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Bill Analysis

Version: As Introduced

Primary Sponsor: Rep. Swearingen

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SUMMARY

- Requires nonprofit corporation directors to be natural persons (i.e., individuals rather than business entities).
- Authorizes a committee consisting of one or more directors of a nonprofit corporation to create a subcommittee, unless otherwise provided in the articles, the regulations, or the resolution of the original committee.
- Specifies the fiduciary duty required of an officer of a nonprofit corporation.
- Expands the circumstances in which provisional directors may be appointed.
- Revises the standards for determining liability of directors when nonprofit corporations make loans and the interest rate relating to that liability.
- Establishes that a loan made in violation of the law governing nonprofit corporation does not affect the borrower's liability on the loan.
- Authorizes a majority of the incorporators of a nonprofit corporation to amend the articles of incorporation if (1) the articles do not name initial directors, (2) a meeting of voting members has not yet occurred, and (3) the incorporators have not yet elected directors.
- Establishes that a certificate issued by the Secretary of State confirming that a nonprofit corporation is in good standing is conclusive evidence of certain facts.
- Limits the liability of those who provide goods to, or perform services for, nonprofit corporations or their members to only the person or entity to whom the goods or services were provided.
- Provides an exception to religious organizations excluded from the definition of an unincorporated nonprofit association in the Unincorporated Nonprofit Association Law.

- Allows a dissolving corporation to provide an affidavit stating that the corporation does not owe any state taxes as an alternative to securing a certificate from the Department of Taxation confirming that all such taxes have been paid.

DETAILED ANALYSIS

The bill makes numerous changes to the Nonprofit Corporation Law, including changes related to director qualifications and appointment, director and officer liability, and certificates of good standing from the Secretary of State. It also makes one change to the Unincorporated Nonprofit Association Law and one change to the General Corporation Law.

Director qualifications

The bill requires nonprofit corporation directors to be natural persons (i.e., not business entities). Current law simply requires directors to have the qualifications, if any, stated in the nonprofit corporation's articles of incorporation or regulations.¹

Director duties

Evaluating duties

Continuing law requires a nonprofit corporation director to perform their duties (1) in good faith, (2) in a manner the director reasonably believes to be in, or not opposed to, the best interests of the corporation, and (3) with care that an ordinarily prudent person in a like position would use under similar circumstances. In determining what is in the best interests of the corporation, or what is not opposed to those interests, current law, changed in part by the bill, requires the director to consider the purposes of the corporation and allows the director to consider the following:

- The interests of the corporation's employees, suppliers, creditors, and customers;
- The economy of the state and nation;
- Community and societal considerations;
- The long- and short-term interests of the corporation, including the possibility that the interests may be best served by the corporation's continued independence.

The bill modifies the application of these criteria in two ways: First, it clarifies that the director's consideration of the permissive criteria (the bulleted items above) is discretionary. Second, it specifies that both the mandatory criterion (the purposes of the corporation) and the permissive criteria apply only to determining what is in the best interests of the corporation. It retains the requirement that the director act in a manner that is not opposed to the

¹ R.C. 1702.27(A)(3).

corporation's interests, but eliminates guidelines as to how the director may determine what is, or is not, opposed to those interests.²

Committees and subcommittees

The bill authorizes any committee consisting of one or more nonprofit corporation directors to create subcommittees and delegate any or all of the committee's power to the subcommittee. This authority, however, may be withheld by the corporation's regulations or the resolution that created the original committee.

The bill does not change provisions in current law that provide for the creation of committees by nonprofit corporation boards of directors. It only establishes the new authority for those committees to create subcommittees.³

Provisional directors

The bill expands the circumstances in which a court may appoint provisional directors for nonprofit corporations. Currently, a provisional director may be appointed by a court upon the complaint of at least one fourth of the directors. In order to make an appointment, the plaintiffs must establish that the continued operation of the corporation is substantially impeded or impossible because of irreconcilable differences among the existing directors.

The bill expands the field of eligible complainants to include at least one fourth of a nonprofit corporation's voting members. It also expands the circumstances allowing appointment to include situations where there are no directors and the voting members are unable to elect directors, making the continued operation of the corporation substantially impeded or impossible.⁴

Corporate officers

Fiduciary duties

The bill establishes a default fiduciary duty that applies to a nonprofit corporation's officers (e.g., president, treasurer, etc.) unless the corporation's articles or regulations, or a written agreement with an officer, establishes *additional* fiduciary duties.

These new provisions largely mirror existing law regarding fiduciary duties for directors. Under the bill, officers must perform their duties in good faith, in a manner reasonably believed to be in or not opposed to the corporation's best interests, and with the care an ordinarily prudent person in a like situation would use. When performing their duties, officers may rely on information, including financial statements and other data, prepared or presented by either:

- The corporation's directors, officers, or employees who the officer in question reasonably believes to be reliable and competent;

² R.C. 1702.30(B) and (F).

³ R.C. 1702.33(G).

⁴ R.C. 1702.521.

- Counsel, accountants, and other professionals working in their scope of practice.⁵

Liability for failure to fulfill fiduciary duties

Under the bill, in order for a court to find that a corporate officer failed to act in good faith, in a manner reasonably believed to be in or not opposed to the corporation's best interests (i.e., to have violated the relevant fiduciary duty), the failure must be proved by clear and convincing evidence. Clear and convincing evidence is evidence indicating something is highly likely or reasonably certain. That is a higher standard than the normal evidentiary standard in civil cases, which is a preponderance of the evidence (the evidence for a proposition outweighs the evidence against, even if only slightly). The bill further provides, however, that an officer will not be considered to be acting in good faith if the officer knows something about the matter in question that would make reliance on information provided by other corporate personnel or professional advisors unwarranted.⁶

The bill has additional provisions for actions seeking to make a nonprofit corporation's officer liable for money damages. In those cases, it must be shown by clear and convincing evidence that the officer's action or inaction was undertaken with deliberate intent to cause the corporation injury or with reckless disregard for its best interests. The bill does provide that this requirement can be nullified by the corporation's articles or regulations or a written agreement with the officer in question.⁷

Limitation of fiduciary duty provisions

The bill limits its new fiduciary duty provisions for corporate officers to those instances where they are acting as corporate officers. The fiduciary duties do not apply when corporate officers are acting in any other capacity.⁸

Director and officer liability

Under continuing law, directors and officers of nonprofit corporations are not personally liable for the corporation's obligations. They may, however, be liable to the corporation itself under certain circumstances. Those are where there is a distribution of corporate assets to members contrary to law or the corporation's articles, where there is a distribution of assets without making sure creditors are paid when winding up the corporation's affairs, and when the corporation makes certain loans. The bill modifies the liability provisions regarding loans.

Under current law, directors and officers may be liable to the corporation when, other than in the usual conduct of the corporation's affairs or in accordance with the corporation's articles, the corporation makes a loan to a corporate officer, director, or member. The bill

⁵ R.C. 1702.341(A) and (B).

⁶ R.C. 1702.341(C), *Black's Law Dictionary* (11th ed. 2019), and *Ohio Trial Practice (Baldwin's Ohio Handbook Series)* § 9:3 (2021 ed.).

⁷ R.C. 1702.341(D).

⁸ R.C. 1702.341(E).

removes the liability application for loans to members. It also removes the liability provision altogether if, at the time of the loan, the majority of disinterested directors voted for the loan after taking into account its terms and provisions and determining that it could reasonably be expected to benefit the corporation.

The bill also adjusts the interest rate applicable to a director's liability on improper loans from 6% annually to the federal short-term rate as determined by the Tax Commissioner under continuing law. Finally, it adds a new provision establishing that even if a loan is made in violation of the nonprofit corporation law, that violation does not affect the borrower's liability on the loan.⁹

Amendment of articles

Nonprofit corporations are formed when articles of incorporation are filed with the Secretary of State. The articles may be filed by one or more persons, called incorporators, and may name the corporation's initial directors. Once incorporated, articles may be amended by a majority vote of the corporation's voting members. The bill adds a new provision allowing articles of incorporation that do not name the initial directors to be amended, if certain circumstances are met. Specifically, under the bill, the incorporators may adopt an amendment to the articles at any time prior to both:

- A meeting of the corporation's voting members;
- Election of directors by the incorporators.¹⁰

Certificate of good standing

The bill specifies that a certificate of good standing issued for a nonprofit corporation by the Secretary of State is conclusive evidence of certain facts for seven days after it is issued. The facts the certificate demonstrates are:

- That an Ohio nonprofit corporation's authority has not been limited by provisions of continuing law dealing with its termination or dissolution and the winding up of its affairs, provided that the person relying on the certificate has no knowledge that the corporation's articles have been canceled and the certificate is not presented as evidence against the state;
- That an out-of-state nonprofit corporation's license to do business in Ohio has not expired, been canceled, or been surrendered.¹¹

⁹ R.C. 1702.55(A), (B), and (H); R.C. 1343.03 and 5703.47, not in the bill.

¹⁰ R.C. 1702.38(C)(1); R.C. 1702.01, 1702.04, and 1702.20, not in the bill.

¹¹ R.C. 1702.53(D).

Providers of goods and services

The bill adds a new provision to the nonprofit corporation law providing that, absent express agreement, those who provide goods or services to a nonprofit corporation do not incur legal liability or owe any duties to the corporation's members or creditors, or the members' creditors, by reason of providing the goods or services. Similarly, the bill specifies that those who provide goods or service to a nonprofit's corporations members do not incur legal liability or owe any duties to the corporation or its creditors by virtue of providing those goods or services.¹²

Nonsubstantive changes

The bill makes numerous stylistic edits to statutory language that do not appear to substantively change the law.¹³

Unincorporated nonprofit associations

Unincorporated nonprofit associations are organizations, consisting of two or more members pursuant to an agreement for one or more common nonprofit purposes. Continuing law exempts several entities from the definition, including religious organizations. The bill permits religious organizations to opt into the unincorporated association law by having the religious organization's governing principles specially state that the exemption does not apply.¹⁴

Certificate of dissolution

Current law requires corporations filing for dissolution with the Secretary of State include with their certificate of dissolution a certificate or other evidence from the Department of Taxation showing that the corporation has paid all taxes owed to the Tax Commissioner, or an "adequate guarantee" that the taxes will be paid. The bill removes the "adequate guarantee" option and instead allows either a certificate from the Department or an affidavit, either from one of the people executing the certificate of dissolution or from an officer of the corporation, stating that the corporation is not required to pay taxes, or has not been assessed any taxes for which it would need to provide a certificate from the Department.¹⁵

¹² R.C. 1702.531.

¹³ R.C. 1701.86(I) and 1702.30(C) through (E).

¹⁴ R.C. 1745.05(M)(5).

¹⁵ R.C. 1701.86(I)(2).

HISTORY

Action	Date
Introduced	10-18-23
