Senate Fiscal Agency
P. O. Box 30036
Lansing, Michigan 48909-7536

BILL ANALYSIS

Telephone: (517) 373-5383
Fax: (517) 373-1986

Senate Bills 623, 624, and 625 (as introduced 10-16-13)
Sponsor: Senator Mike Kowall (S.B. 623)
Senator Rick Jones (S.B. 624)
Senator Steve Bieda (S.B. 625)
Committee: Economic Development

Date Completed: 10-23-13

CONTENT

Senate Bill 623 would amend the Nonprofit Corporation Act to do the following among other things:

- **Allow voting on corporate matters by mail, electronically, or at polling places.**
- **Revise voting requirements for the merger or dissolution of a corporation.**
- **Allow a corporation's board, or an individual the board designated, to appoint one or more nonexecutive committees to assist in conducting the board's affairs.**
- **Allow a nonprofit corporations to provide "services in a learned profession".**
- **Limit members' and shareholders' ability to obtain certain corporate information.**
- **Revise a provision that allows a corporation's articles of incorporation to a volunteer's liability to the corporation for money damages, and extend this provision to a director.**
- **Revise and expand upon provisions concerning the indemnification of a director, officer, employee, nondirector volunteer, or agent, who is or is threatened to be made a party to a civil, administrative, or criminal suit, action, or proceeding.**
- **Delete a filing fee applicable to foreign corporations and add other filing fees that would apply to foreign corporations.**

The bill also would repeal multiple sections of the Act.

Senate Bill 624 would amend Public Act 169 of 1965, which regulates the dissolution of charitable purpose corporations, to do the following:

- **Prohibit a nonprofit corporation or other entity organized for charitable purposes from merging, converting, or dissolving without the consent of the Attorney General.**
- **Prohibit the Department of Licensing and Regulatory Affairs (LARA) from accepting certificates of dissolution or merger, or restated articles of incorporation, from a charitable purpose corporation without the consent of the Attorney General.**
- **Establish procedures for securing the Attorney General's consent for a charitable purpose corporation's dissolution, merger, or conversion.**

The bill also would name Public Act 169 the "Dissolution of Charitable Purpose Corporation Act".

Senate Bill 625 would amend the Michigan Limited Liability Company Act to include in the Act's definition of "corporation" or "domestic corporation" a corporation formed under or subject to, wholly or in part, the Nonprofit Corporation Act.

Senate Bills 624 and 625 are tie-barred to Senate Bill 623, which is tie-barred to Senate Bill 624.

A more detailed description of Senate Bills 623 and 624 follows.

Senate Bill 623

Voting by Mail, Electronically, or at Polling Places

The Nonprofit Corporation Act specifies that a corporation's articles of incorporation may provide that a shareholder or member entitled to vote at an election for directors may vote in person, by proxy, or by electronic transmission. The bill instead would allow the articles of a corporation organized on a stock or membership basis to provide that a shareholder or member who was entitled to vote at an election for directors could vote in person, by proxy, or by ballot as provided in Sections 408 and 409 (described below). The bill would define "ballot" as an instrument in written or electronic form that is designed to record the vote or votes of shareholders or members under Section 408 or Section 409 or at a meeting of the shareholders or members.

The articles of incorporation of a corporation organized on a directorship basis could provide that a person entitled to vote at an election for directors could vote in person, by proxy, or by electronic transmission.

Currently, an annual meeting of shareholders or members for the election of directors and for other business, must be held at a time provided in the bylaws, unless the action is taken by written consent as allowed under the Act. The bill instead would require a corporation to hold such an annual meeting unless the shareholders or members acted by written consent or by ballot under Section 408 or 409.

The bill would add Sections 408 and 409 to allow a corporation to provide in its articles of incorporation, or in bylaws approved by the shareholders or members, that any action the shareholders or members were required or permitted to take at an annual or special meeting could be taken without a meeting if the corporation provided a ballot to each shareholder or member who was entitled to vote. Under Section 409, the corporation could allow the voting at a polling place or places established by the corporation. The polling places would have to be reasonably accessible to the shareholders or members.

The corporation would have to provide notice to shareholders or members entitled to cast a ballot at a polling place within the same time and in the same manner as for notice of meetings of shareholders or members. A provision in the articles or bylaws authorizing voting at a polling place would not preclude the calling or holding of an annual or special meeting. An action would be considered approved if the total number of votes cast at the polling places during the period when polls were open equaled or exceeded the quorum required to be present at a meeting to take that action, and the number of favorable votes equaled or exceeded the number of votes that would be required to take the action at a meeting.

Voting Requirements for Mergers & Dissolutions

Mergers. Chapter 7 of the Act regulates mergers and consolidations. Under the bill, except as otherwise provided, a plan of merger adopted by the board of each constituent corporation organized on a stock or membership basis would have to be submitted for approval at a meeting of the shareholders or members. At the meeting, the plan would be approved if the following were met:

-- A majority of the votes held by shareholders or members who were entitled to vote were cast in favor of the plan.
-- A majority of the votes held by shareholders or members of the class were cast in favor of the plan, if a class of members or shareholders were entitled to vote on the plan as a class.

A class of shares or of members would be entitled to vote as a class if the plan of merger contained a provision that, if contained in a proposed amendment to the articles of incorporation, would entitle the class of shares or members to vote as a class.

Unless a greater vote were required in the articles of incorporation or in a bylaw adopted by the shareholders or members, if there were more than 20 shareholders or members entitled to vote at the meeting, the plan of merger would be adopted if a majority of the votes held by shareholders or members present in person or by proxy at the meeting were cast in favor of the plan and, if a class of shareholders or members were entitled to vote on the proposed merger as a class, a majority of the votes held by shareholders or members of that class present in person or by proxy at the meeting were cast in favor of the plan.

Dissolutions. Chapter 8 of the Act regulates dissolutions of corporations. A corporation may be dissolved in a number of ways specified in Chapter 8. If a corporation is organized on a stock or bond membership basis, the board must submit a proposed dissolution for approval at a meeting of shareholders or members. The corporation must notify each shareholder or member of record entitled to vote at the meeting, as provided in the Act for giving notice of meetings. The notice must state that a purpose of the meeting is to vote on dissolution.

At the meeting, a vote of shareholders or members must be taken, and dissolution is approved upon an affirmative vote of a majority of the outstanding shares or a majority of the members of the corporation entitled to vote. Under the bill, unless a greater vote were required in the articles of incorporation or in a bylaw adopted by the shareholders or members, if there were more than 20 members or shareholders who were entitled to vote, dissolution would be approved if a majority of the votes held by shareholders or members entitled to vote on the proposed dissolution present in person or by proxy at the meeting were cast in favor of dissolution.

The bill would require a person who filed an action for dissolution of a charitable purpose corporation to mail the Attorney General written notice of the commencement of the action within 30 days after filing.

Nonexecutive Committees

Currently, unless otherwise provided in a corporation's articles of incorporation or bylaws, the board may designate one or more committees consisting of one or more directors of the corporation. The bill would refer to these as "executive committees".

Under the bill, unless otherwise prohibited in the articles or bylaws, the board or an individual designated in the bylaws or by the board could appoint one or more committees

that were not executive committees, to assist in the conduct of the board's affairs, and could provide for the creation of one or more subcommittees of any nonexecutive committee. The bylaws, or a resolution establishing a nonexecutive committee that was approved by the board, would have to state the purposes of committees appointed under this provision, the terms and qualifications of committee members, and the ways in which committee members were selected and removed. Some or all of the committee members could be directors, officers, members, or shareholders of the corporation and some or all could be individuals who were not directors, officers, members, or shareholders.

A committee appointed under the provision described above would not be an executive committee and could not execute the board's power or authority in the management of the corporation's business and affairs. It could, however, perform under the board's direction the functions described in the bylaws or determined by the board.

Services in a Learned Profession

The bill would allow a domestic corporation to be formed and a foreign corporation to be authorized to conduct affairs in Michigan for the purpose of providing "services in a learned profession", as well as employ and enter into other arrangements with duly licensed or authorized individuals who would furnish those services on behalf of the corporation.

The bill would define "services in a learned profession" as services provided by a dentist, an osteopathic physician, a physician, a surgeon, a doctor of divinity or other clergy, or an attorney at law.

Limit on Access to Information

The Act requires a corporation, upon written request of a shareholder or member, to mail to that person its balance sheet at the end of the preceding fiscal year; its statement of income for that fiscal year; and, if prepared by the corporation, its statement of source and application of funds for that fiscal year.

In addition, a stockholder or member of record of a corporation, upon at least 10 days' written demand, may examine for any proper purpose, in person or by agent or attorney, during usual business hours, its minutes of stockholders' or members' meetings and record of shareholders or members. The bill would delete this provision.

Under the bill, except as provided below, any shareholder or member of record of a corporation organized on a stock or membership basis, in person or by attorney or other agent, could inspect, for any proper purpose during regular business hours, the corporation's stock ledger, a list of its shareholders or members, and its other books and records, if the shareholder or member gave the corporation written demand describing the purpose of the inspection and the records the shareholder or member wished to inspect, and the records were directly connected with the purpose. "Proper purpose" would mean a purpose that is reasonably related to a person's interest as a shareholder or member.

The bill also would allow a corporation's articles of incorporation, bylaws, or a resolution of the board of directors to provide that the shareholders or members, and their attorneys or agents, would not have the right to inspect the corporation's stock ledger, lists of shareholders or members, lists of donors or donations, or its other books and records, if the incorporators, shareholders, members, or directors who approved this limitation made a good faith determination that one or more of the following applied:

-- Opening the stock ledger, lists, or other books and records for inspection would impair the privacy or free association rights of shareholders or members.

- -- Opening the stock ledger, lists, or other books and records for inspection would impair the lawful purposes of the corporation.
- -- Opening lists of donors or donations for inspection was not in the best interests of the corporation or its donors.

A corporation that limited inspection of lists of its shareholders or members would have to provide a reasonable way for shareholders or members to communicate with all other shareholders or members concerning the election of directors and other affairs of the corporation.

Limit on Liability to Corporation

Currently, a corporation's articles of incorporation may include a provision that eliminates the personal liability of a volunteer director or volunteer officer to the corporation, its shareholders, or its members, for money damages for a breach of the person's fiduciary duty, subject to certain exceptions.

The bill, instead, would allow a corporation's articles to include a provision that eliminated or limited a director's or volunteer officer's liability to the corporation, shareholders, or members for money damages for any action taken or any failure to take any action as a director or volunteer officer, subject to exceptions.

Foreign Corporation Filing Fees

Chapter 10 of the Act regulates foreign corporations. Under Chapter 10 a person must pay certain filing fees to the Administrator (the Director of the Department of Licensing and Regulatory Affairs) when delivering documents to him or her. The bill would delete a $10 filing fee for examining and filing a certificate of election. The bill also would add the following filing fees:

- -- $50, for a certificate of registration of a foreign corporation's corporate name.
- -- $50, for a certificate of renewal of a registration of a foreign corporation's corporate name.
- -- $10, for a certificate of termination of a registration of a foreign corporation's corporate name.

The bill also would authorize the Administrator to charge a nonrefundable fee of up to $50 for any document submitted or certificate sent by facsimile or electronic transmission. The Administrator would have to retain the revenue collected from this fee and LARA would have to use it in carrying out its duties required by law.

Senate Bill 624

Merger, Conversion, or Dissolution of Charitable Purpose Corporation

Under Public Act 169 of 1965, a nonprofit corporation or other entity formed under Michigan law whose corporate purpose is to hold property for any charitable purpose, unless it is organized for religious purposes, may not be dissolved except by giving notice to the Attorney General by registered mail at least 45 days before filing any document concerning dissolution with any other State agency or court. Under the bill, instead, a nonprofit corporation or other entity whose corporate purpose was to hold property for a charitable purpose could not do any of the following, unless it complied with requirements described below:

- -- Enter into a merger with another domestic or foreign nonprofit corporation, domestic or foreign business corporation, or other domestic or foreign business entity.
- -- File an amendment to the articles of incorporation or restated articles of incorporation that converted the entity into a business corporation or to a professional service corporation.
- -- File a certificate of conversion that converted the entity into another form of domestic or foreign business organization.
- -- Dissolve.

A nonprofit corporation or other entity organized under Michigan law whose corporate purpose was to hold property for any charitable purpose, other than a religious purpose, would have to give written notice to the Attorney General before the filing of any paper or document concerning the merger, conversion, or dissolution with any other State agency or court. A corporation that was automatically dissolved under the Nonprofit Corporation Act because its articles of incorporation had expired or it neglected to file annual reports or fees for two years, would have to give notice of the dissolution to the Attorney General within 60 days after the automatic dissolution.

The Attorney General could require that a nonprofit corporation or other charitable entity that was involved in a merger, conversion, or dissolution submit an accounting of the assets of the corporation and of their administration and disposition.

Prohibited Filing without Attorney General Consent

The bill would prohibit LARA from accepting any of the following for filing, unless it were accompanied by the written consent of the Attorney General, an affidavit attesting to the submission of a request for Attorney General approval and the failure of the Attorney General to respond, or a court order:

- -- A certificate of dissolution of a nonprofit corporation or other charitable entity.
- -- A certificate of merger of a nonprofit corporation or other charitable entity, that was not the surviving corporation of the merger.
- -- Restated articles of incorporation or a certificate of conversion to a business corporation, a professional service corporation, or other domestic or foreign business entity.

The Department also could not accept any amendment to the articles of incorporation of a nonprofit corporation or other charitable entity that changed its term of existence to a specific date, unless the amendment were accompanied by the written consent of the Attorney General or an affidavit attesting to the submission of a request for Attorney General approval and the failure of the Attorney General to respond.

Currently, LARA may not accept for filing a notice of withdrawal from Michigan of a foreign nonprofit corporation or charitable entity unless the notice of withdrawal is accompanied by a copy, and proof of service by registered mail, of a notice of intention to withdraw from the State served upon the Attorney General at least 45 days before LARA received the notice of withdrawal. Under the bill, instead, LARA could not issue a certificate of withdrawal from Michigan of a foreign nonprofit corporation or charitable entity unless the request was accompanied by the written consent of the Attorney General or an affidavit attesting to the submission of request for Attorney General approval and the failure of the Attorney General to respond.

Attorney General Consent

Under the bill, if a charitable corporation or other charitable entity submitted a written request to the Attorney General for consent to the filing of a certificate of dissolution,

merger, or conversion, an amendment to or restatement of its articles of incorporation, or to a dissolution, or if a foreign corporation submitted a written request for consent to filing a certificate of withdrawal, the Attorney General would have to provide written consent to the filing or dissolution, or give written notice specifying the reasons for the refusal to consent or requesting additional information, within 120 days after receiving the request.

If the Attorney General failed to provide the written notice within the 120-day period, the person who submitted the request could prepare an affidavit attesting to the submission of the request and the failure of the Attorney General to respond, and could submit the affidavit to LARA.

A domestic or foreign charitable corporation or other entity that was subject to the Act could seek judicial review of the Attorney General's refusal to consent to a transaction described above.

MCL 450.2103 et al. (S.B. 623)
450.251 et al. (S.B. 624)
450.102 (S.B. 625)

Legislative Analyst: Patrick Affholter

FISCAL IMPACT

The bills would have an indeterminate fiscal impact on the Department of Licensing and Regulatory Affairs, and no fiscal impact on local units of government. Senate Bill 623 would eliminate a $10 fee for filing a certificate of election and would create new fees for the registration, renewal, and termination of a certificate of registration of a corporate name for a foreign corporation. It is unknown whether the revenue generated from the new fees would be sufficient to replace revenue lost from the elimination of the certificate of election fee. In fiscal year 2011-12, a total of approximately $940,000 was generated from filing fees paid by nonprofit corporations. The Department has indicated that certificate of election fee revenue was a very small percentage of this, so the fiscal impact of eliminating it would be minor.

Fiscal Analyst: Josh Sefton

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This analysis was prepared by nonpartisan Senate staff for use by the Senate in its deliberations and does not constitute an official statement of legislative intent.