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BILL ANALYSIS

Senate Fiscal Agency

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Senate Bill 181

Sponsor: Senator Virgil Smith

Committee: Commerce and Technology

Date Completed: 4-25-89

SUMMARY OF SENATE BILL 181 as introduced 3-1-89:

The bill would make a number of changes to the Business Corporation Act's corporate provisions concerning the distribution of dividends and corporate shares, the rights and responsibilities of shareholders and boards of directors and procedural matters pertaining to such issues as voting, meeting attendance, notice requirements, and inspection of corporate records.

Chapter 1 - General Provisions

The bill generally would delete definitions of such terms as "capital surplus", "earned surplus", "stated capital" and "net assets", which would not be used under the bill's proposed changes concerning corporate financial matters, and would define new terms contained in the bill. Further, the bill would add a provision to preclude the application of the Fraudulent Conveyance Act to distributions to shareholders.

Chapter 2 - Formation: Purposes and Powers

The bill would prohibit the retroactive application of a provision in a corporation's articles limiting the liability of a director. Further, the bill specifies that the Act's usury defense provision could not be used for loans made to corporations for the personal purposes of their shareholders.

Chapter 3 -Capital Structure and Corporate Finance

The bill would allow a corporation to make distributions to its shareholders, subject to restriction by its articles of incorporation, provided, however, that no distribution could be made if the corporation would not be able to pay its debts as they became due or the corporation's total assets would be less than the sum of its total liabilities plus any amount needed to satisfy the preferential rights of shareholders if the corporation dissolved. The board of a corporation could base a determination that a distribution was not prohibited either on financial statements prepared on the basis of reasonable accounting practices and principles or on a fair valuation or other reasonable method. The term "distribution" would mean the direct or indirect transfer of money or other property, except the corporation's shares or the incurrence of indebtedness by the corporation to or for its shareholders benefits in respect to the

corporation's shares. A distribution could be in the form of a dividend, a purchase, redemption or other acquisition of shares, or a distribution of indebtedness of the shareholders.

The bill also would:

- Allow boards to issue uncertificated shares and share dividends and corporations to issue rights, options or warrants for the purchase of corporative shares.
- Specify that shareholders would not have a preemptive right to acquire unissued shares.
- Specify the conditions under which a corporation could acquire its own shares.

Chapter 4 - Shareholders

The bill would make changes concerning procedural rules on the selection of record dates of shareholders, shareholder action taken by written consent rather than at a meeting, circular voting of shares, and the right to inspect corporate records. In addition, the bill would:

- Delete a requirement that an amendment to a corporation's articles to add a super majority provision be adopted by the same super majority.
- Add a new provision to preclude any inference that a high vote provision was invalid unless included in the articles.
- Specify that pooling agreements would not be subject to statutory provisions on voting trust agreements, and that pooling agreements would be specifically enforceable.
- Include in the remedies currently available to a shareholder who brings an action alleging unfair and aggressive actions by the corporation the dissolution and liquidation of the corporation's assets and business and the award of damages. None of the remedies would apply to shareholders whose shares are traded on the market.
- Revise the Act's current provisions concerning derivative suits to make mandatory a written demand on a board of directors, to take action and provide mechanisms for determining whether an action is in the corporation's best interests.

Chapter 5 - Directors and Officers

The bill would revise current provisions concerning the removal of directors (including authorizing a court to remove a director), the duties of officers and directors, and their ability to rely on certain reports and information. Further, the bill would:

- Provide for the designation of an independent director entitled to reasonable compensation, reimbursement for expenses and the right to communicate with shareholders.
- Provides new rules on filling vacancies on the board to allow shareholders as well as directors to fill vacancies and specify which directors and class of shareholders would make the selections.
- Amend provisions concerning transactions in which a director or officer has an interest to protect a transaction from challenge if it were authorized, approved, or ratified by disinterested board members, independent directors, or shareholders.

- Change current provisions concerning indemnification to specify a procedure for evaluating the reasonableness of expenses and amounts paid in settlement for which indemnification is sought.

Chapter 6 - Amendments to Articles of Incorporation

The bill would delete references to par and no par shares and add a provision authorizing a corporation to convert to a nonprofit corporation by adopting restated articles of incorporation.

Chapter 7 - Corporate Combinations and Dispositions

The bill would change the Act's current provisions concerning merges and provide a new method, the share exchange procedure, by which one corporation could acquire all the shares of another while keeping the acquired corporation alive. The bill also would limit the voting rights of shareholders of merger survivors, specify the latitude of boards of directors to determine the terms upon which they would submit a plan of merger or share exchange to shareholders, specify that a merger or share exchange could be abandoned without shareholder action in accordance with procedures as established by the plan or determined by the board, and provide new procedures to govern the exercise of appraisal rights.

Chapter 8 - Dissolution

The bill would amend the Act's current procedures for voluntary dissolution to permit a board to submit a dissolution proposal to shareholders without a recommendation and conditioned on any basis, delete references to class voting by shareholders, require that notice of a dissolution be given to all shareholders (and not just those entitled to vote), allow a dissolving corporation to bar any existing claims not submitted by a specified date, and specify guidelines for determining what provision for claims would have to be made before assets could be distributed to shareholders in a dissolution.

Chapter 9 - Reports

The bill would add new provisions specifying that the consequences of failure to file reports and penalties for filing false or fraudulent reports would apply to foreign as well as domestic corporations.

Chapter 10 - Foreign Corporations: Fees

The bill would make a number of changes to conform with changes, additions and deletions of provisions throughout the bill.

Legislative Analyst: L. Burghardt

FISCAL IMPACT

The bill would have an indeterminate fiscal impact on State and local government. At the time of filing articles of incorporation under the current Act, each corporation must pay organization and admission fees based on the dollar value of the capital stock. Fees based on the dollar value of the capital stock are also required under the current Act if a corporation should request authorization to issue additional shares of stock. The bill would change the fees from an amount based on the dollar value of the capital stock to a flat fee per number

of shares issued. The number of corporations that would incorporate and pay fees under the new fee structure, and the dollar value of the stock to be issued cannot be determined. The Corporations and Securities Bureau estimates that the revenue would stay the same or rise slightly. The organization filing fees revenue for the past three fiscal years was \$2.3 million in FY 1987-88; \$2.0 million in FY 1986-87; and \$2.1 million in FY 1985-86.

The bill would also authorize circuit court action in certain disputes between shareholder corporations. The number of circuit court actions and their additional cost to local government cannot be determined.

Fiscal Analyst: J. Schultz

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