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SFA BILL ANALYSIS

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Senate Bill 206 (as enrolled) **PUBLIC ACT 57 of 2001**
Sponsor: Senator Bill Bullard, Jr.
Senate Committee: Financial Services
House Committee: Commerce

Date Completed: 3-25-02

CONTENT

The bill amended the Business Corporation Act to do the following:

-- **Permit the electronic transmission of certain documents, including a notice of a shareholders' meeting and a corporation's financial report.**
-- **Permit a shareholders' meeting to be conducted solely by remote communication.**
-- **Allow a board to impose certain restrictions on the exercise, transfer, or receipt of rights to purchase shares of the corporation.**
-- **Establish time limits for commencing a shareholder action for oppression seeking an award of damages.**
-- **Remove mandatory indemnification of an employee or agent of a corporation who is sued.**
-- **Prohibit a class or series of shareholders from voting as a class if it will receive at least the fair value of the shares of the class or series when a plan of merger or share exchange is adopted.**
-- **Specify that a corporation has not disposed of substantially all of its property and assets if it retains a significant business activity, as defined in the bill.**
-- **Extend the Act to professional service corporations formed under the Professional Service Corporation Act.**

Electronic Transmission

Under the Act, a document required or permitted to be filed must be filed by delivery to the administrator together with fees and accompanying documents required by law. (The administrator is the Director of the Department of Consumer and Industry Services.) The administrator may establish a procedure for accepting delivery by facsimile transmission. The bill also allows delivery by other electronic transmission. (The bill defines "electronic transmission" or "electronically transmitted" as any form of communication that meets all of the following: does not directly involve the physical transmission of paper, creates a record that may be retained and retrieved by the recipient, and may be reproduced directly in paper form by the recipient through an automated process.)

Under the Act, if a document relating to a domestic or foreign corporation filed with the administrator was at the time of filing an inaccurate record of the corporation 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 on behalf of the corporation. Under the bill, a certificate of correction also may be filed if the document was electronically transmitted and the electronic transmission was defective.

When, under the Act or the articles of incorporation or bylaws of a corporation or by the terms of an agreement or instrument, a corporation or the board or any board committee may take action after notice to any person or after the lapse of a prescribed period of time, the action may be taken without notice or lapse of time if at any time before or after the action is completed, the person to be notified or to participate in the action to be taken, or in the case of a shareholder, his or her attorney-in-fact, submits a signed waiver of the requirements.

The bill allows a signed waiver or a waiver by electronic transmission.

The bill specifies that when the Act requires or permits a notice to be given in writing, electronic transmission is written notice. The bill also provides that, when the Act permits a notice or communication to be transmitted electronically, the notice or communication is given when electronically transmitted to the person entitled to it in a manner authorized by the person.

Under the Act, if the administrator does not promptly file a document, other than an annual report, submitted for filing, the administrator within 10 days after receiving a written request to file the document from the person submitting it for filing, must give that person written notice of the refusal to file the document, specifying the reasons for the refusal. The bill provides that, if the document was not submitted originally by electronic transmission, the administrator may not give the written notice by electronic transmission.

<u>Notice of Shareholders' Meeting</u>

Except as otherwise provided, the Act requires that written notice of the time, place, and purposes of a shareholders' meeting be given between 10 and 60 days before the meeting date, to each shareholder of record entitled to vote at the meeting. Under the bill, notice may be given personally or by mail (as previously allowed) or by electronic transmission. If a shareholder or proxy holder may be present and vote at the meeting by remote communication, the means of remote communication allowed must be included in the notice. The bill also provides that a shareholder or proxy holder may be present and vote at an adjourned meeting by a means of remote communication if he or she was permitted to be present and vote by that means in the original meeting notice.

<u>Shareholders' Meeting</u>

Under the bill, the board of directors may hold a meeting of shareholders conducted solely by means of remote communication, unless otherwise restricted by the articles of incorporation or bylaws. Subject to any guidelines and procedures adopted by the board of directors, shareholders and proxy holders not physically present at a meeting of shareholders may participate in it by means of remote communication and will be considered present in person and may vote at the meeting if all of the following are met:

-- The corporation implements reasonable measures to verify that each person considered present and permitted to vote at the meeting by means of remote communication is a shareholder or proxy holder.
-- The corporation implements reasonable measures to give each shareholder and proxy holder a reasonable opportunity to participate in the meeting and to vote on matters submitted to the shareholders, including an opportunity to read or hear the proceedings of the meeting substantially concurrently with the proceedings.
-- If any shareholder or proxy holder votes or takes other action at the meeting by means of remote communication, the corporation maintains a record of the vote or other action.

The bill also provides that, in addition to any other form of notice to a shareholder permitted by the articles of incorporation, the bylaws, or Chapter 4 (Shareholders) of the Act, any notice given to a shareholder by a form of electronic transmission to which the shareholder has consented is effective.

Under the Act, the articles of incorporation may provide that any action to be taken at an annual or special meeting of shareholders may be taken without a meeting, without prior notice, and without a vote, if written consents are signed by the holders of outstanding shares having at least the minimum number of votes that would be necessary to authorize or take the action at a meeting at which all shares entitled to vote on the action were present and voted. In addition, any action required or permitted by the Act to be taken at an annual or special meeting of shareholders may be taken without a meeting, without prior notice, and without a vote, if before or after the action all the shareholders entitled to vote consent in writing.

Under the bill, an electronic transmission consenting to an action transmitted by a shareholder or proxy holder, or by a person authorized to act for the shareholder or proxy holder, is written, signed, and dated for purposes of these provisions if the electronic transmission is delivered with information from which the corporation may determine that the electronic transmission was transmitted by the shareholder or proxy holder, or by the person authorized to act for the shareholder or proxy holder, and the date on which the electronic transmission was transmitted. That date of transmission is the date on which the consent was signed. A consent given by electronic transmission is not delivered until reproduced in paper form and the paper form is delivered to the corporation by delivery to its registered office in the State, its principal place of business, or an officer or agent of the corporation having custody of the book in which proceedings of shareholders' meeting are recorded. Delivery must be made by hand, by certified or registered mail, return receipt requested, or in any other manner provided in the articles of incorporation or bylaws or by resolution of the corporation's board of directors.

Under the Act, the officer or agent having charge of the stock transfer books for shares of a corporation must make and certify a complete list of the shareholders entitled to vote at a shareholders' meeting or any adjourned shareholders' meeting. The Act specifies certain requirements a list must meet, including being subject to inspection by any shareholder during the meeting. Under the bill, if the meeting is held solely by means of remote communication, the list must be open to the examination of any shareholder during the entire meeting by being posted on a reasonably accessible electronic network, and the information required to gain access to the list must be provided with the notice of the meeting.

<u>Board Meetings</u>

Unless prohibited by the articles of incorporation or bylaws, the Act provides that action required or permitted to be taken under authorization voted at a meeting of the board or a committee of the board may be taken without a meeting if, before or after the action, all members of the board or of the committee consent to the action in writing. The bill also permits the members to consent to the action by electronic transmission.

<u>Financial Report</u>

The Act requires each domestic corporation at least once a year to cause a financial report of the corporation for the preceding fiscal year to be made and distributed to each shareholder within four months after the end of the fiscal year. Under the bill, the financial report may be distributed electronically, either by electronic transmission of the report or by making the report available for electronic transmission. If the report is distributed electronically, the corporation must provide it in written form to a shareholder on request.

<u>Purchase of Shares</u>

The Act authorizes a corporation to issue rights, options, or warrants for the purchase of its shares. The bill also permits a corporation to do this for the purchase of other securities of the corporation. The Act requires the board to determine the terms upon which the rights, options, or warrants are issued, their form and content, and the consideration for which the shares are to be issued.

Under the bill, the terms and conditions of any right, option, or warrant issued under these provisions, including those outstanding on the bill's effective date, may include, without limitation, restrictions or conditions that preclude or limit the exercise, transfer, or receipt of the right, option, or warrant by any person owning or offering to acquire a specified number or percentage of the outstanding common shares or other securities of a corporation, or any transferee or transferees of that person, or that invalidate or void the right, option, or warrant held by a person or his or her transferee.

<u>Acquisition of Own Shares</u>

Subject to restrictions imposed by the Act or the articles of incorporation, a corporation may acquire its own shares, and those shares constitute authorized but unissued shares. The bill deleted a provision under which shares of a corporation acquired by it could be pledged as security for the payment of the purchase price of the shares. Under the bill, a corporation that acquires its own shares may grant a security interest in the shares as payment of their purchase price. As previously provided, these shares are not canceled and do not constitute authorized but unissued shares until the corporation pays the purchase price.

Shareholders' Actions

Under the Act, a shareholder may bring an action in the circuit court of the county in which the principal place of business or registered office of the corporation is located to establish that the actions of the directors or those in control of the corporation are illegal, fraudulent, or willfully unfair and oppressive to the corporation or the shareholder. If the shareholder establishes grounds for relief, the court may make an order or grant relief as it considers appropriate, including an award of damages to the corporation or a shareholder. Under the bill, an action seeking an award of damages must be commenced within three years after the cause of action has accrued, or within two years after the shareholder discovers or reasonably should have discovered the cause of action, whichever occurs first.

The bill also defines "willfully unfair and oppressive conduct", as used in these provisions, as a continuing course of conduct or a significant action or series of actions that substantially interferes with the interests of a shareholder as a shareholder. The term does not include conduct or actions that are permitted by an agreement, the articles of incorporation, the bylaws, or a consistently applied written corporate policy or procedure.

Indemnification

The Act authorizes a corporation to indemnify a person who is or was a party, or is threatened to be made a party to an action, suit, or proceeding, by reason of the fact that he or she is or was a director, officer, employee, or agent of the corporation. To the extent that a director or officer has been successful in defense of the action, suit, or proceeding under the Act or in defense of a claim, issue, or matter in the action, suit, or proceeding, the individual must be indemnified against actual and reasonable expenses, including attorneys' fees, incurred by him or her in connection with the action, suit, or proceeding. Previously, the indemnification requirement also applied to an employee or agent, but the bill limited it to a director or officer.

A corporation also 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 in advance of final disposition, if the individual gives the corporation a written undertaking to repay the advance if it is determined that he or she did not meet the applicable standard of conduct for indemnification. The bill deleted a requirement that the person also give the corporation a written affirmation of his or her good faith belief that he or she met the applicable standard of conduct.

Plan of Merger or Share Exchange

Under the Act, two or more domestic corporations may merge into one pursuant to a plan of merger, and a corporation may acquire all of the outstanding shares of one or more classes or series of shares of another corporation pursuant to a plan of share exchange, approved as provided in the Act. A plan of merger or share exchange adopted by the board of each constituent corporation must be submitted for approval at a shareholders' meeting, except as otherwise provided in the Act. For a plan of merger or share exchange to be approved certain conditions must be met. Among other things, the board must recommend the plan to the shareholders, unless the board determines that because of conflict of interest, events occurring after the board adopts the plan, contractual obligations, or other special circumstances, it should make no recommendation and communicates the basis for its determination to the shareholders with the plan. (Previously, the Act referred only to conflict of interest or other special circumstances.)

The Act requires that a vote of the shareholders be taken on the proposed plan of merger or share exchange. A class or series of shares is entitled to vote as a class in the case of a merger, if the plan of merger contains a provision that, if contained in a proposed amendment to the articles, would entitle the class or series of shares to vote as a class, or in the case of a share exchange, if the class or series is included in the exchange. Under the bill, a class or series of shares is not entitled to vote as a class in the case of a merger or share exchange, if the board of directors determines on a reasonable basis that the class or series is to receive consideration under the plan of merger or share exchange that has a fair value that not less than the fair value of the shares of the class or series on the date of the adoption of the plan. The bill also deleted a provision under which a class or series of shares was not entitled to vote as a class if the sole purpose of a merger was to change the corporation's jurisdiction of incorporation.

The bill specifies that a plan of merger or share exchange may provide for differing forms of consideration for holders of shares within the same class based on the election of the holders, the amount of shares held, or another reasonable basis.

Disposition of Corporate Property & Assets

Except as otherwise provided in the Act, a corporation may sell, lease, exchange, or otherwise dispose of all, or substantially all, of its property and assets, with or without the goodwill, if not in the regular course of its business, upon terms and conditions and for a consideration consisting of cash or other property, including shares, bonds, or other securities of any other corporation, domestic or foreign, as authorized in the Act. Under the bill, a corporation has not disposed of all or substantially all of its property and assets if it retains "a significant continuing business activity". The bill specifies that for purposes of these provisions, it is presumed conclusively that a corporation has retained a significant continuing business activity if the corporation retains a business activity that represents at least 25% of total assets at the end of the most recently completed fiscal year, and 25% of either income from continuing operations before taxes or revenues from continuing operations for that fiscal year, in each case of the corporation and its subsidiaries on a consolidated basis.

The board must recommend the proposed transaction to the shareholders unless the board determines that because of conflict of interest, events occurring after the board adopts the plan, contractual obligations, or other special circumstances, it should make no recommendation and communicates the basis for its determination to the shareholders with the submission of the proposed transaction. (Previously, the Act referred only to conflict of interest or other special circumstances.)

MCL 450.1105 et al.

Legislative Analyst: Suzanne Lowe

FISCAL IMPACT

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

Fiscal Analyst: Marie Tyszkiewicz

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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.