



# OHIO LEGISLATIVE SERVICE COMMISSION

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## Bill Analysis

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(As Reported by S. Government Oversight and Reform)

**Sens.** LaRose, Hackett

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## **BILL SUMMARY**

### **Limited liability companies**

- Specifies that if a limited liability company (LLC) does not properly maintain an agent in Ohio and does not respond to a notice from the Secretary of State within a given period of time, the LLC's articles of organization must be automatically canceled.
- Allows the members of an LLC whose articles of organization have been automatically canceled under the bill to apply for reinstatement and have the LLC's rights restored retroactive to the time of the cancellation.
- Provides a procedure to continue the operation of an LLC after all of its members have ceased to be members.
- Adds to the information that must be included on an LLC's certificate of dissolution and requires the Secretary of State to make the certificate available to the public on the Secretary's website along with certain other information about the LLC.
- Provides general requirements for winding up the affairs of the dissolved LLC.
- Creates a process for the LLC to notify any known creditors and other potential claimants of the dissolution and to resolve those claims according to a certain schedule.
- Specifies that a claim brought against the LLC by a person who was notified under the claims process is barred unless it is brought according to that schedule.

- Specifies that a claim brought against the LLC by any other person is barred unless it is brought within five years after the certificate of dissolution is filed.
- Provides a rule to determine the appropriate court to hear issues involving the dissolved LLC and lists several matters with respect to which the court may order and adjudge.
- Establishes a procedure for a court to appoint a receiver to wind up the LLC's affairs and describes the receiver's authority and duties.
- Modifies the law governing the distribution of the LLC's assets to include references to the changes made by the bill.
- Places additional limitations on the liability of the members of a dissolved LLC.

## **Corporations**

- Allows a dissolving corporation to submit certain affidavits to the Secretary of State instead of providing a certificate or other evidence from the Department of Taxation that the corporation has paid all taxes owed to the Department.
- Eliminates an option for a dissolving corporation to submit a certificate or other evidence from the Department that the Department has received an adequate guarantee for the payment of all taxes owed by the corporation.

## **Nonprofit corporations**

- Provides a process for amending a newly formed nonprofit corporation's articles of incorporation if initial directors are not named in the articles.
- Requires a director to be a natural person who is at least 18 years old.
- Specifies that a director is not a trustee with respect to the corporation or with respect to any property it holds or administers, including property that may be subject to restrictions imposed by the property's donor or transferor.
- Permits a committee of directors of a corporation to create subcommittees.
- Allows the voting members to request a court to appoint a provisional director for the corporation because the voting members are unable to elect any directors, so long as the corporation's articles or regulations expressly provide for such an appointment.

- Specifies an officer's fiduciary duties with respect to a corporation and provides the circumstances under which an officer may be found liable for violating those duties.
- Makes changes to the law that prohibits a corporation's directors from lending the corporation's money to an officer, director, or member of the corporation in a context other than in the usual conduct of the corporation's affairs or in accordance with the corporation's articles.
- Provides generally that a person providing goods or services to a corporation owes no duty to, incurs no liability or obligation to, and is not in privity with the corporation's members or creditors by reason of providing those goods or services.
- Provides generally that a person providing goods or services to a member or group of members of a corporation owes no duty to, incurs no liability or obligation to, and is not in privity with the corporation, any other members of the corporation, or the corporation's creditors by reason of providing those goods or services.
- Authorizes the Secretary of State to issue a certificate of good standing to a corporation and specifies the legal significance of such a certificate.
- Makes several stylistic changes that do not affect the operation of the law.

### **Unincorporated nonprofit associations**

- Permits a religious organization to be treated as an unincorporated nonprofit association under the Revised Code if its governing principles specify that it is one.

### **Business name notifications**

- Permits the Secretary of State to implement an electronic notification system that allows a person to request to be notified if a business name containing a specific word or words has been registered.

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## **TABLE OF CONTENTS**

Limited liability companies .....	4
Automatic cancellation of articles of organization .....	4
Generally.....	4
Reinstatement.....	4
LLCs with no remaining members .....	5
Winding up the affairs of a dissolved LLC.....	6
Certificate of dissolution .....	6
Dissolution, generally .....	7
Claims process.....	8
Court involvement .....	9
Receivership .....	12



Distribution of assets .....	12
Liability of members .....	13
Corporations .....	14
Nonprofit corporations.....	15
Articles of incorporation.....	15
Director qualifications, duties, and powers .....	15
Appointment of provisional director .....	15
Officer duties.....	16
Loans made to an officer, director, or member .....	17
Contractors .....	18
Certificate of good standing.....	18
Stylistic changes .....	19
Unincorporated nonprofit associations .....	19
Business name notifications.....	19

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## CONTENT AND OPERATION

### Limited liability companies

#### Automatic cancellation of articles of organization

##### Generally

Under the bill, if a limited liability company (LLC) fails to maintain an agent in Ohio for the purpose of receiving service of process on behalf of the company, or if the LLC or the agent fails to notify the Secretary of State of the agent's change of address, the Secretary must notify the LLC by ordinary or electronic mail at the address provided by the LLC. If the LLC does not obtain an agent or file a notice of change of address, as applicable, within 30 days after the notice is sent or within any longer period of time the Secretary grants, the LLC's articles of organization must automatically be canceled and the Secretary must make a note of that fact.

Continuing law requires an LLC continuously to maintain an agent in Ohio and to notify the Secretary of any change in the agent's identity or address. If a person who wishes to serve documents on the LLC is unable to locate the LLC's agent, then the person may serve the Secretary as the LLC's agent. The Secretary then must forward the documents to the LLC at its principal office or another specified address. Service is considered complete when the Secretary forwards the documents.<sup>1</sup>

##### Reinstatement

When an LLC's articles of organization have automatically been canceled under the bill, the LLC must be reinstated if the LLC: (1) applies to the Secretary of State for

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<sup>1</sup> R.C. 1705.06(L)(1).



reinstatement on a form the Secretary prescribes, (2) submits the required appointment of an agent or notice of agent's change of address, as applicable, and (3) submits the continuing-law \$25 reinstatement fee for entities canceled by operation of law.

Upon reinstatement of the LLC's articles of organization, the LLC's rights, privileges, and franchises existing at the time of the cancellation, including all real or personal property rights and credits and all contract and other rights, are fully vested in the LLC as if the articles of organization were not canceled, and the LLC again is entitled to exercise those rights, privileges, and franchises. Further, if a manager, member, officer, agent, or employee of the LLC exercised or attempted to exercise any rights, privileges, or franchises on behalf of the LLC while its articles of organization were canceled, the action has the same force and effect that it would have had if the LLC's articles of organization had not been canceled. And, the LLC is exclusively liable for the action, provided that the person had no knowledge of the cancellation and the action was within the scope of the LLC's articles of organization as they existed immediately before the cancellation.

The bill requires the Secretary of State to reserve the name of an LLC whose articles of organization have automatically been canceled for one year after the cancellation. If the LLC applies for reinstatement more than one year after the cancellation and the previous name is unavailable because it is not distinguishable from the name of another business, then the LLC must change its name by amending its articles of organization before it may be reinstated.

The bill provides that its reinstatement provisions are remedial in nature and are to be construed liberally to accomplish the purpose of providing full reinstatement of an LLC's articles of organization, retroactive to the time of the cancellation.<sup>2</sup>

### **LLCs with no remaining members**

The bill provides a procedure to continue the operation of an LLC after all of its members have ceased to be members. Under the bill, such an LLC is dissolved unless (1) the operating agreement provides for a substitute member to be admitted as of the date the last remaining member ceased to be a member of the LLC, or (2) the operating agreement does not so provide, but the legal representative or successor of the last remaining member admits a substitute member to the LLC in writing within 90 days after the last remaining member ceased to be a member. The substitute member is deemed to have been admitted as of the date the last remaining member ceased to be a member.

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<sup>2</sup> R.C. 1705.06(L)(2) through (5). See also R.C. 111.16(Q) and 1705.05, not in the bill.



Existing law specifies that an LLC is dissolved when a member withdraws, unless the LLC is continued by consent of all of the remaining members or under a right to continue the LLC that is stated in writing in the operating agreement. If an LLC has only one member and that member withdraws – for example, by dying or being adjudicated incompetent – the LLC is dissolved and the member's heirs or successors have no opportunity to continue the LLC's operation.<sup>3</sup>

### **Winding up the affairs of a dissolved LLC**

The bill makes several changes to the process for winding up the affairs of a dissolved LLC. Among those changes is the creation of a statute of repose for LLCs, which provides procedures for persons with claims against a dissolved LLC to be notified of the dissolution so that they can resolve those claims, while providing a date after which the dissolved LLC is no longer responsible for paying any claims.

#### **Certificate of dissolution**

Under the bill, the certificate of dissolution an LLC must file with the Secretary of State must include all of the following information:

- The name of the LLC;
- The location of the LLC's current or future principal office in Ohio;
- The Internet address of each domain name held or maintained by or on behalf of the LLC;
- The name and address of the LLC's statutory agent;
- The effective date of the LLC's dissolution.

Existing law only requires the certificate of dissolution to include the name of the LLC, the name of its statutory agent, and the effective date of its dissolution.

The Secretary of State must make available on the Secretary's website, in a searchable format, a list of all domestic LLCs that have filed certificates of dissolution, along with a copy of each LLC's certificate and a copy of the notice of dissolution the LLC must send to potential claimants (see "**Claims process**," below). That information must remain available on the website for at least five years after the certificate of dissolution is filed.<sup>4</sup>

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<sup>3</sup> R.C. 1705.14 and 1705.43(A)(6). See also R.C. 1705.15, not in the bill.

<sup>4</sup> R.C. 1705.43(B).



## **Dissolution, generally**

The bill specifies that when an LLC is dissolved, it must cease to carry on business and take only the actions necessary to wind up its affairs, except that if authorized by the operating agreement, the persons winding up the affairs may continue the business of the LLC in order to maximize its value as a going concern for eventual sale. The LLC must continue as an LLC for five years after the certificate of dissolution is filed to wind up its affairs, except for extensions granted to conclude a court case. The persons winding up the affairs promptly must proceed to complete the winding up as speedily as is practicable. (Under continuing law, the members of a dissolved LLC who have not wrongfully dissolved the LLC, a liquidating trustee selected by those members, or the LLC's managers may wind up the affairs of the LLC, except as otherwise provided in the operating agreement. Alternatively, a court may wind up the affairs or appoint a liquidating trustee or receiver to do so, as described below under "**Court involvement**" and "**Receivership**.")

The LLC's dissolution does not eliminate or impair any remedy available to or against the LLC or its members or managers for any right or claim existing, or any liability incurred, before the dissolution, so long as the LLC brings any action by the applicable deadline prescribed by law. A person with a claim against the LLC who is sent a notice under the claims process described below must submit the person's claim not later than the deadline specified under that process. Any other person with a claim against the LLC must bring an action not later than five years after the certificate of dissolution is filed.

Any existing claim, any claim that would have accrued, and any pending action or proceeding by or against the LLC may be prosecuted to judgment, with a right of appeal as in other cases, except that a court may stay any proceeding, execution, or process or the satisfaction or performance of any order, judgment, or decree, as described below under "**Court involvement**." Any action, suit, or proceeding begun by or against the LLC in accordance with the bill does not abate, and the LLC must be continued as an LLC for that sole purpose until any judgments, orders, or decrees are fully executed.

If any property right of the LLC is discovered after the winding up of affairs is complete, any member, manager, or liquidating trustee that wound up the affairs or a court-appointed receiver may enforce the property right, collect and divide the assets discovered among the persons who are entitled to them, and prosecute any necessary actions or proceedings in the name of the LLC. The assets must be distributed and



disposed of in accordance with any applicable court order or, in the absence of a court order, in the manner prescribed by law (see "**Distribution of assets**," below).<sup>5</sup>

### **Claims process**

Not later than 90 days before the end of the five-year period after the certificate of dissolution is filed, a dissolved LLC must give notice of the dissolution to each known creditor and to each known person that has a claim against the LLC, including a claim that is conditional, unmatured, or contingent on the occurrence or nonoccurrence of future events. The LLC must send that notice by certified or registered mail, return receipt requested. And, the LLC must post the notice on any website it maintains in its own name and file a copy of the notice with the Secretary of State for inclusion on the Secretary's website (see "**Certificate of dissolution**," above).

The notice must include all of the following:

- A statement that all claims against the LLC must be presented in writing, identify the claimant, and contain sufficient information to reasonably inform the LLC of the substance of the claim;
- The mailing address to which a claimant must send the claim;
- The deadline by which the LLC must receive the claim, which must be at least 60 days after the LLC gives the notice;
- A statement that a claim will be barred if the LLC does not receive the claim not later than the deadline specified in the notice;
- A statement that the LLC may make distributions to other creditors or claimants, including distributions to members of the LLC, without further notice.

A claim asserted by a claimant that was given notice of the LLC's dissolution under the bill is barred unless the claimant delivers the claim to the LLC not later than the deadline specified in the notice.

The LLC may reject any matured claim, in whole or in part, by sending notice of the rejection to the claimant by certified or registered mail, return receipt requested, not later than 90 days after the company receives the claim and not later than 30 days before the end of the five-year period after the certificate of dissolution is filed. The notice of rejection must include a copy of the bill's provisions concerning claims submitted under

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<sup>5</sup> R.C. 1705.43(C) and 1705.44(A). See also R.C. 1705.45(A)(1), not in the bill.





the claims process and a copy of the section of law that governs court involvement in the winding up of the affairs of a dissolved LLC. After a claimant receives a notice of rejection under the bill, the claim is barred unless the claimant commences an action to enforce the claim not later than 30 days after the company mails the notice of rejection to the claimant.

The bill allows the LLC to offer to any claimant whose claim is contingent, conditional, or unmaturing the security the LLC determines is sufficient to compensate the claimant if the claim matures. The LLC must send the offer of security to the claimant by certified or registered mail, return receipt requested, not later than 90 days after the company receives the claim from the claimant and not later than 30 days before the end of the five-year period after the certificate of dissolution is filed. The offer of security must include a copy of the bill's provisions concerning offers of security and a copy of the section of law that governs court involvement in the winding up of the affairs of a dissolved LLC. If the claimant does not reject the offer of security in writing within 30 days after the company mails the offer, the claimant is deemed to have accepted the security as the sole source from which to satisfy the claim.

The LLC may apply to the appropriate court, as determined below under "**Court involvement**," for a determination of the amount and form of insurance or other security that will be sufficient to compensate any claimant that (1) has rejected an offer of security and (2) that is reasonably likely to be sufficient to provide compensation for any claims that have not been made known to the LLC or that have not arisen but that, based on the facts known to the LLC, are likely to arise or to become known to the LLC within five years after the certificate of dissolution is filed or within a longer period not to exceed ten years after that date, as determined by the LLC's members or managers or by the court.

An LLC's act of giving notice of dissolution or making an offer of security under the bill does not revive any claim then barred, constitute acknowledgment by the LLC that any person to whom the LLC gave notice of dissolution is a proper claimant, or operate as a waiver of any defense or counterclaim.<sup>6</sup>

### **Court involvement**

The bill specifies that the court of common pleas of the county in which a dissolved LLC's principal office is or was to be located has authority over the winding up of the LLC's affairs. (Existing law refers only to "the court of common pleas.") Under the bill, the court may order and adjudicate with respect to any of the following matters:

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<sup>6</sup> R.C. 1705.431.

- A request by the LLC that the court wind up the LLC's affairs or appoint a liquidating trustee to do so. Any member of the LLC or the member's legal representative or assignee, a majority of the company's managers, or a creditor or claimant, including a creditor or claimant who is a member or manager of the LLC, may request the court to do so. If the court grants the request, the court must provide such notice of the court's decision as the court considers proper to all of the LLC's members and managers and any other interested persons.
- An application for a determination concerning insurance or security to compensate claimants who have rejected an offer of security (see "**Claims process**," above);
- The presentation and proof of all claims and demands against the LLC and of all rights, interest, or liens in or on any of its property, including property rights discovered after the winding up of affairs is complete. The court may fix the time within which and the manner in which that proof must be made and the person to whom the presentation must be made, and may bar any person who fails to make and present required proof from participating in any distribution of assets.
- The stay of the prosecution of any proceeding against the LLC or involving any property and the requirement that the parties to the proceeding present and prove their claims, demands, rights, interests, or liens at the time and in the manner required of creditors or others, or the grant of leave to bring or maintain an independent proceeding to enforce liens;
- The settlement or determination of all claims of every nature against the LLC or any of its property, the determination of the assets required to be retained or insurance to be obtained to pay or provide for the payment of those claims or any claim, the determination of the assets available for distribution among members, and the making of new parties to the proceeding so far as the court considers proper for the determination of all matters;
- The determination of the rights of members in, and the assets of, the LLC;
- The presentation and filing of intermediate and final accounts of the LLC's members, managers, or liquidating trustee and hearings on them, the allowance, disallowance, or settlement of those accounts, and the

discharge of the members, managers, or liquidating trustee from their duties and liabilities;

- The appointment of a special master commissioner or guardian ad litem to hear and determine any matters the court considers proper. The applicant in the proceeding must pay the reasonable fees and expenses of the commissioner or guardian, including all reasonable expert witness fees, unless the court orders otherwise.
- The filling of any vacancies among the LLC's managers or in the position of liquidating trustee when the members are unable to fill the vacancies because they lack a quorum or for any other reason;
- The appointment of a receiver, in accordance with the usages of a court in equitable matters, to wind up the affairs of the company, to take custody of any of its property, or for any other purpose, as described below under "**Receivership**";
- The issuance or entry of any injunction or other order the court considers proper in the administration of the trust involved in winding up the LLC's affairs and giving notice of the winding up of affairs;
- The allowance and payment of compensation to the LLC's members, managers, or liquidating trustee or to any person rendering services beneficial to the LLC or to those interested in the LLC;
- The entry of a judgment or decree to operate as a deed or other instrument ordered to be executed or the appointment of a master commissioner or guardian ad litem to execute that deed or instrument in the name of the LLC with the same effect as if it were executed by an authorized member or manager, if there is no agent competent to execute that deed or instrument, if the LLC or its members or managers do not perform or comply with a judgment or decree of the court, or if the court considers it proper.

A judicial proceeding under the bill concerning the winding up of an LLC's affairs is a special proceeding, and final orders of the proceeding may be vacated, modified, or reversed on appeal under the Rules of Appellate Procedure and, to the extent not in conflict with those rules, under the Revised Code chapter governing appellate procedure.<sup>7</sup>

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<sup>7</sup> R.C. 1705.44(B) and (C).

## Receivership

Under the bill, after an LLC is dissolved, the appropriate court (see "**Court involvement**," above) may appoint any member, manager, or other person, regardless of whether the person is an Ohio resident and regardless of the person's interest in the LLC, as a receiver to wind up the LLC's affairs. If a receiver is appointed, all of the creditors', claimants', and members' claims, demands, rights, interests, or liens must be determined as of the day the receiver was appointed, unless they have already been determined under the bill's claims process discussed above.

Unless the court orders otherwise, the receiver and the receiver's successors have the right to immediate possession of all of the LLC's property, and the LLC must, if so ordered, execute and deliver conveyances of its property to the receiver or to the receiver's nominee. And, unless the court orders otherwise, the receiver has all of the authority vested in the LLC's members or managers. The receiver must exercise that authority subject to the court's orders and may be required to qualify by giving bond to the state in an amount fixed by the court, with surety to the satisfaction of the clerk of the court, conditioned on the faithful discharge of the receiver's duties and on a due accounting for all money or property the receiver receives.<sup>8</sup>

## Distribution of assets

The bill adds a reference to an LLC obtaining insurance to cover potential claims and liabilities to the provision of continuing law that requires a dissolved LLC to pay in full, or make a reasonable provision to pay in full, any claims and liabilities, including all contingent, conditional, or unmatured claims and liabilities that are known to the LLC and all claims and liabilities that are known to the LLC but with respect to which the claimant or obligee is unknown. The bill also makes stylistic amendments to that provision that do not change its operation, such as substituting the word "liabilities" for "obligations."

Under the bill, a dissolved LLC must do all of the following:

- Pay the claims made and not rejected under the claims process described above;
- Post the security offered and not rejected under the provision of the claims process that allows the LLC to make offers of security to potential claimants;

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<sup>8</sup> R.C. 1705.441.

- Post any security ordered by a court under the provision of the claims process that allows the LLC to request a determination of the amount and form of insurance or other security that will be sufficient to compensate any claimant that has rejected an offer of security and that is reasonably likely to be sufficient to provide compensation for any claims that have not been made known to the LLC or that have not yet arisen;
- Make any other payment required by a court acting under the bill;
- Pay, or make provision by insurance or otherwise for, all other claims that are mature, known, and uncontested or that have been finally determined to be owing by the LLC and any other claims that have not been made known to the LLC or that have not yet arisen but that, based on the facts known to the LLC, are likely to arise or to become known to the LLC within five years after the certificate of dissolution is filed or within a longer period not to exceed ten years after that date, as determined by the LLC's members or managers or by the court. In the absence of fraud, the judgment of the company's members or managers as to the LLC's provision for those claims is conclusive.

Continuing law requires a dissolved LLC to distribute its liquidated assets in the following order:<sup>9</sup>

(1) To the extent permitted by law, to members who are creditors and other creditors in satisfaction of liabilities of the LLC other than liabilities for distributions to members;

(2) Except as otherwise provided in the operating agreement, to members and former members in satisfaction of liabilities for distributions to members;

(3) Except as otherwise provided in the operating agreement, to members as follows:

(a) First, for the return of their contributions;

(b) Second, with respect to their membership interests.

### **Liability of members**

Under continuing law, in general, members of an LLC are not personally liable to satisfy any debt, obligation, or liability of the LLC. The bill specifies that the dissolution

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<sup>9</sup> R.C. 1705.46.

of an LLC does not affect the limited liability of a member of the LLC with respect to transactions occurring, or acts or omissions done or omitted, in the name of or by the LLC. Further, under the bill, a member of a dissolved LLC who receives a distribution of assets from the LLC is not liable for any claim against the LLC in any amount in excess of the amount of the member's *pro rata* share of the claim or the amount distributed to the member, whichever is less. No member's aggregate liability for claims against a dissolved LLC may exceed the amount distributed to that member after the dissolution. When the assets of a dissolved LLC are distributed, a member of the LLC may be liable for a claim against the LLC only if an action on that claim is commenced by the applicable deadline specified by the bill (see "**Dissolution, generally**" and "**Claims process**," above).<sup>10</sup>

## Corporations

When a corporation files a certificate of dissolution with the Secretary of State, current law requires the corporation to submit one of the following:

- A certificate or other evidence from the Department of Taxation showing that the corporation has paid all taxes administered by and required to be paid to the Tax Commissioner that are or will be due from the corporation on the date of the dissolution;
- A certificate or other evidence from the Department that the Department has received an adequate guarantee for the payment of all such taxes.

The bill eliminates the second option listed above and instead allows the corporation to submit an affidavit of one or more of the persons executing the certificate, or of an officer of the corporation, stating that the corporation is not required to pay, or the Department has not assessed, any taxes other than taxes concerning which the corporation is submitting evidence of payment from the Department under the first option above.

Alternatively, the bill allows the dissolving corporation to submit an affidavit of one or more of the persons executing the certificate, or of an officer of the corporation, stating that the corporation advised the Department in writing of the date of the dissolution and acknowledged to the Department that under continuing law, the corporation's directors are jointly and severally liable to the corporation for any tax payments owed if the corporation winds up its affairs and distributes its assets to

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<sup>10</sup> R.C. 1705.48.

shareholders without paying all known tax obligations or making adequate provision for their payment.<sup>11</sup>

## **Nonprofit corporations**

### **Articles of incorporation**

The bill provides a process for amending a newly formed nonprofit corporation's articles of incorporation if initial directors are not named in the articles. Under the bill, at any time before a meeting of voting members is held and before the incorporators have elected directors, the incorporators may amend the articles by a majority vote at a meeting. Existing law only allows the voting members of a nonprofit corporation to amend its articles of incorporation, except that the directors may adopt certain technical amendments.<sup>12</sup>

### **Director qualifications, duties, and powers**

The bill requires a director of a nonprofit corporation to be a natural person who is at least 18 years old. Under continuing law, a director also must have any other qualifications that are stated in the corporation's articles or regulations.

Under the bill, a director is not a trustee with respect to the corporation or with respect to any property it holds or administers, including property that may be subject to restrictions imposed by the property's donor or transferor.

Finally, the bill permits a committee of directors of a corporation to create one or more subcommittees consisting of members of the committee and to delegate any or all of the committee's powers and authority to a subcommittee, unless otherwise provided in the corporation's articles or regulations or in the resolution of the directors creating the committee.<sup>13</sup>

### **Appointment of provisional director**

The bill allows the voting members of a nonprofit corporation, by a vote of at least  $\frac{1}{4}$  of the voting members, to request the court of common pleas of the county in which the corporation maintains its principal office to appoint a provisional director, so long as the corporation's articles or regulations expressly provide for such an

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<sup>11</sup> R.C. 1701.86. See also R.C. 1701.95, not in the bill.

<sup>12</sup> R.C. 1702.38.

<sup>13</sup> R.C. 1702.27, 1702.30(G), and 1702.33.



appointment. Under continuing law, a corporation's directors may make such a request by a vote of at least  $\frac{1}{4}$  of the directors.

Before appointing a provisional director, continuing law requires the court to hold a hearing, at which the complainants must establish that the continued operation of the corporation has been substantially impeded or made impossible because of irreconcilable differences among the existing directors. Under the bill, the complainants instead may establish that the appointment is necessary because there are no directors and the voting members are unable to elect any directors.<sup>14</sup>

### **Officer duties**

The bill provides that unless a nonprofit corporation's articles or regulations or a written agreement with an officer establish additional fiduciary duties, an officer's only fiduciary duties are to perform the officer's duties to the corporation in good faith, in a manner the officer reasonably believes to be in or not opposed to the corporation's best interests, and with the care that an ordinarily prudent person in a like position would use under similar circumstances. In performing the officer's duties, the officer is entitled to rely on information, opinions, reports, or statements, including financial statements and other financial data, that are prepared or presented by (1) one or more directors, officers, or employees of the corporation whom the officer reasonably believes are reliable and competent in the matters prepared or presented, or (2) counsel, public accountants, or other persons as to matters that the officer reasonably believes are within the person's professional or expert competence.

In any action brought against an officer, the officer must not be found to have violated the officer's duties under the bill unless it is proved by clear and convincing evidence that the officer has not acted in good faith, in a manner the officer reasonably believes to be in or not opposed to the best interests of the corporation, or with the care that an ordinarily prudent person in a like position would use under similar circumstances. An officer is not considered to be acting in good faith if the officer has knowledge concerning the matter in question that would cause reliance on information, opinions, reports, or statements that are prepared or presented by the corporation's directors, officers, employees, counsel, public accountants, or other persons to be unwarranted.

An officer is liable in damages for a violation of the officer's duties only if it is proved by clear and convincing evidence in a court of competent jurisdiction that the officer's act or omission was undertaken with deliberate intent to cause injury to the corporation or with reckless disregard for the best interests of the corporation.

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<sup>14</sup> R.C. 1702.521.





However, that provision does not apply if, and only to the extent that, at the time of the act or omission, the corporation's articles or regulations or a written agreement between the officer and the corporation state by specific reference to that provision that it does not apply to the officer.

An officer is not a trustee with respect to the corporation or with respect to any property it holds or administers, including property that may be subject to restrictions imposed by the property's donor or transferor.

The bill specifies that the provisions described above concerning officers' duties do not affect the duties of an officer who acts in any capacity other than that of an officer and do not affect an officer's contractual obligations to the corporation.<sup>15</sup>

### **Loans made to an officer, director, or member**

The bill makes changes to the law that prohibits a nonprofit corporation's directors from lending the corporation's money to an officer, director, or member of the corporation in a context other than in the usual conduct of the corporation's affairs or in accordance with the corporation's articles. Under continuing law, if the directors make a loan in violation of the statute, the directors who voted in favor of the loan are jointly and severally liable to the corporation for the amount of the loan, plus interest, until that amount is repaid. (That is, the corporation has the right to collect the full amount of the loan from one or more of the directors who approved the loan, unless and until the borrower repays it.) In general, however, a corporation's members, directors, and officers are not personally liable for the corporation's obligations.

Under the bill, a corporation's directors may make such a loan to a member of the corporation. And, the directors may make a loan to an officer or director, so long as a majority of the corporation's disinterested directors vote in favor of the loan and, taking into account the loan's terms and provisions and other relevant factors, determine that making the loan reasonably may be expected to benefit the corporation.

The bill changes the interest rate that directors must pay in cases in which they are jointly and severally liable for the amount of a loan made in violation of the statute. Currently, the rate is 6% per annum; under the bill, the interest rate is either the rate specified in the contract for the loan or, if no interest rate is specified in the contract, the rate set under the Ohio Uniform Commercial Code (UCC) for situations in which a party owes money and no interest rate is stipulated. Under the Ohio UCC, the annual rate is the rate determined by the Tax Commissioner for the coming calendar year by rounding the federal short-term rate for July of the previous calendar year to the nearest

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<sup>15</sup> R.C. 1702.341.



whole number percent and adding 3%. (The federal short-term rate is the rate of the average market yield on outstanding marketable obligations of the United States with remaining periods to maturity of three years or less, as determined by the Internal Revenue Service.) For calendar year 2019, the annual rate determined by the Tax Commissioner is 5%, consisting of a 2.38% federal short-term rate, rounded to 2%, plus 3%.

Lastly, the bill specifies that the fact that a loan is made in violation of that law does not affect the borrower's liability on the loan.<sup>16</sup>

## **Contractors**

Under the bill, in the absence of an express agreement to the contrary, a person providing goods or services to a domestic or foreign nonprofit corporation owes no duty to, incurs no liability or obligation to, and is not in privity with the corporation's members or creditors by reason of providing those goods or services. Similarly, in the absence of an express agreement to the contrary, a person providing goods or services to a member or group of members of a domestic or foreign corporation owes no duty to, incurs no liability or obligation to, and is not in privity with the corporation, any other members of the corporation, or the corporation's creditors by reason of providing those goods or services.

In other words, a person who has a contract with a nonprofit corporation is not automatically considered to have a contract with the corporation's members or creditors, and a person who has a contract with one or more members of a nonprofit corporation is not automatically considered to have a contract with the corporation or any of the corporation's other members or creditors.<sup>17</sup>

## **Certificate of good standing**

The bill authorizes the Secretary of State to issue a certificate of good standing to a nonprofit corporation. In the case of a domestic corporation, for a period of seven days after it is issued, a certificate of good standing is conclusive evidence that the corporation's authority has not been limited under the law governing corporations that have been voluntarily dissolved, had their articles canceled, or have expired, so long as

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<sup>16</sup> R.C. 1702.55. See also R.C. 1343.03 and 5703.47, not in the bill; Internal Revenue Service, *Index of Applicable Federal Rates (AFR) Rulings*, RR-2018-19, available at [apps.irs.gov/app/picklist/list/federalRates.html](https://apps.irs.gov/app/picklist/list/federalRates.html); and Ohio Department of Taxation, *Annual Certified Interest Rates*, available at [tax.ohio.gov/ohio\\_individual/individual/interest\\_rates.aspx](https://tax.ohio.gov/ohio_individual/individual/interest_rates.aspx), accessed November 29, 2018.

<sup>17</sup> R.C. 1702.531.



the certificate is not presented as evidence against the state. For a foreign corporation, a certificate of good standing is conclusive evidence for a period of seven days after it is issued that the corporation's license to transact business in Ohio has not expired or been canceled or surrendered.<sup>18</sup>

### **Stylistic changes**

The bill also makes several stylistic changes to the law governing nonprofit corporations – for example, changes that correct grammar and improve readability – that do not affect the operation of that law.<sup>19</sup>

### **Unincorporated nonprofit associations**

The bill allows a religious organization to be treated as an unincorporated nonprofit association under the Revised Code if its governing principles specify that it is an unincorporated nonprofit association for that purpose. Under current law, a religious organization that operates according to the rules, regulations, canons, discipline, or customs established by the organization, including any ministry, apostolate, committee, or group within that organization, is not considered an unincorporated nonprofit association.<sup>20</sup>

### **Business name notifications**

The bill also permits the Secretary of State to implement an electronic notification system that allows a person to request to be notified if a business name containing a specific word or words has been registered. Currently, that information is available by conducting a search on the Secretary of State's website.<sup>21</sup>

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## **HISTORY**

<b>ACTION</b>	<b>DATE</b>
Introduced	08-10-17
Reported, S. Gov't Oversight & Reform	11-28-18

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<sup>18</sup> R.C. 1702.53.

<sup>19</sup> R.C. 1702.30 and 1702.55.

<sup>20</sup> R.C. 1745.05.

<sup>21</sup> R.C. 111.35. See also Ohio Secretary of State, *Business Search by Name*, available at [www5.sos.state.oh.us/ords/f?p=100:1](http://www5.sos.state.oh.us/ords/f?p=100:1), accessed November 29, 2018.

