

## BUSINESS CORPORATION ACT

Senate Bill 625 with House committee  
amendments  
First Analysis (9-24-92)

Sponsor: Sen. Frederick Dillingham  
Senate Committee: Corporations &  
Economic Development  
House Committee: Corporations & Finance

### ***THE APPARENT PROBLEM:***

The Business Corporation Act specifies the powers and duties of corporate shareholders and directors, provides for the distribution of corporate shares, and details the conditions for mergers and dissolutions. Public Act 121 of 1989 extensively revised the act to eliminate outdated concepts of corporate organizational and financial structure and to provide businesses with greater flexibility to respond to changes in the corporate world. At this time, further changes are necessary to address issues that were overlooked in 1989, correct errors in the revisions, or eliminate confusion or problems caused by the revisions. For example, it is unclear to what extent independent directors, a position created by Public Act 121, are exposed to liability. Some feel that amendments are necessary to ensure that the liability risk for these directors is no greater than that for other directors. There also is some confusion as to the type of business a foreign corporation may transact and whether a foreign acquiring corporation in a share exchange is liable for the obligations of a domestic acquired corporation. Further, changes made by Public Act 121 have cast some doubt on the legality of corporations' pledging reacquired shares to secure installment payment obligations--reportedly a common financial management technique. Finally, additional changes appear necessary to make various sections of the law consistent with each other.

### ***THE CONTENT OF THE BILL:***

The bill would amend the Business Corporation Act to:

--Allow a corporation to pledge shares it acquired as security for the purchase of other shares.

- Specify that an independent director could not have any duties or liabilities greater than those of any other director.
- Allow a corporation's articles to be amended or restated initially if the signatures of a majority of the incorporators, rather than the signatures of all the incorporators, were obtained.
- Apply liability in a merger only to the surviving corporation.
- Specify that a shareholder who consented to a corporate action would not be entitled to assert dissenters' rights.
- Extend the categories of foreign corporations subject to most of the act's provisions to include nonprofit foreign corporations.
- Set a \$5,000 maximum on the initial filing fee for articles of incorporation and a \$5,000 maximum on the filing fee each time an amended application or an amendment to the articles was filed because of an increase in the number of authorized shares.
- Provide for the filing of documents under the act by facsimile transmission.
- Change the following references: "consolidation" would become "share exchange", "executor" would become "personal representative", and "stock" would become "shares".

A more detailed summary of the bill follows.

Chapter 1 - Definitions, Department Records. The bill would add a definition of "shareholder," meaning a person holding units of proprietary interest in a corporation and construed to be synonymous with "member" in a nonstock corporation. Further, the act currently specifies that the records and files of the Department of Commerce (i.e., the "administrator") relating to domestic and foreign corporations may be maintained in their original form, or in microfilm or

other reproduced form. The bill would allow the records and files to be maintained in a photostatic, micrographic, photographic, or optical disc medium, as well as in their original form or other reproduced form. Moreover, the bill specifies that a photostatic, micrographic, photographic, optical disc medium, or other reproduced copy certified by the administrator would be considered an original for all purposes and would be admissible in evidence as if it were an original. The bill also would allow the department to establish procedures for accepting documents to be filed by means of facsimile transmission.

Chapter 2 - Formation: Powers and Purposes. The act specifies generally that a corporation may be formed for any lawful business purpose, except under certain circumstances. The bill would delete the word "business", thus allowing a corporation to be formed for any lawful purpose, except under the circumstances specified in the act.

Chapter 3 - Purchase of Shares. The act allows a corporation to acquire its own shares and specifies that such shares constitute authorized but unissued shares. The bill would allow a corporation to pledge shares that it acquired as security for the payment of the purchase price of the shares, and until the purchase price was paid by the corporation, such shares would not be canceled and would not constitute authorized but unissued shares. The acquired and pledged shares, however, could not be voted directly or indirectly at any meeting or otherwise, could not be counted in determining the total number of issued shares entitled to vote at any given time, and upon payment of the purchase price, could be canceled and constitute authorized but unissued shares. If the articles of the corporation prohibited reissue of canceled shares, the board by resolution would have to adopt and file an amendment of the articles reducing the number of authorized shares accordingly.

Chapter 4 - Shareholders. The act specifies that articles of incorporation may provide for an action to be taken without a meeting of the shareholders, without prior notice, and without a vote, if certain shareholders consent in writing to the action. The written consents are not effective unless, 60 days after the record date for determining the shareholders entitled to express consent to or dissent from a proposal without a meeting, written consents signed by a sufficient number of shareholders to take the action are delivered to the

corporation. The bill would add that the written consents submitted to the corporation could not be dated any more than 10 days before the record date. Further, the bill would require that prompt notice of the taking of the corporate action without a meeting by less than unanimous written consent would have to be given to shareholders who would have been entitled to notice of the shareholder meeting if the action had been taken at the meeting and who had not consented in writing. The act currently requires the notice to be given to shareholders who have not consented in writing.

The act specifies that, absent a court order based on a determination that special circumstances exist and the best interests of the corporation would be served, the shares of a corporation cannot be voted on any matter or considered to be outstanding shares if they are owned by a second corporation, and the first corporation owns a majority of the shares entitled to vote for directors of the second corporation. The bill provides also that the shares could not be considered outstanding shares for any purpose related to voting.

The act allows the circuit court of the county in which a corporation's registered office is located to order annual meetings, elections, and special meetings of shareholders under certain circumstances. The bill also would allow the circuit court of the county in which the corporation's principal place of business was located to order the meetings.

The act specifies that a person may not commence or maintain a derivative proceeding (a suit by a shareholder to enforce a corporate cause of action) unless he or she meets certain criteria. The bill specifies that a shareholder, rather than a person, could not commence or maintain the proceeding and would add to the criteria the requirement that the shareholder continue to be a shareholder until the time of judgment unless the failure to continue to be a shareholder resulted from corporate action in which the former shareholder did not acquiesce and the derivative proceeding was commenced prior to the termination of the former shareholder's status as such.

Chapter 5 - Directors and Officers. The bill specifies that an independent director could not have any duties or liabilities greater than any other director. In addition, the bill provides that a

corporation's articles or bylaws could limit the term of a director chosen to fill a vacancy.

Chapter 6 - Amendments to Articles. The act specifies that before the first meeting of a corporation's board of directors or other governing board, the incorporators may amend the articles of incorporation or adopt restated articles of incorporation if all of them sign the certificate of amendment or the restated articles. The bill would require only a majority of the incorporators to sign.

Chapter 7 - Combinations and Dispositions. The act requires a certificate of merger to set forth the merger plan. The bill would require the certificate instead to specify the name of each constituent corporation and the name of the surviving corporation, any amendment to the articles of incorporation of the surviving corporation to be effected by the merger or any restatement of the articles, and the manner and basis of converting shares of each constituent corporation as set forth in the merger plan.

According to the act, the surviving corporation of a merger or the acquiring corporation in a share exchange is liable for the enforcement of an obligation of a domestic corporation that is party to the merger or share exchange and in a proceeding for the enforcement of a right of a dissenting shareholder of a domestic corporation against the surviving or acquiring corporation. The bill would apply the liability only to the surviving corporation in a merger and would delete the references to share exchange and acquiring corporation.

The act specifies that if corporate action creating dissenters' rights is taken without a vote of shareholders, the corporation must notify in writing all shareholders entitled to assert dissenters' rights that the action was taken and send them the requisite dissenters' notice concerning payment demand, deposit of certificates for shares, and restriction of transfers of shares. The bill would add that a shareholder who consented to the corporate action would not be entitled to assert dissenters' rights.

The act specifies that as soon as the proposed corporate action is taken or upon receipt of a payment demand, the corporation must pay each dissenter who complies with certain requirements the amount the corporation estimates to be the fair value of his or her shares, plus accrued interest.

The bill would require the corporation to make the payment within seven days after the action was taken or a payment demand was received, whichever occurred later.

Chapter 9 - Reports. The act requires each domestic corporation and each foreign corporation subject to Chapter 10 of the act, which regulates foreign corporations, to submit an annual report to the Department of Commerce. The report must include the amount of authorized stock and number of shares of each class authorized, amount of stock subscribed, and amount of stock paid in, in addition to other information. The bill would require, instead, that the report include the total number of authorized shares, and, for each foreign corporation authorized to do business in Michigan, the most recent percentage used in computation of the tax required by the Single Business Tax act. Further, the act provides for the dissolution of a corporation that fails, for a period of two years, to file an annual report or pay a filing fee. The bill would specify that the dissolution would occur 60 days after the expiration of the two-year period.

Chapter 10 - Foreign Corporations, Filing Fees. The bill would extend the categories of foreign corporations subject to most of the chapter's provisions to include nonprofit foreign corporations.

The act specifies that a foreign corporation issued a certificate of authority to transact business is authorized to transact any business of the character set forth in its application for a certificate. The bill would allow the corporation to transact any business as set forth in its application, which a domestic corporation formed under the act could lawfully transact.

The act also specifies the types of activities in which a foreign corporation may become involved without being considered to be transacting business in this state. These activities include borrowing money, with or without security, and conducting an isolated transaction not in the course of a number of repeated transactions of similar nature. The bill would delete these provisions and, instead, allow the corporation to create or acquire indebtedness, mortgages, and security interests in real or personal property, and conduct an isolated transaction that was completed within 30 days and that was not one in the course of repeated transactions of similar nature. Further, the bill provides that a corporation would not be considered to be transacting business

in Michigan if it were "owning, without more, real or personal property".

The act specifies that a foreign corporation that has been authorized to transact business in Michigan and that, after its authorization, increases the amount of its authorized stock attributable to Michigan over the previous highest amount of its authorized stock attributable to Michigan, must file a supplemental statement giving a detailed account of the amount of the increase and pay an additional franchise fee. The bill would repeal this provision and instead would require the corporation to file an amended application with a detailed account of the amount of the increase and pay an additional franchise fee. The amended application would have to be filed within 30 days after the end of the corporation's fiscal year. The number of shares attributable to Michigan would have to be determined according to the formula provided in the chapter.

Finally, the act prescribes organization, admission, and franchise fees for foreign and domestic corporations and regulated investment companies based on the number of their authorized shares. The bill would retain the current fee structure but set a \$5,000 maximum on the initial fee for filing of the articles of incorporation and a \$5,000 maximum on the filing fee each time an amended application or an amendment to the articles was filed because of an increase in the number of authorized shares. Further, the bill would authorize the administrator to charge a nonrefundable fee of \$50 for each document submitted or certificate sent by facsimile transmission. The revenue would be retained by the Corporations and Securities Bureau for administrative purposes.

MCL 450.1131 et al.

#### ***HOUSE COMMITTEE ACTION:***

The House Committee on Corporations and Finance adopted several nonsubstantive amendments to the bill, as well as provisions for allowing facsimile transmittal of documents under the act.

#### ***FISCAL IMPLICATIONS:***

According to the Senate Fiscal Agency, the bill would have an indeterminate fiscal impact on the state. The bill's provision that would set a \$5,000

maximum for an initial filing fee and a \$5,000 maximum on filing fees for an amended application, could, in years with unusually large transactions, reduce the potential fee income to the Corporation and Securities Bureau. In fiscal year 1990-91, for example, the bill would have resulted in a net loss of \$350,000 to \$500,000 in fee collections from inordinately large transactions by General Motors Corporation and others. (2-26-92)

#### ***ARGUMENTS:***

##### ***For:***

The bill would continue the efforts to modernize, streamline, and clarify the Business Corporation Act by addressing issues that were overlooked in 1989, correcting some of the revisions, making sections of the act internally consistent, and providing the additional detail, definitions, or procedures necessary to eliminate confusion and ambiguity.

##### ***For:***

When the act was amended in 1989, the concept of par value was eliminated and the fees for filing articles of incorporation, which had been based on the par value of stock, became flat fees based on the number of shares issued. The magnitude of the fees that now result from very large issues, however, apparently was not contemplated. This has led to some concern that these fees could encourage corporations to locate in or relocate to another jurisdiction, thus resulting in a loss of business activity here. Establishing a \$5,000 maximum on filing fees would address this concern. Although this cap would decrease fee revenue to the state in years in which an unusually large issue was made, it is anticipated that over the years the retention of business in Michigan would compensate for this loss.

#### ***POSITIONS:***

A representative of the Department of Commerce testified in support of the bill. (9-23-92)

A representative of the State Bar of Michigan testified in support of the bill. (9-23-92)