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House Bill 5356 (Substitute H-4 as passed by the House)  
House Bill 5357 (Substitute H-4 as passed by the House)  
House Bill 5358 (as passed by the House)  
Sponsor: Representative Bill Huizenga (H.B. 5356)  
Representative Andy Meisner (H.B. 5357)  
Representative Ed Clemente (H.B. 5358)  
House Committee: New Economy and Quality of Life  
Senate Committee: Economic Development and Regulatory Reform

Date Completed: 1-23-08

### **CONTENT**

**House Bills 5356 (H-4), 5357 (H-4), and 5358 would amend, respectively, the Business Corporation Act, the Professional Service Corporation Act, and the Michigan Limited Liability Company Act, to do all of the following:**

- **Exclude from incorporation under the Business Corporation Act a corporation that engaged in "services in a learned profession".**
- **Allow a domestic corporation to convert into a "business organization".**
- **Allow a business organization to convert into a domestic corporation.**
- **Allow a voting shareholder to dissent from a domestic corporation's conversion plan, unless shareholders received cash and/or shares.**
- **Impose a \$50 fee for filing a certificate of conversion.**
- **Specify that satisfying requirements that preclude an action regarding a transaction in which a director or officer has an interest, would not preclude other claims.**
- **Specify that a for-profit corporation that provided services in a learned profession could incorporate only under the Professional Service Corporation Act and not under the Business Corporation Act, and allow a corporation that provided professional services other than**

**services in a learned profession to incorporate under either Act.**

- **Eliminate a provision in the Professional Service Corporation Act and the Limited Liability Company Act under which "professional service" includes services rendered by physicians, dentists, attorneys, accountants, and other specified professionals.**

The bills are tie-barred.

Under House Bill 5356 (H-4), "professional service" would mean a type of personal service to the public that requires, as a condition precedent to the rendering of the service, obtaining a license or other legal authorization.

Under House Bills 5356 (H-4) and 5357 (H-4), "services in a learned profession" would mean services rendered by a dentist, an osteopathic physician, a physician, a surgeon, a chiropractor, a physical therapist, an optometrist, a doctor of divinity or other clergy, or an attorney at law.

Under the Business Corporation Act, "business organization" means a domestic or foreign limited liability company, limited partnership, general partnership, or any other type of domestic or foreign business enterprise, incorporated or unincorporated, except a domestic corporation. "Domestic corporation" means a corporation formed

under that Act, or existing on January 1, 1973, and formed under any other statute of this State for a purpose for which a corporation may be formed under the Act.

### **House Bill 5356 (H-4)**

#### Scope of Business Corporation Act

The Business Corporation Act lists businesses to which it applies unless otherwise provided in, or inconsistent with, the act under which a corporation is or has been formed. The bill would delete from that list professional service corporations formed under the Professional Service Corporation Act.

The bill specifies that the Business Corporation Act would apply to corporations organized under Michigan statutory law governing the formation and internal affairs of professional service corporations, except to the extent that a provision of the Act was in conflict with the provisions of that statutory law. If a conflict existed, the provision of the other law would apply with respect to a corporation organized under that statutory law. A corporation that provided one or more services in a learned profession could not incorporate under the Business Corporation Act.

A corporation that engaged in providing professional services that was organized under the Act before the bill's effective date, and that did not provide any services in a learned profession, could not be considered as improperly organized because it was organized under the Act.

A corporation may be formed under the Business Corporation Act for any lawful purpose, except to engage in a business for which a corporation may be formed under any other Michigan statute unless that statute permits formation under the Act. The bill also would exclude from formation under the Act a corporation formed to engage in one or more services in a learned profession.

#### Conversion of Domestic Corp. into a Business Organization

The bill would allow a domestic corporation to convert into a business organization if all of the following requirements were satisfied:

- The conversion was permitted by the law that would govern the business organization after conversion and the surviving business organization complied with that law in converting.
- If the board adopted the plan of conversion (as described below), the plan was submitted for approval in the same manner required for a merger under the Act, including the procedures pertaining to dissenters' rights if any shareholder had the right to dissent under the Act.
- If the domestic corporation had not commenced business, had not issued any shares, and had not elected a board, provisions regarding board action would not apply and the incorporators could approve of the conversion by unanimous consent.

Unless the domestic corporation had not commenced business, issued any shares, and elected a board, the board of the domestic corporation proposing to convert would have to adopt a plan of conversion that included all of the following:

- The name of the domestic corporation, the name and type of the business organization into which it was converting, the statute that would govern the surviving business organization, the street address of the domestic corporation if different from that of the surviving business organization, and the principal place of business of the surviving business organization.
- For the domestic corporation, the designation and number of outstanding shares of each class and series, specifying the classes and series entitled to vote, each class and series entitled to vote as a class, and, if the number of shares were subject to change before the conversion's effective date, the manner in which the change could occur.
- The terms and conditions of the proposed conversion, including the manner and basis of converting the shares into ownership interests or obligations of the surviving business organization, into cash, into other consideration that could include ownership interests or obligations of an entity that was not a party to the conversion, or into a combination of cash and other consideration.
- The terms and conditions of the organization documents that would

govern the surviving business organization.

- Any other provisions with respect to the proposed conversion that the board considered necessary or desirable.

After the plan of conversion was approved, or the incorporators approved of the conversion by unanimous consent, the domestic corporation would have to file any formation documents required to be filed under the laws governing the surviving business organization and file a certificate of conversion with the Administrator (the Director of the Department of Labor and Economic Growth). The certificate would have to include all of the following:

- Unless the conversion were approved by unanimous consent of the incorporators, all of the information required above for a plan of conversion and the manner and basis of converting the shares of the domestic corporation contained in the plan.
- Unless the conversion were approved by unanimous consent of the incorporators, a statement that the board had adopted the plan of conversion; or, if approved by unanimous consent of the incorporators, a statement that the domestic corporation had not commenced business, had not issued any shares, and had not elected a board and that the plan of conversion was approved by the incorporators' unanimous consent.
- A statement that the surviving business organization would furnish a copy of the plan of conversion, on request and without cost, to any shareholder of the domestic corporation.
- If approval of the domestic corporation's shareholders were required, a statement that the plan was approved by the shareholders.
- A statement specifying each assumed name of the domestic corporation to be used by the surviving business organization and authorized under the bill.

A business organization into which a corporation was converted could use an assumed name of the converting corporation, if the corporation had a certificate of assumed name for that assumed name on file with the Administrator before the conversion, by providing for the use of the name as an assumed name in the

certificate of conversion. The use of an assumed name could continue for the remaining effective period of the certificate on file before the conversion, and the surviving business organization could terminate or extend the certificate in the manner allowed under the Act.

When a conversion took effect, the domestic corporation would convert into the surviving business organization, and the articles of incorporation would be canceled. Except as otherwise provided, the surviving business organization would be organized under and subject to the organization laws of the jurisdiction of the surviving business organization as stated in the certificate of conversion. The surviving business organization would have all of the liabilities of the domestic corporation. The conversion would not be considered to affect any obligations or liabilities of the domestic corporation incurred before the conversion or the personal liability of any person incurred before the conversion, and the conversion could not be considered to affect the choice of law applicable to the domestic corporation with respect to matters arising before the conversion.

The title to all real estate and other property and rights owned by the domestic corporation would remain vested in the surviving business organization without reversion or impairment. The rights, privileges, powers, and interests in property of the domestic corporation, as well as its debts, liabilities, and duties, would not be considered, as a consequence of the conversion, to have been transferred to the surviving business organization for any purpose of the laws of this State.

The surviving business organization could use the name and the assumed names of the domestic corporation if the required filings were made and the laws regarding use and form of names were followed.

A proceeding pending against the domestic corporation could be continued as if the conversion had not occurred, or the surviving business organization could be substituted for the domestic corporation in the proceeding. The surviving business organization would be considered to be the same entity that existed before the conversion and would be considered to be

organized on the date that the domestic corporation was originally incorporated.

The shares of the domestic corporation that were to be converted into ownership interests or obligations of the surviving business organization or into cash or other property would be converted.

Unless otherwise provided in a plan of conversion, the domestic corporation would not be required to wind up its affairs or pay its liabilities and distribute its assets on account of the conversion, and the conversion would not constitute a dissolution of the domestic corporation.

If the surviving business organization were a foreign business organization, it would be subject to Michigan laws pertaining to the transaction of business in this State if it transacted business in Michigan. The surviving business organization would be liable, and would be subject to service of process in a proceeding in this State, for the enforcement of an obligation of the domestic corporation, and in a proceeding for the enforcement of a right of a dissenting shareholder of the domestic corporation against the surviving business organization.

#### Conversion of Business Organization into Domestic Corp.

The bill would authorize a business corporation to convert into a domestic corporation if the conversion were permitted by the law that governed the internal affairs of the business organization and the business organization complied with that law in converting.

A business organization proposing to convert into a domestic corporation would have to adopt a plan of conversion that included all of the following:

- The name of the business organization, the type of business organization that was converting, the statute that governed the internal affairs of the business organization, the name of the surviving domestic corporation into which the business organization was converting, the street address of the surviving domestic corporation, and the principal place of business of the surviving corporation.

- A description of all of the ownership interest in the business organization, specifying the interest entitled to vote, any rights those interests had to vote collectively or as a class, and if the ownership interest were subject to change before the conversion's effective date, the manner in which the change could occur.
- The terms and conditions of the proposed conversion, including the manner and basis of converting the ownership interest of the business organization into shares or obligations of the surviving domestic corporation, into cash, into other consideration that could include ownership interests or obligations of an entity that was not a party to the conversion, or into a combination of cash and other consideration.
- The terms and conditions of the articles and bylaws that would govern the surviving domestic corporation.
- Any other provisions with respect to the proposed conversion that the business organization considered necessary or desirable.

A plan of conversion adopted as described above would have to be submitted for approval in the manner required by the law governing the internal affairs of the business organization.

After the plan of conversion was approved, the business organization would have to file a certificate of conversion with the Administrator. The certificate would have to include all of the identifying and ownership interest information required to be in the conversion plan; a statement that the business organization had adopted the plan of conversion; a statement that the surviving business corporation would furnish a copy of the conversion plan, on request and without cost, to any owner of the business organization; a statement specifying each assumed name of the business organization to be used by the surviving domestic corporation and authorized under the bill; and articles of incorporation for the surviving domestic corporation that met all applicable requirements of the Act.

A corporation into which one or more business organizations had converted could use as an assumed name the name of any business organization converting into that

corporation, or use as an assumed name an assumed name of that business organization, by filing a certificate of assumed name pursuant to the Act or by providing for the use of that name or assumed name as an assumed name of the corporation in the certificate of conversion. A provision in the certificate of conversion would have to be treated as a new certificate of assumed name.

When a conversion took effect, the business organization would convert into the surviving domestic corporation. Except as otherwise provided, the surviving domestic corporation would be organized under the Act. The surviving corporation would have all of the liabilities of the business organization. The conversion could not be considered to affect any obligations or liabilities of the business organization incurred before the conversion or the personal liability of any person incurred before the conversion, and the conversion could not be considered to affect the choice of law applicable to the business organization with respect to matters arising before the conversion.

The title to all real estate and other property and rights owned by the business organization would remain vested in the surviving domestic corporation without reversion or impairment. The rights, privileges, powers, and interests in property of the business organization, as well as its debts, liabilities, and duties, could not be considered, as a consequence of the conversion, to have been transferred to the surviving domestic corporation for any purpose of the laws of this State.

The surviving domestic corporation could use the name and assumed names of the business organization if the required filings were made and the laws regarding use and form of names were followed.

A proceeding pending against the business organization could be continued as if the conversion had not occurred, or the surviving domestic corporation could be substituted in the proceeding for the business organization. The surviving domestic corporation would be considered to be the same entity that existed before the conversion and would be considered to be organized on the date that the business organization originally was organized.

The ownership interests of the business organization that were to be converted into shares or obligations of the surviving domestic corporation or into cash or other property would be converted.

Unless otherwise provided in a plan of conversion adopted under the bill, the business organization would not be required to wind up its affairs or pay its liabilities and distribute its assets on account of the conversion, and the conversion would not constitute a dissolution of the business organization.

#### Dissent from Conversion

The Act provides that a shareholder is entitled to dissent from certain corporate actions, and may obtain payment of the fair value of his or her shares in the event of those actions. The bill would include in those actions consummation of a plan of conversion to which a corporation was a party as the corporation that was being converted, if the shareholder were entitled to vote on the plan. Any rights under these provisions of the Act, however, would not be available if the corporation were converted into a foreign corporation and the shareholder received shares that had terms as favorable to him or her in all material respects, and that represented at least the same percentage interest of the total voting rights of the outstanding shares of the corporation, as the shares held by the shareholder before the conversion.

Unless otherwise provided in the articles of incorporation, bylaws, or a resolution of the board, a shareholder may not dissent from certain corporate actions. The bill would include in those actions a transaction described above in which shareholders received cash, shares that satisfied certain standards on the effective date of the conversion, or any combination of cash and those shares.

#### Conversion Fee

The Act includes the schedule of fees a person must pay to the Administrator when certain documents are delivered for filing. This includes a \$50 fee for a certificate of merger or share exchange. The bill also would require a \$50 fee for a certificate of conversion.

### Director-Interest Transactions

Under the Act, a transaction in which a director or officer is determined to have an interest may not, because of the interest, be enjoined, be set aside, or give rise to an award of damages or other sanctions, in a proceeding by a shareholder or by or in the right of the corporation, if the person interested in the transaction establishes any of the following:

- The transaction was fair to the corporation at the time entered into.
- The material facts of the transaction and the director's or officer's interest were disclosed or known to the board, a committee of the board, or the independent director or directors, and they authorized, approved, or ratified the transaction.
- The material facts of the transaction and the director's or officer's interest were disclosed or known to the shareholders entitled to vote and they authorized, approved, or ratified the transaction.

The bill specifies that satisfying those requirements would not preclude other claims relating to a transaction in which a director or officer was determined to have an interest. Those claims would have to be evaluated under principles of law applicable to a transaction in which a director or officer did not have an interest.

### Reasonable Expenses

Under the Act, a corporation may pay or reimburse the reasonable expenses incurred by a director, officer, employee, or agent who is a party or threatened to be made a party to an action, suit, or proceeding before final disposition of the proceeding if the person gives the corporation a written undertaking, executed personally or on his or her behalf, to repay the advance if it is ultimately determined that he or she did not meet the applicable standard of conduct for the indemnification of a person under the circumstances. An evaluation of reasonableness under this provision must be made in the manner specified in the Act for an evaluation of reasonableness of expenses, and authorization must be made in a manner specified in the Act unless an advance is mandatory.

The bill specifies that authorization of advances with respect to a proceeding and a determination of reasonableness of advances or selection of a method for determining reasonableness could be made in a single action or resolution covering an entire proceeding. Unless the action or resolution provided otherwise, however, the authorizing or determining authority could subsequently terminate or amend the authorization or determination with respect to advances not yet made.

### **House Bill 5357 (H-4)**

The bill specifies that the Professional Service Corporation Act would not apply to any corporation providing professional services that was organized under the Business Corporation Act before the bill's effective date, if none of the professional services provided by the corporation were services in a learned profession. Such a corporation could bring itself within the Professional Service Corporation Act, however, by amending its articles of incorporation in a manner that would make them consistent with that Act and by affirmatively stating in the amended articles of incorporation that the shareholders had elected to take that action.

The bill also specifies that a corporation for pecuniary profit that provided one or more professional services that were services in a learned profession could incorporate only under the Professional Service Corporation Act and could not elect to incorporate under the Business Corporation Act. A corporation that provided one or more professional services could elect to incorporate under either Act if it did not provide any professional services that were services in a learned profession.

The Professional Service Corporation Act provides that the Business Corporation Act applies to a corporation organized under the Professional Service Corporation Act except to the extent that a provision of that Act conflicts with the Business Corporation Act. The bill would refer to Michigan statutory law governing the formation and internal affairs of business corporations, rather than referring to the Business Corporation Act.

The Professional Service Corporation Act specifies that "professional service" includes services rendered by certified or other public

accountants, chiropractors, dentists, optometrists, veterinarians, osteopaths, physicians and surgeons, doctors of medicine, doctors of dentistry, podiatrists, chiropodists, architects, professional engineers, land surveyors, and attorneys at law. The bill also would delete that provision.

### **House Bill 5358**

The Michigan Limited Liability Company Act specifies that "professional service" includes services rendered by a certified or other public accountant, chiropractor, dentist, optometrist, veterinarian, osteopathic physician, physician, surgeon, podiatrist, chiropodist, architect, professional engineer, land surveyor, and attorney at law. The bill would delete that provision.

MCL 450.1108 et al. (H.B. 5356)  
450.222 et al. (H.B. 5357)  
450.4902 (H.B. 5358)

Legislative Analyst: Patrick Affholter

### **FISCAL IMPACT**

The bills 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.