North Dakota Century Code—entirely devoted to the Publicly Traded Corporations Act.<sup>12</sup> The legislative sponsors of the bill were Representatives Larry Klemin, Duane DeKrey, and Lois Delmore and Senators Tony Grindberg, Carolyn Nelson, and Dave Nething.<sup>13</sup> The

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11. The only publicly traded corporations incorporated in North Dakota are Dakota Growers Pasta Company, Inc. of Carrington, ND, and Integrity Mutual Funds, Inc. of Minot, ND.

12. *H B. 1340*, 2007 Leg., 60th Sess., 2007 N.D. Laws 497.

13. *Id.*

House passed it on a vote of 63 to 31. The Senate passed it on a vote of 42 to 5.

As I testified before the 2007 Legislative Assembly, my office was not an expert on the corporate governance structure provided for in the North Dakota Publicly Traded Corporations Act of 2007.<sup>14</sup> As an office of record, that was not our role. There would be others who would debate and promote the merits of the Act and whether it was an appropriate choice for corporate governance. North Dakota was just providing the legal structure for those who wished to choose it.

As I have often stated, it is an option. No business wanting to become a publicly traded corporation is forced to use it. A business can freely choose to incorporate in North Dakota either under the traditional provisions of chapter 10-19.1 of the North Dakota Century Code or under the shareholder governance provisions in chapter 10-35.<sup>15</sup>

Regardless of which they choose, the Secretary of State's office will provide them with efficient and timely service unequaled anywhere in this nation. It is the same high standard of service the Secretary of State's office has always provided regardless of the type of business entity registered with it.

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14. *Hearing on H.B. 1340 Before the Senate Judiciary Comm.*, 2007 Leg., 60th Sess. (N.D. 2007) (statement of Al Jaeger, Secretary of State, North Dakota); *Hearing on H.B. 1340 Before the House Judiciary Comm.*, 2007 Leg., 60th Sess. 12 (N.D. 2007) (statement of Al Jaeger, Secretary of State, North Dakota).

15. N.D. CENT. CODE § 10-35-02 to -03 (2007).