Legislative Analysis

BUSINESS COPORATION ACT REVISIONS

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Senate Bill 442 reported w/o amendment
Sponsor: Sen. Mike Kowall
House Committee: Commerce and Trade
Senate Committee: Commerce
Complete to 1-11-18

(Enacted as Public Act 85 of 2018)

BRIEF SUMMARY:

Senate Bill 442 would amend 30 sections of the Business Corporation Act (MCL 450.1131 et seq.) to do the following:

- Allow various notices to be transmitted by the director via electronic communication.
- Allow the administrator to give notice to a corporation, if required to do so under the act, electronically and in the manner authorized by the corporation.
- Allow the administrator to provide a written notice for failing to file a document in additional formats, including email.
- Allow the administrator to maintain and reproduce documents filed under the act in accordance with the Records Reproductions Act and remove references to other forms of document storage and reproduction.
- Require a corporation's articles of incorporation to include a statement of authority vested in the board regarding share designations and issuances in 1 or more classes or series.
- Allow the board of a corporation to authorize resolutions to designate shares into classes and classes into series, or to eliminate or revise classes and series.
- Revise requirements for owning shares in a professional organization, and modify the provisions for severing employment and financial interest in a professional organization.
- Allow a shareholder or a direction to execute a consent to an action that will take effect at a future date.
- Allow a plan of merger or share exchange to take effect without shareholder approval in certain circumstances.
- Redefine, and introduce definitions for, various terms.

Under the act, the "administrator" is the chief officer of the Department of Licensing and Regulatory Affairs (LARA) or his or her designated representative.

The bill would take effect 90 days after being enacted. See below for a detailed summary.

FISCAL IMPACT:

Senate Bill 442 does not appear to have a significant fiscal impact on units of state or local government.

DETAILED SUMMARY:

Maintaining and Reproducing Documents

Currently under the act, the administrator is required to return the original or a copy of a document filed under the act, other than an annual report, to the person that submitted it. The bill would delete the exemption for an annual report.

The administrator's records related to domestic and foreign corporations must be open to inspection by the public. Currently, the administrator may maintain the records in their original form or in photostatic, micrographic, photographic, optical disc media, or other reproduced form. The bill would delete the second set of options, and instead allow the administrator either to maintain the records as originals or to maintain them in the form of reproductions pursuant to the Records Reproduction Act (MCL 24.401 to 24.406) and destroy the originals. The bill would also allow the administrator to make reproductions of documents pursuant to the Records Reproduction Act. Such a reproduced copy of a document would be considered an original document.

Sending Notices

Currently under the act, if a notice or communication is required or permitted by the act, it must be mailed to a specific person through the United States Postal Service. The bill would add that if the administrator were required to send a notice, he or she could electronically transmit the notice to the corporation's resident agent in the manner authorized by the corporation.

"Resident agent" is used in the act to mean the agent of the corporation upon whom any process, notice, or demand required or permitted by law to be served upon the corporation may be served.

Failure to File by Administrator

Currently under the act, if the administrator fails to file a document, other than an annual report, submitted for filing, he or she must, within 10 days after receiving a written request to file the document by the person that submitted it, give written notice of the refusal to file and specify the reasons for doing so. If the document was not originally submitted electronically, the administrator's response cannot be made electronically.

The bill would change "refusal" to "failure," and delete the provision regarding the document being originally submitted electronically. The bill would allow the administrator's written notice to take any of the following forms: a posting on the administrator's website; a mailing sent to the address provided by the person that submitted the document; or an email, if the person provided an email address.

Contents of Articles of Incorporation

Currently under the act, the articles of incorporation for a corporation must include specific information. The articles must include the number of shares the corporation has the authority to issue, as well as a designation of each class and series, if applicable, and a statement of the relative rights, preferences, and limitations of the shares of each class and

series. Additionally, if any class of shares is divided into series, the articles must include a statement of any authority vested in the board to divide the class of shares into series, and to determine or change for any series its designation, number of shares, relative rights, preferences, and limitations.

The bill would require the statement of authority vested by the board in any case where the shares are to be designated and issued in 1 or more classes or series.

Assumed Name Certificate

Currently under the act, a corporation may transact business under any assumed name or names other than its corporate name by filing a certificate stating the true name of the corporation and the assumed name or names. These certificates expire, and the administrator must notify the corporation of that impending expiration no later than 90 days before the expiration date. The bill would allow the administrator to electronically transmit this notice to the resident agent of the corporation, if authorized by the corporation.

Professional Corporations

Currently under the act, 1 or more "licensed persons" may form a professional corporation under chapter 2A of the act. A "licensed person" is defined as an individual who is duly licensed or otherwise legally authorized to practice a professional service by a court, department, board, commission, or agency of the state or another jurisdiction. The term includes an entity if all of its owners are licensed persons.

The bill would change this definition so that the term "licensed person" would include an entity if either all of its owners are licensed persons or the entity itself is licensed or otherwise legally authorized to practice a professional service.

Also under the act, each shareholder of a professional corporation must be a licensed person in 1 or more of the professional services provided by the corporation. The bill would restate this requirement in two ways.

First, the bill would reference two sections of the act as exceptions to this requirement: Section 284(5), which regulates professional corporations in the practice of public accounting, and Section 288(2), which regulates sales and transfers of shares of professional corporations.

Second, the bill would require that each shareholder of a professional corporation must be either a licensed person or an entity that is directly or beneficially owned only by persons that are licensed persons in 1 or more of the professional services provided by the corporation.

Also under the act, if an officer, shareholder, agent, or employee of a professional corporation becomes legally disqualified to provide the services rendered by the corporation, or accepts employment that limits the authority to provide the services, he or she must sever employment and financial interests in the professional organization within a reasonable time.

The bill would create a list of individuals who must sever all employment with, and direct and indirect financial interests in, the professional organization within a reasonable time. The individuals would include:

- An officer, shareholder, agent, or employee of a professional corporation who becomes legally disqualified with the result that the individual is not a licensed person in at least 1 of the professional services provided.
- An officer, shareholder, agent, or employee of a professional corporation who accepts employment that restricts the authority to provide the services, and who is no longer authorized to provide at least 1 of the professional services provided.
- A person that is an owner of an entity that is a shareholder of a professional corporation and that becomes legally disqualified with the result that the person is not a licensed person in at least 1 of the professional services provided.
- A person that is an entity that is a shareholder of a professional corporation, that itself is licensed to provide 1 or more professional services, and that becomes legally disqualified with the result that it is not a licensed person in at least 1 of the professional services provided.

The bill would also provide that, for any persons described above, if the person regained status as a licensed person in 1 or more of the professional services provided by the corporation or regained the legal ability to provide 1 or more professional services within 90 days of losing the status, the person would not be required to sever employment and financial interests in the corporation.

The act currently prohibits a professional corporation from issuing any of its capital stock to anyone other than an individual who is duly licensed or legally authorized to provide the same professional services as those for which the corporation was incorporated. The bill would delete this requirement, and instead state that capital stock could only be issued to a person that is eligible to be a shareholder of the professional corporation. The same restriction would be extended to a voting agreement in which a shareholder vested another person with the authority to exercise the voting power to vote any or all of his or her stock.

Capital Structure

Currently under the act, the articles of incorporation for a corporation can allow a class of shares to be divided and issued in series. The board may divide any class into series, and may prescribe the rights and preferences of shares of any series.

Under the bill, if authorized by the articles of incorporation, the board by resolution could designate shares as 1 or more classes or divide a class into 1 or more series, and could establish rights and preferences of those classes or series. If a board adopted a resolution for this purpose, the corporation would be required to file with the administrator a certificate that contains the resolution. The certificate would be considered an amendment to the articles of incorporation.

Also under the act, the board can adopt and file an amendment to the articles of incorporation to eliminate a series of shares if there are no outstanding shares of the series, convertible bonds, or other rights to shares.

Under the bill, the board could by resolution eliminate a class or series of shares, or amend or alter the relative rights and preferences of a class or series, if there were no outstanding shares of the class or series. If a board adopted a resolution for this purpose, the corporation would be required to file a certificate that contains the resolution with the administrator. The certificate would be considered an amendment to the articles of incorporation and would eliminate any existing provisions regarding the affected class or series of stock.

The filing of certificates described above or the filing of restated articles of incorporation would not prohibit the board from subsequently adopting another resolution.

Shareholder Meetings and Actions

Currently under the act, a shareholder may participate in a shareholder meeting by conference call or other remote communication, so long as it is not otherwise restricted by the articles of incorporation or bylaws.

Under the bill, a shareholder could participate in a shareholder meeting by conference call if all of the following are met:

- The use and means of remote communication are authorized by the board of directors in its sole discretion.
- The means of communication meets the requirements that it includes measures to verify that each person present is a shareholder or proxy holder, that each shareholder and proxy holder is provided a reasonable opportunity to participate, and that a record of the vote is maintained by the corporation.
- All participants are advised of the means of remote communication (as currently required).

Also under the act, the articles of incorporation can provide that any action required or permitted to be taken at an annual or special meeting may be taken without a meeting, prior notice, or a vote, if consents in writing, setting forth the action taken, are signed by the holders of outstanding shares that have at least the minimum number of votes that would be necessary to take the action at a full shareholder meeting.

The bill would allow a person to execute a shareholder consent for this purpose that directs that the consent will take effect at a future time. All of the following would apply to this consent:

- The person may provide the direction through an agent or in some other manner.
- The person must select a date on which the consent takes effect that is not more than 60 days after the date the person provides the direction.
- The person could direct the consent to take effect at the time a specific future event occurs, rather than a specific date, if the event will occur not more than 60 days after the person provides the direction.

- Unless otherwise provided in the direction, a direction is revocable at any time before it becomes effective.
- If evidence of a direction was provided to the corporation and is not revoked, the future time established in the direction is considered the time the consent takes effect.

The consent would only take effect if the person were a shareholder on the record date applicable.

Director Consent

Currently under the act, an action required or permitted to be taken under authorization voted at a meeting of the board or committee of the board may be taken without a meeting if all members of the board or committee consent to the action in writing or by electronic transmission, and unless otherwise prohibited by articles or bylaws.

Under the bill, an individual could direct that a consent to an action of the board or committee will take effect at a future time. All of the criteria described above regarding shareholder consent would apply to this director consent. The consent would only take effect if the individual were a director at the future time specified in the direction.

Corporate Mergers and Share Exchanges

Currently under the act, a merger plan or share exchange adopted by the board of each constituent corporation must be submitted for approval at a meeting of the shareholders, with certain exceptions. The board must recommend the merger plan or share exchange to the shareholders, unless certain circumstances apply.

Under the bill, the board would also be required to recommend that the shareholders tender their shares to the offeror, in response to an offer to purchase any and all outstanding shares of the corporation that would be entitled to vote. As currently required, the board would have to communicate to shareholders the basis for its decision.

The bill would add a new subsection to this section of the act. The new subsection, 703a(3) would provide that, if certain conditions were met and unless the articles of incorporation provided otherwise, approval of a merger plan or share exchange by the shareholders of a corporation that had a class of voting stock registered with the Securities and Exchange Commission (SEC) would not be required before the execution of a merger plan or share exchange. The conditions to be met would include:

- The merger plan or share agreement expressly permits or requires the merger or share exchange to be effected under the bill, and that if the merger or share exchange were to be effected, it would be effected as soon as practicable.
- Another party to the merger or share exchange makes an offer to purchase, on the terms provided, any and all of the outstanding shares of the corporation that would be entitled to vote on the merger or exchange, except that the offer could exclude shares of the corporation owned at the commencement of the offer by the corporation, the offeror, or a parent.

- The offer discloses that the plan or share exchange provides that the merger or exchange will be effected as soon as practicable, and that shares that are not tendered in response to the offer will be treated in a specific manner.
- The offer remains open for at least 20 business days or for any other period of time that is required for tender offers under SEC rules.
- The offeror purchases all shares that are properly tendered in response to the offer and not properly withdrawn.
- The offeror or a wholly owned subsidiary of the offeror merges with or into, or effects a share exchange in which it acquires shares of, the corporation.
- Each outstanding share of each class or series of shares of the corporation that the offeror is offering to purchase in accordance with the offer, and that is not purchased in accordance with the offer, must be converted in the merger into, or into the right to receive, or must be exchanged for, or the right to receive, the same amount and kind of securities, interests, obligations, rights, cash, or other property to be paid or exchanged in accordance with the offer for each share of that class or series of shares that is tendered in response to the offer, except that certain shares of the corporation would not need to be converted into or exchanged for consideration.

Shares tendered in response to an offer would be considered "purchased" in accordance with the offer and the earliest time as of which both the following apply: the offeror has irrevocably accepted those shares for payment and the offeror has either physically received the certificates representing the shares or has received them into an account.

Certain shares would be entitled to cast at least the minimum number of votes on the merger or share exchange that would be required under the act and under the articles of incorporation for the approval of the merger or share exchange by the shareholders and by any other voting group that is entitled to vote on the merger or share exchange at a meeting at which all shares entitled to vote on the approval were present and voted. The shares would include those that are purchased by the offeror in accordance with the offer, those otherwise owned by the offeror or by any parent or wholly owned subsidiary of the offerer, and those that are subject to an agreement to be transferred, contributed, or delivered to the offeror or any parent or wholly owned subsidiary of the offeror in exchange for stock or other equity interests in that offeror, parent, or subsidiary.

This new subsection would define "offer," "offeror," "parent," and "wholly owned subsidiary."

Certificate of Merger or Share Exchange

Currently under the act, after a merger plan or share exchange is approved, a certificate must be executed and filed on behalf of each corporation, and the certificate must include certain information.

Under the bill, if the plan or exchange were adopted without a shareholder vote, as provided for above, the certificate would be required to state that, and that the conditions necessary for that merger or exchange were met.

Business Organization Conversion to Domestic Corporation

Currently under the act, a business organization can convert into a domestic corporation if certain requirements are met. To do so, a business organization proposing to convert must comply with the law that governs the internal affairs of the business organization, and must adopt a plan of conversion that includes various descriptions, terms, conditions, and provisions.

The bill would delete the requirement to approve a plan of conversion.

After conversion is approved, the business organization files a certificate of conversion with the administrator. Under the bill, the certificate would be required to include information similar to what was required in the plan of conversion, and a statement that the organization has complied with the law that governs the internal affairs of the organization. The bill would remove requirements that the certificate also include descriptions of ownership interests, a statement that the business organization has adopted the plan of conversion, and a statement that the surviving business corporation will furnish a copy of the plan of conversion to any owner of the business organization.

Shareholder Dissent

Currently under the act, a shareholder is entitled to dissent from, and obtain payment of the fair value of his or her shares in the event of certain corporation actions.

Under the bill, a shareholder would also be entitled to dissent and obtain payment in the event of a consummation of a plan of merger to which a corporation was a party and in which shareholder approval would be required if section 703a(3) did not apply and the shareholder were a shareholder on the date of the offer made under that section. The shareholder would also be entitled to dissent and payment for the consummation of a plan of share exchange to which the corporation is a party as the corporation whose shares will be acquired, if either of the following are met: the shareholder would be entitled to vote on the plan, and would vote if not for section 703a(3).

Also under the act, if a proposed corporate action that creates dissenters' rights is submitted to a vote at a shareholders' meeting, the meeting notice must state that shareholders are or may be entitled to assert dissenters' rights under the act. Under the bill, if a corporate action creates dissenters' rights, an offer made under section 703a(3) would be required to state that shareholders are or may be entitled to dissenters' rights and to be provided of copy of relevant statute sections. Also under the bill, if a shareholder wished to assert dissenters' rights, the shareholder would be required to deliver to the corporation before the shares are purchased pursuant to the offer written notice of the shareholder's intent to demand payment for shares and could not tender, or cause or permit to be tendered, any shares in response to the offer.

Interested Stakeholder

The act currently defines "interested stakeholder" as a person, other than the corporation or subsidiary, that meets certain criteria. One criterion is that the person is the beneficial owner of 10% or more of the voting power of the then-outstanding voting shares of the

corporation. The bill would state that this calculation includes shares acquired before or after the effective date of the bill, but that voting shares that meet any of the following are not considered beneficially owned by a person, unless the corporation determines otherwise:

- Shares acquired by the person from the corporation.
- Shares acquired by the person in a public offering by or on behalf of the corporation.
- Shares acquired by the person in an offer described in section 703a(3).

Market Value

The act defines "market value" as the highest closing sale price during the 30-day period immediately preceding the date in question of a share that is listed on any of a list of exchanges. The bill would remove the National Association of Securities Dealers, Inc. automated system or any other system then in use, for purposes of calculating market value.

Business Combination Advisory Statement

Currently under the act, a business combination requires an advisory statement from the board of directors and approval by an affirmative vote of both the following:

- At least 90% of the votes of each class of stock entitled to be cast by shareholders.
- Not less than 2/3 of the votes of each class of stock entitled to be cast by the shareholder of the corporation other than voting shares beneficially owned by the interested shareholder who is, or whose affiliate is, a party to the business combination or an affiliate or associate of the interested stakeholder.

Unless a corporation's articles provide otherwise, these requirements do not apply to certain types of business combinations, including those involving a corporation that does not have a class of voting stock registered with the SEC. The bill would eliminate a provision related to this purpose.

Annual Reports and Electronic Transmissions

Currently under the act, if a domestic corporation neglects or refuses to file an annual report or pay an annual filing fee for at least 2 years, the corporation is automatically dissolved 60 days after expiration of the 2-year period. The administrator is required to notify the corporation of the impending dissolution no later than 90 days before the 2-year period expires. The administrator can extend the time for filing a report for not more than 1 year from the due date, if good cause is shown.

The bill would allow the administrator to electronically transmit a notice of impending dissolution or violation for failing to file its report within the time prescribed to the resident agent of the corporation in the manner authorized by the corporation.

Also under the act, the administrator may revoke a certificate of authority of a foreign corporation only if 90 days' notice has been given. Additionally, if the administrator does revoke a certificate, he or she must issue a certificate of revocation.

The bill would allow both the notice and certificate of revocation to be provided electronically to the resident agent of the corporation.

Also under the act, a foreign corporation that is not authorized to transact business in the state and is not required to be authorized to transact business in this state may register its corporate name under the act. These registrations are effective until the close of the calendar year in which the application for registration is filed. The administrator is required to notify the corporation of the impending expiration at least 90 days before the expiration.

Under the bill, the administrator could electronically transmit this notice to the resident agent of the corporation.

Fees Paid by Credit Card

Currently under the act, fees paid to the administrator for document filing are not considered paid if they are paid by check and the check is dishonored. Under the bill, this would also apply if the fees were paid by credit card and a chargeback was successful.

BRIEF DISCUSSION:

According to testimony before the Commerce and Trade Committee (11-28-17), the bill represents changes to the Business Corporation Act suggested by the Business Law Section of the State Bar of Michigan. Reportedly, the act is updated on a 3- to 4-year cycle to incorporate changes recommended by practitioners, reconcile inconsistencies within the act, and incorporate changes enacted in other states. The last such update took place in 2012.

HOUSE COMMITTEE ACTION:

The House Commerce and Trade Committee reported the Senate-passed version of SB 442 without amendment.

POSITIONS:

A representative of the Department of Licensing and Regulatory Affairs indicated support for the bill. (11-28-17)

A representative of the State Bar of Michigan (Business Law Section) testified in support of the bill. (11-28-17)

Legislative Analyst: Patrick Morris
Fiscal Analyst: Marcus Coffin

■ This analysis was prepared by nonpartisan House Fiscal Agency staff for use by House members in their deliberations, and does not constitute an official statement of legislative intent.