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BILL ANALYSIS



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Senate Bills 623, 624, and 929 (as enacted)
Sponsor: Senator Mike Kowall (S.B. 623)
Senator Rick Jones (S.B. 624)
Senator Steve Bieda (S.B. 929)
Senate Committee: Economic Development
House Committee: Commerce

PUBLIC ACTS 557, 558, & 559 of 2014

Date Completed: 8-12-15

CONTENT

Senate Bill 623 amended the Nonprofit Corporation Act to do the following, among other things:

- Allow electronic voting on, and notice of, various corporate matters.
- Revise voting requirements for the merger or dissolution of a corporation.
- Allow a corporation's board, or an individual the board designates, to appoint one or more nonexecutive committees to assist in conducting the board's affairs.
- Revise a provision regarding the formation of a corporation under the Act when the corporation may be formed under a different statute.
- Allow a nonprofit corporation to provide "services in a learned profession" (e.g., services provided by a dentist, a physician, a member of the clergy, or an attorney).
- Provide that a licensed person employed by a corporation providing services in a learned profession is personally and fully liable for his or her negligent acts or misconduct.
- Allow a corporation employing a licensee providing services in a learned profession to indemnify the licensed employee.
- Limit members' and shareholders' ability to obtain certain corporate information.
- Revise a provision that allows a corporation's articles of incorporation to eliminate 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 apply to foreign corporations.
- Require the waiver of certain fees for honorably discharged military veterans.

The bill also repealed multiple sections of the Act.

Senate Bill 624 amended 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 an amendment to the articles of incorporation, from a charitable purpose corporation unless accompanied by a circuit court order, the consent of the Attorney General, or an affidavit that the Attorney General failed to issue his or her consent or refusal to consent.**
- **Establish procedures for securing the Attorney General's consent for a charitable purpose corporation's dissolution, merger, or conversion.**

The bill also named Public Act 169 the "Dissolution of Charitable Purpose Corporations Act".

Senate Bill 929 amended the Michigan Limited Liability Company Act to authorize the merger of a domestic limited liability company (LLC) with a nonprofit corporation.

The bills took effect on January 15, 2015.

Senate Bill 623

Electronic Communications

Voting by Mail, Electronically, or at Polling Places. The Nonprofit Corporation Act previously allowed a corporation's articles of incorporation to provide that a shareholder or member entitled to vote at an election for directors could vote in person, by proxy, or by electronic transmission. The bill instead allows the articles of a corporation organized on a stock or membership basis to provide that a shareholder or member who is entitled to vote at an election for directors may vote in person, by proxy, or by ballot as provided in Sections 408 and 409 (described below). The bill defines "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 bill specifies that the articles of incorporation of a corporation organized on a directorship basis may provide that a person entitled to vote at an election for directors may vote in person, by proxy, or by electronic transmission.

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

The bill added 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 are required or permitted to take at an annual or special meeting may be taken without a meeting if the corporation provides a ballot to each shareholder or member who is entitled to vote. Under Section 409, the corporation may allow the voting at a polling place or places established by the corporation. The polling places must be reasonably accessible to the shareholders or members.

The corporation must 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 provided for notice of meetings of shareholders or members. A provision in the articles or bylaws authorizing voting at a polling place does not preclude the calling or holding of an annual or special meeting. An action will be considered approved if the total number of votes cast at the polling places during the period when polls are open equals or exceeds the quorum required to be present at a

meeting to take that action, and the number of favorable votes equals or exceeds the number of votes that is required to take the action at a meeting.

Other Electronic Communications. Throughout the Act, the bill allows various notices and correspondence to be conducted electronically. In some cases, this authorization includes providing notice by posting information on the LARA website.

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 must be submitted for approval at a meeting of the shareholders or members. At the meeting, the plan will be approved if the following are met:

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

A class of shares or of members is entitled to vote as a class if the plan of merger contains 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 is required in the articles of incorporation or in a bylaw adopted by the shareholders or members, if there are more than 20 shareholders or members entitled to vote at the meeting, the plan of merger will be adopted if a majority of the votes held by shareholders or members present in person or by proxy at the meeting are cast in favor of the plan and, if a class of shareholders or members is 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 are 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 is required in the articles of incorporation or in a bylaw adopted by the shareholders or members, if there are more than 20 members or shareholders who are entitled to vote, dissolution is 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 are cast in favor of dissolution.

Also, the bill requires a person who files 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

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

Under the bill, unless otherwise prohibited in the articles or bylaws, a board or an individual designated in the bylaws or by the board may appoint one or more committees that are not executive committees, to assist in the conduct of the board's affairs, and may provide for the creation of one or more subcommittees of any nonexecutive committee. The bylaws, or a resolution establishing a nonexecutive committee that is approved by the board, must state the purposes of committees appointed under this provision, the terms and qualifications of committee members, and the ways in which committee members are selected and removed. Some or all of the committee members may be directors, officers, members, or shareholders of the corporation and some or all may be individuals who are not directors, officers, members, or shareholders.

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

Incorporation when Formation Allowed under another Statute

The bill allows a corporation to be formed under the Nonprofit Corporation Act for any lawful purposes not involving pecuniary gain or profit for its officers, directors, shareholders, or members, other than a purpose for which a corporation may be formed under any other Michigan statute and that statute expressly prohibits formation under the Nonprofit Corporation Act. Previously, the Act allowed formation of a corporation under it unless a corporation was required by law to incorporate under another statute.

The bill specifies that a corporation formed under the Act for a purpose for which a corporation may be formed under another statute does not have any powers or privileges conferred by that other statute that are not conferred under the Nonprofit Corporation Act.

Services in a Learned Profession

The bill allows 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 will furnish those services on behalf of the corporation.

Except as otherwise provided, any duly licensed or authorized individual who is employed by a corporation providing services in a learned profession is personally and fully liable and accountable for any negligent or wrongful acts or misconduct committed by him or her, or by any individual under his or her direct supervision and control, while rendering professional services on behalf of the corporation to the person for whom the services were rendered. The corporation, however, may indemnify a duly licensed or authorized employee for any resulting liabilities and expenses as provided under the Act and other applicable law.

The bill defines "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.

Previously, a stockholder or member of record of a corporation, upon at least 10 days' written demand, could 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 deleted that 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, may 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 gives the corporation written demand describing the purpose of the inspection and the records the shareholder or member wishes to inspect, and the records are directly connected with the purpose. "Proper purpose" means a purpose that is reasonably related to a person's interest as a shareholder or member.

The bill also allows 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, do not have the right to inspect the corporation's stock ledger, lists of shareholders or members, lists of donors or donations, or other books and records, if the incorporators, shareholders, members, or directors who approve this limitation make a good faith determination that one or more of the following apply:

- Opening the stock ledger, lists, or other books and records for inspection will impair the privacy or free association rights of shareholders or members.
- Opening the stock ledger, lists, or other books and records for inspection will impair the lawful purposes of the corporation.
- Opening lists of donors or donations for inspection is not in the best interests of the corporation or its donors.

A corporation that limits inspection of lists of its shareholders or members must 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

Previously, a corporation's articles of incorporation could include a provision that eliminated 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, allows a corporation's articles to include a provision that eliminates or limits 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.

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 deleted a \$10 filing fee for examining and filing a certificate of election. The bill also added 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 authorizes 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 must retain the revenue collected from this fee and LARA must use it in carrying out its duties required by law.

The bill requires the Administrator to waive the fee for filing initial articles of incorporation if a majority of the initial members of a membership corporation, initial directors of a directorship corporation, or initial shareholders of a stock corporation served in the armed forces and were separated from that service with an honorable character of service or under honorable conditions (general) character of service. Previously, the Act required the Administrator to waive any required fee if a majority of the members or directors responsible for paying the fee were honorably discharged veterans of the U.S. armed forces.

To request a fee waiver under the bill, a person submitting a document for filing must submit both of the following to the Administrator, along with the document:

- A signed affidavit requesting the fee waiver and certifying that a majority of the initial members, directors, or shareholders are or will be individuals who served and were separated from service as described above.
- Copies of Form DD214 (report of separation from military service) or Form DD215 (a corrected report of separation), or any other form satisfactory to LARA, for each individual who is or will be an initial member, director, or shareholder and qualifies for the armed forces waiver.

Senate Bill 624

Merger, Conversion, or Dissolution of Charitable Purpose Corporation

Previously, a nonprofit corporation or other entity formed under Michigan law whose corporate purpose was to hold property for any charitable purpose, unless it was organized for religious purposes, could 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 purposes include operating or holding property for a charitable purpose, unless it is organized for religious purposes, may not do any of the following, unless it complies 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.
- Amend or restate its articles of incorporation to become a corporation governed by the Business Corporation Act.
- Convert a domestic or foreign nonprofit corporation, domestic or foreign business corporation, or other domestic or foreign business entity into another form of domestic or foreign business organization.
- Dissolve.

A nonprofit corporation or other entity described above, must give written notice to the Attorney General before the filing of an amendment to or restatement of its articles of incorporation, a certificate of conversion, or any other paper or document concerning a merger, conversion, or dissolution with any other State agency or court. A corporation that is automatically dissolved under the Nonprofit Corporation Act because its articles of incorporation have expired or it neglected to file annual reports or fees for two years, must give notice of the dissolution to the Attorney General within 60 days after the automatic dissolution.

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

Prohibited Filing without Attorney General Consent

The bill prohibits LARA from accepting any of the following for filing, unless it is accompanied by the written order of a circuit court dissolving the corporation or entity, the written consent of the Attorney General to the dissolution, or an affidavit attesting to the submission of a request for Attorney General approval and the failure of the Attorney General to respond:

- A certificate of dissolution of a nonprofit corporation or other charitable entity.
- A certificate of merger of a nonprofit corporation or other charitable entity.
- Restated articles of incorporation or a certificate of conversion to a business corporation, a professional service corporation, or other domestic or foreign business entity.
- Any amendment to the articles of incorporation of a nonprofit corporation or other charitable entity that changes its term of existence to a specific date.

Previously, LARA could not accept for filing a notice of withdrawal from Michigan of a foreign nonprofit corporation or charitable entity unless the notice of withdrawal was 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 may not issue a certificate of withdrawal from Michigan of a foreign nonprofit corporation or charitable entity unless the request is 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.

Attorney General Consent

Under the bill, if a charitable corporation or other charitable entity submits 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 a dissolution, or if a foreign corporation submits a written request for consent to filing a certificate of withdrawal, the Attorney General must 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 fails to provide the written notice within the 120-day period, the person who submitted the request may prepare an affidavit attesting to the submission of the request and the failure of the Attorney General to respond, and may submit the affidavit to LARA.

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

Senate Bill 929

Section 705a of the Michigan LLC Act allows one or more domestic LLCs to merge with one or more business organizations under certain circumstances. The bill includes a domestic or foreign nonprofit corporation in the definition of "business organization".

The bill also defines "nonprofit corporation" as a corporation that is incorporated to carry out any lawful purpose or purposes that do not involve pecuniary profit or gain for its directors,

officers, shareholders, or members, including a corporation formed under or subject to the Nonprofit Corporation Act.

MCL 450.2103 et al. (S.B. 623)
450.251 et al. (S.B. 624)
450.7505a (S.B. 929)

Legislative Analyst: Patrick Affholter

FISCAL IMPACT

The bills will 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 eliminated a \$10 fee for filing a certificate of election and created 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 will be sufficient to replace revenue lost from the elimination of the certificate of election fee. Approximately \$900,000 to \$1.0 million is generated from filing fees paid by nonprofit corporations each year. The Department indicated that certificate of election fee revenue was a very small percentage of this, so the fiscal impact of eliminating it will be minor.

Finally, Senate Bill 623 allows a nonprofit corporation to be exempted from paying filing fees for its initial incorporation if a majority of its initial members are honorably discharged veterans. While it is unknown precisely how much revenue will be lost from this exemption, the amount is expected to be trivial.

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.