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BILL ANALYSIS

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Senate Bill 123 (Substitute S-1 as passed by the Senate)  
Sponsor: Senator Alan Sanborn  
Committee: Economic Development and Regulatory Reform

Date Completed: 4-19-07

### **RATIONALE**

Public Act 57 of 2001 made a number of amendments to the Business Corporation Act, which governs for-profit corporations, at the recommendation of the Business Law Section of the State Bar of Michigan. Among other things, the changes updated the Act to reflect the way in which business is conducted electronically. Under the amendments, for example, shareholders' meetings may be held entirely by remote communication, and a board of directors may permit shareholders to participate in meetings by remote communication. Some have suggested that similar changes should be made to the Nonprofit Corporation Act.

### **CONTENT**

**The bill would amend the Nonprofit Corporation Act to permit the use of electronic communication. The bill would do the following:**

- **Specify that, when a notice was required or permitted by the Act to be given in writing, electronic transmission would be written notice.**
- **Allow notice of meetings to be electronically transmitted.**
- **Allow a board of directors to conduct a meeting of shareholders or members solely by means of remote communication.**
- **Specify conditions under which a shareholder or member could participate in a meeting and vote by means of remote communication.**
- **Specify methods, including electronic transmission, by which a shareholder or member could grant authority to another person to act as his or her proxy.**

- **Allow a corporation's bylaws to permit voting by electronic transmission.**
- **Describe conditions under which shareholders and members could consent by electronic transmission to actions taken without a meeting.**
- **Allow a board or committee to consent by electronic transmission to action taken without a meeting.**
- **Allow a corporation to distribute its annual financial report by electronic transmission.**

#### Electronic Transmission – General Provisions

The bill would define "electronic transmission" or "electronically transmitted" as any form of communication that meets all of the following:

- It does not directly involve the physical transmission of paper.
- It creates a record that may be retained and retrieved by the recipient.
- It may be directly reproduced in paper form by the recipient through an automated process.

The bill specifies that, when a notice was required or permitted by the Act to be given in writing, electronic transmission would be written notice. When the Act permitted a notice or communication to be electronically transmitted, the notice or communication would be given when electronically transmitted to the person entitled to it in a manner authorized by the person.

Under the Act, if the administrator (the Director of the Department of Labor and Economic Growth) refuses to file a document, except an annual report,

submitted for filing, he or she must give written notice of the refusal to the person submitting the document, and specify the reasons for the refusal. The bill provides that if the document were not originally submitted by electronic transmission, the administrator could not give the written notice by electronic transmission.

Under the Act, if a document filed with the administrator is an inaccurate record of the corporate action referred to in the document or was defectively or erroneously executed, the document may be corrected by the filing of a certificate of correction. Under the bill, this also would apply if a document were electronically transmitted and the electronic transmission were defective.

### Meetings

Under the bill, in addition to any other form of notice to a shareholder or member permitted by the articles of incorporation, the bylaws, or Chapter 4 (Meetings) of the Act, any notice given to a shareholder or member by a form of electronic transmission to which the shareholder or member had consented would be effective.

The Act requires written notice of the time, place, and purposes of a meeting of shareholders or members to be given personally or by mail, or by publication in a newspaper or other periodical regularly published by or on behalf of a corporation. Under the bill, the notice also could be given by electronic transmission. If a shareholder or member were permitted to participate in and vote at a meeting by remote communication (as described below), the notice would have to describe the means of remote communication by which a shareholder or member could participate.

The bill states that, unless otherwise restricted by the articles of incorporation or bylaws, a board of directors could hold a meeting of shareholders or members conducted solely by means of remote communication.

Subject to any guidelines and procedures adopted by the board, shareholders or members not physically present at a meeting of shareholders or members could participate by means of remote communication and would be considered

present in person and could vote at the meeting if all of the following were met:

- The corporation implemented reasonable measures to verify that each person considered present and permitted to vote by means of remote communication was a shareholder or member.
- The corporation implemented reasonable measures to give each shareholder and member a reasonable opportunity to participate and vote on matters submitted to the shareholders or members, including an opportunity to read and hear the proceedings of the meeting substantially concurrently with them.
- If any shareholder or member voted or took other action at the meeting by means of remote communication, the corporation maintained a record of the vote or action.
- A shareholder or member could be present and vote at an adjourned meeting by means of remote communication if he or she were permitted to be present and vote by that means in the original meeting notice.

The Act allows a corporation to provide in its articles of incorporation or bylaws for a shareholder's or member's participation in a meeting of shareholders or members by a conference telephone or similar communications equipment by which all participants may hear each other. The bill would refer to "other means of remote communication", rather than similar communications equipment. Currently, all participants must be advised of the communications equipment and the names of the participants must be divulged to all of them. The bill would require that the participants be advised of the means of remote communication in use.

The Act provides that any action required or permitted by the Act to be taken at an annual or special meeting of shareholders or members may be taken without a meeting, without prior notice, and without a vote, if all of the shareholders or members entitled to vote on the action consent to it in writing. The articles of incorporation also may contain such a provision, with a requirement that the written consent, setting forth the action taken, be signed by a minimum number of shareholders or members.

Under the bill, an electronic transmission consenting to an action transmitted by a shareholder or member, or by a person authorized to act for a shareholder or member, would be written, signed, and dated for the purpose of these provisions if the transmission were delivered with information from which the corporation could determine that the transmission was sent by the shareholder or member, or an authorized person, and the date on which the transmission was sent. The date a transmission was sent would be the date on which the consent was signed. A consent given by electronic transmission would not be delivered until reproduced in paper form and the paper form delivered to the corporation by delivery to its registered office or principal office in this State, or an officer or agent of the corporation having custody of the book in which proceedings of meetings of shareholders or members were recorded. Delivery to a corporation's registered office would have to be made by hand or by certified or registered mail, return receipt requested. Delivery to a principal office or to an officer or agent would have to be made in the same manner or in any other manner provided in the articles of incorporation or bylaws or by resolution of the board of the corporation.

The Act requires the officer or agent having charge of the shareholder or member records of a corporation to make and certify a complete list of the shareholders or members entitled to vote at a shareholders' or members' meeting. The list must be open to inspection by any shareholder or member during the entire meeting. Under the bill, if the meeting were held solely by means of remote communication, the list would have to be posted on a reasonably accessible electronic network, and the information required to gain access to the list would have to be given with the notice of the meeting.

Under the Act, each outstanding share or member is entitled to one vote on each matter submitted to a vote (except as otherwise provided in the Act), and a vote may be cast either orally or in writing, unless otherwise provided in the bylaws. The bill would allow the bylaws also to provide for voting by electronic transmission.

Currently, if the votes of shares or a membership are held by two or more people as joint tenants or tenants in common, the votes may be cast or voted by any of them unless another joint tenant or tenant in common seeks to vote in person or by proxy. In that case, the written agreement, if any, that governs the manner in which the shares or membership must be voted controls if it is presented at the meeting. Under the bill, the agreement would control if presented at the meeting either physically or by means of electronic transmission.

Under the Act, articles of incorporation may provide that a shareholder or member entitled to vote at an election for directors may vote, in person or by proxy, for as many people as there are directors to be elected, to cumulate votes for one director, or to distribute the votes of the shareholder or member among the candidates. Under the bill, articles of incorporation could allow a shareholder or member to exercise these voting options by mail, proxy, or electronic transmission.

The Act permits a corporation, board, or committee to take action without notice or the lapse of a prescribed period of time, which otherwise is required by the Act, articles of incorporation, bylaws, or an agreement, if the person entitled to receive notice or to participate in the action submits a signed waiver of the requirements. The bill would refer to a signed waiver or a waiver by electronic transmission.

#### Proxy Authority

Under the Act, except as otherwise provided in the articles of incorporation or in a bylaw adopted by shareholders or members, a shareholder or member entitled to vote at a meeting or express consent or dissent without a meeting may authorize another to act for the shareholder or member by proxy.

The bill specifies that, without limiting the manner in which a shareholder or member may authorize another to act for him or her by proxy, each of the following methods would constitute a valid means by which a shareholder or member could grant proxy authority:

- Delivering to the person a writing authorizing that person to act for the shareholder or member as proxy,

executed by the shareholder or member, or by an authorized officer, director, employee, or agent of the shareholder or member, by signing the writing or causing his or signature to be affixed to it by any reasonable means, including facsimile signature.

- Transmitting or authorizing the transmission of a telegram, cablegram, or other means of electronic transmission to the person who would hold the proxy or to a proxy solicitation firm, proxy support service organization, or similar agent fully authorized by the person who would hold the proxy to receive that transmission.

Any telegram, cablegram, or other means of electronic transmission either would have to set forth or be submitted with information from which it could be determined that the telegram, cablegram, or other electronic transmission was authorized by the shareholder or member. If a telegram, cablegram, or other electronic transmission were determined to be valid, the inspectors or persons making the determination would have to specify the information upon which they relied.

A copy, facsimile telecommunication, or other reliable reproduction of the writing or transmission authorizing a proxy could be substituted or used in lieu of the original writing or transmission for any purpose for which the original writing or transmission could be used, if the copy, facsimile telecommunication, or other reproduction were a complete reproduction of the entire original.

### Management

Under the Act, unless otherwise restricted by the articles of incorporation or bylaws, a member of the board or a committee designated by the board may participate in a board meeting by means of conference telephone or similar communications equipment. The bill would refer to other means of remote communication, rather than similar communications equipment.

Under the Act, unless otherwise provided by the articles of incorporation or bylaws, action that is required or permitted to be taken under authorization voted at a board or committee meeting may be taken without a meeting if all members of the board or committee consent to the action in writing.

Under the bill, members could consent in writing or by electronic transmission.

### Annual Report

The Act requires each domestic corporation, at least once every year, to have a report of the corporation for the preceding fiscal year made and distributed to each shareholder or member of the corporation or presented at the annual meeting of shareholders or members, or, if the corporation is organized upon a directorship basis, at the annual meeting of the board. The report must include the corporation's year-end statement of assets and liabilities.

The bill would allow a corporation to distribute the financial report electronically, either by electronic transmission of the report or by making it available for electronic transmission. If the report were distributed electronically, the corporation would have to provide the report in written form to a shareholder or member on request.

### Consumer Cooperative

Under Chapter 11 of the Act, the Consumer Cooperative Act, the articles or bylaws of a consumer cooperative may provide a method by which members may vote on matters submitted to a vote by mail ballot or referendum. The bill would refer to mail ballot, referendum, or electronic transmission.

MCL 450.2106 et al.

## **ARGUMENTS**

*(Please note: The arguments contained in this analysis originate from sources outside the Senate Fiscal Agency. The Senate Fiscal Agency neither supports nor opposes legislation.)*

### **Supporting Argument**

The bill would enhance the ability of nonprofit corporations to communicate and conduct business electronically, as 2001 amendments did regarding for-profit corporations. In particular, the bill explicitly would authorize nonprofits to use electronic technology when conducting shareholders' meetings, which current law neither prohibits nor allows. Under the bill, a nonprofit corporation could conduct a shareholders' or members' meeting solely by

means of remote communication, unless the corporation's articles or bylaws restricted it from doing so. Subject to guidelines and procedures adopted by its board of directors, a corporation's shareholders could participate in and vote at a meeting by remote communication. The bill also would allow a nonprofit corporation to give notice to shareholders and members electronically, permit shareholders and members to consent electronically to action taken at a meeting, allow authorization of a proxy by electronic means, and authorize a corporation to distribute its annual financial report to shareholders or members by electronic transmission. These changes, which have been recommended by the Michigan Society of Association Executives, would reflect the way in which electronic technology is used to conduct business, modernize the Nonprofit Corporation Act, and bring parity in this respect between that statute and the Business Corporation Act.

#### **Supporting Argument**

The bill would benefit cooperative organizations, which are governed by Chapter 11 of the Act. Evidently, some have 50,000 to 60,000 members, and holding a physical meeting to elect board members limits participation. If consumer cooperatives could allow their members to vote electronically, these entities could function more efficiently and be more inclusive.

#### **Supporting Argument**

Public Acts 217 through 220 of 2005 amended various statutes that govern business entities, including nonprofit corporations, to require the Department of Labor and Economic Growth (DLEG), by December 31, 2006, to establish a procedure for accepting documents submitted by electronic transmission. Beginning January 1, 2007, a person may submit a document to DLEG under the amended statutes by electronic mail or over the internet. The bill would address two situations that could arise under the 2005 amendments to the Nonprofit Corporation Act: If the electronic transmission of a document were defective, the bill would permit a certificate of correction to be filed. If DLEG refused to file particular documents that were not submitted electronically, the bill provides that the notice of refusal could not be electronic.

Legislative Analyst: Patrick Affholter

#### **FISCAL IMPACT**

The bill would have no fiscal impact on State or local government.

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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.