

Legislative Analysis



DEFINITION OF "PROFESSIONAL SERVICES"; BUSINESS CONVERSION PLANS & PROCEDURES

Mitchell Bean, Director
Phone: (517) 373-8080
<http://www.house.mi.gov/hfa>

House Bill 5356

Sponsor: Rep. Bill Huizenga

House Bill 5357

Sponsor: Rep. Andy Meisner

House Bill 5358

Sponsor: Rep. Ed Clemente

Committee: New Economy and Quality of Life

Complete to 11-28-07

A SUMMARY OF HOUSE BILLS 5356 - 5358 AS INTRODUCED 10-24-07

The bills would amend three acts to distinguish between "professional service" and "services in a learned profession;" designate the act corporations providing such services would fall under; revise the definition of "person" to include a limited liability company; revise certain procedures to be followed when converting a domestic company into a business organization, or the reverse; and repeal a section of law dealing with "control share acquisitions," (which, generally speaking, was enacted to address hostile takeovers of Michigan corporations.)

The bills are tie-barred so that none could go into effect unless the others also were enacted into law.

Under the bills, a "professional service" would refer to a type of personal service to the public that requires as a condition precedent to the rendering of the service the obtaining of a license or other legal authorization. "Services in a learned profession" would refer to services rendered by a dentist, an osteopathic physician, a physician, a surgeon, a doctor of divinity or other clergy, or an attorney-at-law.

(A portion of the current definition of "professional service" would be deleted. That portion reads: "Professional service includes, but is not limited to, 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 bills specify that corporations that provide one or more services in a learned profession could only incorporate under the Professional Service Corporation Act and could not incorporate under the Business Corporation Act. Corporations providing

professional services could elect to incorporate under either act if they did not provide professional services that are services in a learned profession.

The provisions added to the Business Corporation Act on conversions deal with the conversion of a domestic corporation to a business organization and a business organization to a domestic corporation. Under the act, a business organization is defined as "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*. (Emphasis added.) A domestic corporation refers to a corporation formed under the Business Corporation Act (or a similar earlier act).

A more detailed description of the bills follows.

House Bill 5356 would amend the Business Corporation Act (MCL 450.1108 et al) to define "professional service" to mean a type of personal service to the public that requires as a condition precedent to the rendering of the service the obtaining of a license or other legal authorization. The bill would define "services in a learned profession" to mean services rendered by a dentist, an osteopathic physician, a physician, a surgeon, a doctor of divinity or other clergy, or an attorney-at-law. The bill would modify the definition for the term "person" to mean an individual, a partnership, a domestic or foreign corporation, "a limited liability company" or any other association, corporation, trust, or legal entity.

The bill specifies that the Business Corporation Act would be applicable to corporations organized under Michigan's statutory law governing the formation and internal affairs of profession service corporations, unless there were conflicts with this act, in which case the statutory law would apply. The bill also specifies that a corporation that provides one or more services in a learned profession could *not* incorporate under the Business Corporation Act. Further, under the bill, a corporation that currently provides professional services that was organized under this act before the effective date of this legislation, and not providing any services in a learned profession, would not be considered to be improperly organized.

The bill adds two new substantially similar sections to the act--the first governing the occasion when a domestic corporation converts to a business organization (Section 745), and the second governing the occasion when a business organization converts to a domestic corporation (Section 746). Under the bill, a conversion can occur if all of the following requirements are satisfied:

- The conversion is permitted by the law that will govern the internal affairs of the business organization or domestic corporation after conversion and the surviving business organization complies with that law in converting.
- The board of the domestic corporation or business organization proposing to convert adopts a plan of conversion that includes all of the following:

- The name of the domestic corporation or business organization, the name of the business organization into which the domestic corporation is converted or the reverse, the type of business organization into which the domestic corporation is converting or the reverse, identification of the statute that will govern the internal affairs for the surviving business organization, the street address of the surviving business organization or domestic corporation, the street address of the domestic corporation or business organization if different, and the principal place of business of the surviving business organization or domestic corporation.
- For the domestic corporation or the business organization, 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 is subject to change before the effective date of the conversion, the manner in which they change may 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 may include ownership interest or obligations of an entity that is not a party to the conversion, or into a combination of cash and other considerations.
- The terms and conditions of the organizational documents that are to govern the surviving business organization.
- Any other provision with respect to the proposed conversion that the board considers necessary or desirable.

If the board of a domestic corporation adopts the plan of conversion, it is submitted for approval in the same manner required for a merger (under Section 7031(2)), including the procedures pertaining to dissenters' rights, if any shareholder has the right to dissent. If a plan of conversion is adopted by a business organization, the plan is submitted for approval in the manner required by the law governing the internal affairs of that business organization.

If a domestic corporation has not commenced business, has not issued any shares, and has not elected a board, then the incorporators may approve of the conversion into a business organization by unanimous consent. To effect the conversion, the majority of the incorporators must execute and file a certificate of conversion. After the plan of conversion is approved, the domestic corporation files any formation documents under the laws governing the internal affairs of the surviving business organization.

The bill specifies that the certificate of conversion include five statements, including but not limited to a statement concerning the manner and basis of converting the shares; whether the corporation has commenced business, issued any shares, or elected a board; whether the corporation has furnished a copy of the plan of conversion to any shareholders; whether the plan was approved by the shareholders; and specifying each assumed name of the domestic corporation to be used by the surviving business organization.

When a conversion takes place under Section 745, all of the following (among other things) apply:

- The domestic corporation converts into the surviving business organization, and the articles of incorporation of the domestic corporation are canceled.
- The surviving business organization has all of the liabilities of the domestic corporation.
- The title to all real estate and other property and rights owned by the domestic corporation remain vested in the surviving business organization without reversion or impairment.
- The surviving business organization may use the name and the assumed names of the domestic corporation if the filings are made under the law.
- A proceeding pending against the domestic corporation may be continued as if the conversion had not occurred, or the surviving business organization may be substituted in the proceedings for the domestic corporation.
- The surviving business organization is considered to be the same entity that existed before the conversion and is 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 are converted.
- Unless otherwise provided in a plan of conversion, the domestic corporation is not required to wind up its affairs or pay its liabilities and distribute its assets on account of the conversion, and the conversion does not constitute a dissolution of the domestic corporation.

If the surviving business organization of a conversion is a foreign business organization, it is subject to Michigan laws. The surviving business organization is liable, and is subject to service of process in a proceeding in Michigan, 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.

When a plan of conversion is approved under Section 746, the business organization files a certificate of conversion with the administrator, and the bill specifies what that certificate must include. When a certificate takes effect, all of the following apply:

- The business organization converts into the surviving domestic corporation.
- The surviving domestic corporation has all of the liabilities of the business organization.
- The title to all real estate and other property and rights owned by the business organization remain vested in the surviving domestic corporation without reversion or impairment.
- The surviving domestic corporation may use the name and the assumed names of the business organization if the filings are made and the laws regarding use and form of names are followed.

- A proceeding pending against the business organization may be continued as if the conversion had not occurred, or the surviving domestic corporation may be substituted in the proceedings for the business organization.
- The surviving domestic corporation is considered to be the same entity that existed before the conversion and is considered to be organized on the date that the business organization was originally 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 are converted.
- Unless otherwise provided for in a conversion plan, the business organization is not required to wind up its affairs or pay its liabilities and distribute its assets on account of the conversion, and the conversion does not constitute a dissolution of the business organization.

Currently under the law, a shareholder is entitled to dissent from a conversion, and obtain payment of the fair value of his or her shares, in the event of any of seven corporate actions. House Bill 5356 would modify the list of corporate actions. It would eliminate as a reason for shareholder dissent "the approval of a control share acquisition." The bill would add as a reason for shareholder dissent the "consummation of a plan of conversion to which the corporation is a party as the corporation that is being converted, if the shareholder is entitled to vote on the plan." However, the bill specifies that any rights provided would not be available if the corporation was converted into a foreign corporation, and the shareholder received shares that had terms as favorable in all material respects, and represented at least the same percentage interest of the total voting rights of the outstanding shares of the corporation, as the shares held before the conversion.

Also, House Bill 5356 would repeal Chapter 7B of the act, which deals with "control share acquisitions." (Generally speaking, these provisions were enacted to address hostile takeovers of Michigan corporations.)

House Bill 5357 would amend the Professional Service Corporation Act (CL 450.222 et al) to modify the definition of the term "professional service" to mean a type of personal service to the public that requires as a condition precedent to the rendering of the service the obtaining of a license or other legal authorization. Under the bill, the *following provision would be eliminated* from the current definition: Professional service includes, but is not limited to, services rendered by certified and other public accountants, chiropractors, dentists, optometrists, veterinarians, osteopaths, physicians and surgeons, doctors of medicine, doctors of dentistry, podiatrist, chiropodists, architects, professional engineers, land surveyors, and attorneys at law.

The bill would also define the term "services in a learned profession" to mean services rendered by a dentist, an osteopathic physician, a physician, a surgeon, a doctor of divinity or other clergy, or an attorney-at-law.

The bill specifies that the Professional Service Corporation Act would not apply to any corporation providing professional services that was previously organized under the Business Corporation Act before the effective date of this legislation, if none of the professional services provided by the corporation were services in a learned profession. A corporation could bring itself within the provisions of the Professional Services Corporation Act by amending its articles of incorporation so they are consistent with the act, and by affirmatively stating in the amended articles that the shareholders had elected to bring the corporation within the provisions of the Professional Service Corporation Act.

The bill would also specify a corporation for pecuniary profit that provided one or more professional services that were services in a learned profession could only incorporate under the Professional Service Corporation Act and could not elect to incorporate under the Business Corporation Act. However, a corporation that provided one or more professional services could elect to incorporate under this act *or* the Business Corporation Act, if it did not provide any professional services that were services in a learned profession.

Finally, the bill specifies that Michigan statutory law governing the formation and internal affairs of business corporations, rather than only the Business Corporation Act, would be applicable to a corporation organized under this act, and in the case of conflict, the provision of this act would apply with respect to a corporation organized under it.

House Bill 5358 would amend the Michigan Limited Liability Company Act to revise the definition of the term "professional service" to mean a type of personal service to the public that requires as a condition precedent to the rendering of the service the obtaining of a license or other legal authorization. Under the bill, the *following provision would be eliminated* from the current definition: Professional service includes, but is not limited to, services rendered by a certified or other public accountant, chiropractor, dentist, optometrist, veterinarian, osteopathic physician, physician, surgeon, podiatrist, chiroprapist, architect, professional engineer, land surveyor, and attorney at law.

FISCAL IMPACT:

There is no fiscal impact on the State of Michigan or its local units of government.

Legislative Analyst: J. Hunault
Fiscal Analyst: Richard Child

■ This analysis was prepared by nonpartisan House staff for use by House members in their deliberations, and does not constitute an official statement of legislative intent.