



Senate Fiscal Agency  
P. O. Box 30036  
Lansing, Michigan 48909-7536

BILL



ANALYSIS

Telephone: (517) 373-5383  
Fax: (517) 373-1986

Senate Bills 1316 through 1320 (as reported without amendment)  
Sponsor: Senator Mike Kowall (S.B. 1316, 1317, & 1320)  
Senator Tonya Schuitmaker (S.B. 1318)  
Senator Rick Jones (S.B. 1319)  
Committee: Judiciary

Date Completed: 10-22-12

### **RATIONALE**

Individuals who provide professional services, such as medical care, legal advice, or accounting, and wish to incorporate may do so under either the Professional Service Corporation Act or the Business Corporation Act. Having two separate statutes that govern the incorporation of these professional business enterprises evidently can cause confusion. It has been suggested that the Professional Service Corporation Act be repealed and recodified as a new chapter within the Business Corporation Act, similar to the approach taken in the Michigan Limited Liability Company (LLC) Act, where the formation and organization of a professional LLC is addressed in Article 9 of that Act.

In addition, the Business Law Section of the State Bar of Michigan periodically recommends statutory revisions to keep Michigan's business law up to date and consistent with that of other jurisdictions. The section has recommended several changes to the Business Corporation Act, including changes regarding indemnification of directors, officers, and employees; the amendment of articles of incorporation by a board of directors before shares are issued; and the inclusion of conversion in provisions dealing with business combinations.

### **CONTENT**

**Senate Bill 1320 would repeal the Professional Service Corporation Act and essentially recodify it as Chapter 2A (Professional Corporations) of the Business Corporation Act. In addition to recodifying the repealed Act, the bill**

**would require a corporation to incorporate as a professional corporation under Chapter 2A if it were to provide one or more services in a learned profession.**

**The bill also would amend the Business Corporation Act to do the following:**

- **Eliminate a requirement that the names of all participants in a shareholder meeting be divulged to all participants, if a shareholder participated by a conference call or other means of remote communication.**
- **Allow an agreement among shareholders that shares of the corporation were assessable, even if it were inconsistent with the Act.**
- **Specify that the power and authority of committees of a corporation's board of directors would not include adoption of an agreement of conversion.**
- **Allow a corporation to agree to submit a matter to a vote of the shareholders even if the board, after initially approving the matter, later determined it no longer recommended the matter or recommended against shareholder approval.**
- **Allow a corporation to pay or reimburse the legal expenses of a person who was presently serving, or had served, at the corporation's request, as an officer, director, or employee of another corporation or enterprise.**

- **Allow a corporation's board of directors to amend the articles of incorporation, if the corporation had not yet issued shares or accepted any written subscription for shares.**
- **Include a conversion in the definition of "business combination" in Chapter 7A (Regulation of Business Combinations).**
- **Require a professional corporation's annual report to certify that each shareholder was licensed in one or more of the professional services provided by the corporation, and that the corporation otherwise met the requirements of Chapter 2A.**

**Senate Bills 1316, 1317, and 1319 would amend the Public Health Code, the Occupational Code, and the Michigan Limited Liability Company Act, respectively, to delete references to businesses incorporated under the Professional Service Corporation Act and to refer instead to businesses incorporated under Chapter 2A of the Business Corporation Act.**

**Senate Bill 1318 would amend Public Act 101 of 1907, which regulates the carrying on of business under an assumed or fictitious name, to delete a reference to the Professional Service Corporation Act. Public Act 101 specifies that it does not affect or apply to any corporation or limited partnership organized under the laws of this State, or organized under the laws of any other state and lawfully doing business in Michigan, except as otherwise provided by the Professional Service Corporation Act. The bill would delete that exception.**

Senate Bills 1316, 1317, 1318, and 1319 are tie-barred to Senate Bill 1320.

Senate Bill 1320 is described in greater detail below.

#### Professional Corporations

The Professional Service Corporation Act authorizes the creation of, and regulates, professional service corporations. The bill would repeal that Act and add Chapter 2A (Professional Corporations) to the Business Corporation Act, essentially recodifying the Professional Service Corporation Act. Under

the Professional Service Corporation Act, "professional service" means a type of personal service to the public that requires the provider to obtain a license or other legal authorization as a condition precedent to providing that service. The term includes services provided by a certified or other public accountant, chiropractor, dentist, optometrist, veterinarian, osteopathic physician, physician, surgeon, podiatrist, chiropodist, physician's assistant, architect, professional engineer, land surveyor, or attorney. "Professional service" would have the same meaning under Chapter 2A.

Chapter 2A would require a corporation to incorporate as a professional corporation if it were incorporated to provide one or more "services in a learned profession", whether or not it provided other professional services. "Services in a learned profession" would mean services provided by a dentist, an osteopathic physician, a physician, a surgeon, a doctor of divinity or other clergy, or an attorney-at-law.

A corporation could comply with Chapter 2A and incorporate as a professional corporation if it were incorporated to provide one or more professional services, none of which were services in a learned profession, or could incorporate as a corporation that was not required to comply with Chapter 2A.

A corporation incorporated as a professional corporation, and its shareholders, would be subject to Chapter 2A and the Business Corporation Act. If there were a conflict between an applicable provision of Chapter 2A and another provision of the Act, Chapter 2A would take precedence.

Chapter 2A would apply to a corporation previously incorporated under the Professional Service Corporation Act, or to a corporation that on the bill's effective date was governed by the Professional Service Corporation Act.

Chapter 2A would not apply to a corporation organized in Michigan before the enactment of the Professional Service Corporation Act to provide professional services to the public, that did not previously amend its articles of incorporation to bring itself within the provisions of that Act, unless the corporation amended its articles of incorporation in a manner that was consistent with Chapter 2A and affirmatively

stated in its amended articles that the shareholders elected to bring the corporation within the provisions of Chapter 2A and the Business Corporation Act.

#### Remote Meetings

Under the Business Corporation Act, unless otherwise restricted by the articles of incorporation or bylaws, a shareholder may participate in a meeting of shareholders by a conference call or other means of remote communication in which all people participating in the meeting may communicate with the other participants. All participants must be advised of the means of remote communication and the names of the participants in the meeting must be divulged to all participants. The bill would delete the requirement to divulge the names of all participants.

#### Shareholder Agreements

Under the Act, certain agreements among shareholders are effective among the shareholders and the corporation even though they are inconsistent with the Act. The bill would include in this provision an agreement that established that shares of the corporation were assessable and included the procedures for an assessment and the consequences of a failure by a shareholder to pay an assessment.

#### Board Committees

Unless otherwise provided in the articles of incorporation or bylaws, the Act authorizes a corporation's board of directors to designate one or more committees. To the extent provided in a resolution of the board or in the bylaws, a committee may exercise all powers and authority of the board in the management of the corporation's business and affairs. The Act specifies certain powers that a committee does not have, including the adoption of an agreement of merger or share exchange. Under the bill, a committee also could not adopt an agreement of conversion.

#### Submitting a Vote to Shareholders

The bill would add Section 529, which would allow a corporation to agree to submit a matter to a vote of its shareholders even if, after initially approving the matter, the board of directors later determined that it no

longer recommended the matter or recommended against approval of the matter by the shareholders.

Under the Act, subject to several exceptions, a plan of merger or share exchange adopted by the board of each constituent corporation must be submitted for approval at a meeting of the shareholders. The board must recommend the plan to the shareholders, unless the board determines that it should make no recommendation because of conflict of interest, events occurring after the board adopts the plan, contractual obligations, or other special circumstances. Under the bill, the board would have to recommend the plan to the shareholders unless the board made this determination or Section 529 applied.

The bill would require the board, if it did not recommend the plan of merger or share exchange to the shareholders, or recommended against the plan, to communicate to the shareholders the basis for its decision.

The Act allows a corporation to sell, lease, exchange, or otherwise dispose of all, or substantially all, of its property and assets under certain circumstances. A corporation has not disposed of all or substantially all of its property and assets if it retains a significant continuing business activity. The board must recommend such a transaction to the shareholders unless it determines that, because of conflict of interest, events occurring after board adopts the plan, contractual obligations, or other special circumstances, it should make no recommendation. Under the bill, the board would have to recommend the plan to the shareholders unless it made this determination or Section 529 applied.

The bill would require the board, if it did not recommend the transaction to the shareholders, or recommended against the transaction, to communicate to the shareholders the basis for its decision.

The Act allows a corporation to be dissolved by action of its board and shareholders. A board may propose dissolution for action by the shareholders. If it does so, the board must recommend dissolution unless it determines that, because of conflict of interest or other special circumstances, it should make no recommendation. Under

the bill, the board would have to recommend dissolution unless it made that determination or Section 529 applied.

If the board did not recommend dissolution to the shareholders, or recommended against the transaction, the board would have to communicate to the shareholders the basis for its decision.

#### Indemnification or Advance Payment of Expenses

The Act allows a corporation to 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 to repay the advance if it is ultimately determined that he or she did not meet the applicable standard of conduct for indemnification under the circumstances. The bill would include in this provision the payment or reimbursement of expenses incurred by a person who was presently serving, or had served, at the corporation's request as a director, officer, partner, trustee, employee, or agent of another foreign or domestic corporation, partnership, joint venture, trust, or other profit or nonprofit enterprise.

The bill also would prohibit a corporation from eliminating or impairing a right to indemnification or to advancement of expenses established in a provision of the articles of incorporation or the bylaws, by amending that provision after the occurrence of the act or omission that was the subject of a formal or informal civil, criminal, administrative, or investigative action, suit, or proceeding for which indemnification or advancement of expenses was sought, unless the provision in effect at the time of that act or omission explicitly authorized the elimination or impairment after the act or omission occurred.

#### Early Amendments to the Articles

The Act allows incorporators to amend the articles of incorporation before the first meeting of the board of directors. The bill also would allow the board to amend the articles of incorporation if the corporation had not yet issued shares or accepted any written subscription for shares.

The Act also allows the adoption of restated articles of incorporation. Under the bill, if the restated articles restated, integrated, and amended the articles, but the amendments included only those adopted by the board before it issued shares or accepted any written subscription for shares, the board could adopt the restated articles of incorporation without a vote of the shareholders.

#### Business Combination

The bill would include conversion in the definition of "business combination" under Chapter 7A (Regulation of Business Combinations) of the Business Corporation Act.

(Under Chapter 7A, in addition to any vote otherwise required by law or a corporation's articles of incorporation, a business combination must require an advisory statement from the board of directors and approval by an affirmative vote of both of the following:

- At least 90% of the votes of each class of stock entitled to be cast by the shareholders.
- At least two-thirds of the votes of each class of stock entitled to be cast by the shareholders 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 shareholder.)

#### Annual Report

The Act requires a domestic corporation and each foreign corporation to file a report with the Director of the Department of Licensing and Regulatory Affairs by May 15 of each year. The Act specifies the information that must be contained within the report. Under the bill, the report also would have to include, for each professional corporation, the names and addresses of its shareholders and a certification that both of the following were met:

- Each shareholder was a licensed person in one or more of the professional services provided by the professional corporation.

-- The corporation met the other requirements of Chapter 2A.

MCL 333.17048 (S.B. 1316)  
339.721 (S.B. 1317)  
445.4 (S.B. 1318)  
450.4102 & 450.4902 (S.B. 1319)  
450.1105 et al. (S.B. 1320)

## **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**

Currently, professional service corporations may organize under either the Professional Service Corporation Act or the Business Corporation Act, while the formation of a professional limited liability company is regulated under the statute that governs the formation of other LLCs. Some licensed professionals may be unaware of their options for incorporating a professional service corporation. Moving regulation of the incorporation and operation of a professional service corporation from a separate statute to a new chapter of the Business Corporation Act would alleviate this possible confusion about the legal framework for those operations. Including the incorporation of professional service corporations in the Business Corporation Act also would streamline the State's regulatory structure for corporations.

The bill's other proposed revisions reflect recommendations that the State Bar Business Law Section has made as part of its periodic effort to keep Michigan business law current and consistent with business law in other jurisdictions.

Legislative Analyst: Patrick Affholter

### **FISCAL IMPACT**

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

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.