Gerald T. Noel, Jr. *Legislative Service Commission*

Am. Sub. H.B. 597

123rd General Assembly
(As Passed by the General Assembly)

Reps. **Womer Benjamin, Callender, Salerno, Mead, Cates**

Sens. **Latta, Fingerhut, Herington**

Effective date: *

ACT SUMMARY

- Modifies the Nonprofit Corporation Law (Chapter 1702. of the Revised Code), including changes relative to directors; adoption and content of regulations; membership; notice requirements; voting; actions without a meeting; sales or other dispositions of assets by "mutual benefit" and "public benefit" corporations; mergers and consolidations; dissolution and winding up of affairs; and definitions.

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* *The Legislative Service Commission had not received formal notification of the effective date at the time this analysis was prepared.*

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CONTENT AND OPERATION

Directors

References to "trustees"

Under prior law, the term "trustees" was defined as "the persons vested with the authority to conduct the affairs of the corporation irrespective of the name by which they are designated." The act replaces that term with the term "directors," states that the term "directors" means the persons vested with the authority to conduct the affairs of the corporation irrespective of the name, *such as trustees*, by which they are designated, and makes conforming changes in every other provision of the Nonprofit Corporation Law that makes reference to "trustees."[1] (R.C. 1702.01(K).)

Required number

Prior law generally required a minimum number of three trustees. The act permits fewer than three if there are only one or two members of the nonprofit corporation; however, the number of directors cannot be less than the number of members. (R.C. 1702.27(A)(1).)

Prior law also required that executive or other committees of trustees consist of at least three trustees. The act instead requires that those committees consist of "one or more" directors. (R.C. 1702.33(A).)

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[1] *See sections 1702.01, 1702.02, 1702.04, 1702.06, 1702.10, 1702.11, 1702.12, 1702.14, 1702.15, 1702.16, 1702.17, 1702.19, 1702.21, 1702.23, 1702.25, 1702.26, 1702.27, 1702.28, 1702.29, 1702.30, 1702.301, 1702.31, 1702.32, 1702.33, 1702.34, 1702.36, 1702.38, 1702.39, 1702.41, 1702.42, 1702.44, 1702.47, 1702.48, 1702.49, 1702.50, 1702.51, 1702.52, 1702.521, 1702.53, 1702.54, 1702.55, and 1702.59.*

Naming of directors in the articles

Under prior law, the articles of incorporation filed with the Secretary of State in order to form a nonprofit corporation were required to include the names and addresses of at least three natural persons who were to be initial trustees. The act removes that requirement and, instead, *permits* the articles to set forth "the names of individuals who are to serve as the initial directors." (R.C. 1702.04(A) and (B)(1).)

Adoption of regulations; content

The act provides that if the incorporators fail to adopt *within 90 days after the date of incorporation* any regulations for the government of the nonprofit corporation, the conduct of its affairs, and the management of its property, regulations may be adopted at a meeting of voting members by affirmative vote of a majority of the voting members (R.C. 1702.10).

Prior existing and continuing law specifies what may be included in the regulations, such as the appointment of executive or other committees of trustees or members. With respect to that information, the act adds "and the method by which they take action." (R.C. 1702.11(A)(8).)

Membership in a nonprofit corporation

Nonprofit corporations previously were required to keep a *membership book* containing the name and address of each member, the date of admission to membership, the class to which the member belongs, and the fact and date of termination of membership. The act instead requires that such information be maintained in *a record of its members.* (R.C. 1702.13(A) and (C) and 1702.15.)

Whenever the number of members of a nonprofit corporation that, under the law, articles, or regulations, must have a specified number, was reduced below that number, the corporation was permitted to carry on its duties and the continuing members, *if two or more*, were authorized to fill all vacancies. The act removes the phrase "*if two or more*." (R.C. 1702.13(F).)

The act also provides that:

--A limited liability company may become a member of a nonprofit corporation *if* permitted by the corporation's articles or regulations (R.C. 1702.13(E));

--Unless otherwise provided in the articles or regulations, all members have the same membership rights and privileges (R.C. 1702.13(G)).

Notice requirements

The act mandates that any notice required by the Nonprofit Corporation Law be in writing and be delivered personally or sent by telegram, telecopy, or electronic mail transmission or by U.S. mail, express mail, or courier service, with postage or fees prepaid unless another form of notice is required by the articles, regulations, or bylaws, or by applicable law (R.C. 1702.02(A)).

The act specifies that a written notice or report delivered as part of a newsletter, magazine, or other publication regularly sent to members constitutes a written notice or report *if* addressed or delivered to the member's address shown in the corporation's current list of members, or, in the case of members who are residents of the same household and have the same address in the corporation's current list of members, *if* addressed or delivered to one of such members at the address appearing on the corporation's current list of members (R.C. 1702.02(C)).

For purposes of computing the period of time for the giving of notice, the act provides (R.C. 1702.02(B)):

(1) If notice is given by personal delivery or transmitted by telegram, telecopy, or electronic mail, the notice is deemed to have been given when delivered or transmitted.

(2) If notice is sent by U.S. mail, express mail, or courier service, the notice is deemed to have been given when deposited in the mail or with the courier service.

Under prior law, unless the articles or regulations provided otherwise, written notice of meetings of voting members was required to be given *either by personal delivery or by mail*. The act requires that notice of meetings must be given in the manner as described above. (R.C. 1702.18.)

Under prior law, with respect to meetings of a corporation's members to authorize the sale or other disposition of assets, to approve an agreement of merger or consolidation, or to adopt a resolution of dissolution, notice of the meeting was to be given to *all* members--*whether or not* entitled to vote at the meeting. Under the act, notice is limited to only those members entitled to vote. (R.C. 1702.39(A), 1702.42(A), and 1702.47(D).)

Voting

By mail or proxy

The act modifies certain provisions of the Nonprofit Corporation Law that address the voting procedures of a corporation, to recognize that voting "by mail

or by proxy" *may* be another manner of conducting votes (R.C. 1702.08(A), 1702.11(A)(4) and (B), 1702.27(A)(2), 1702.38(C), 1702.42(B), 1702.47(D), and 1702.58(E)). Voting *by proxy* only (not by mail) may be permitted at a meeting of voting members to authorize the sale or other disposition of all or substantially all of the assets of a mutual benefit corporation (R.C. 1702.39(A)).

Prior law provided that unless the articles or regulations provided otherwise, the voting members present at any meeting of voting members constituted a *quorum* for the meeting. The act provides that unless the articles or regulations provide otherwise, the voting members present *in person or, if permitted, by mail or by proxy*, at any meeting of voting members constitute a *quorum* for the meeting. (R.C. 1702.22(A).)

By certain corporate members

Under the act, when any domestic or foreign limited liability company holds membership in a domestic or foreign nonprofit corporation, any manager or member of the limited liability company holding that membership is conclusively deemed to have authority to vote on behalf of that limited liability company and to appoint proxies and execute written consents, waivers, and releases on its behalf, *unless*--before a vote is taken or a consent, waiver, or release is acted upon--it appears by a certified copy of the articles of organization, operating agreement, or a resolution of the managers or the members of that limited liability company that such authority does not exist or is vested in some other representative or person. (R.C. 1702.21(B).)

With respect to voting by corporate members in general, prior law stated that a person exercising authority as a specified officer was prima-facie deemed to be duly elected, qualified, and acting as that officer. The act instead specifies that a person exercising authority as an officer, *representative*, or *other person entitled to vote and acting in that capacity* is prima-facie deemed to be duly elected, qualified, and acting as that officer, representative, or other person. (R.C. 1702.21(C).)

Actions without a meeting

Under continuing law, unless the articles or regulations prohibit otherwise, an action that can be taken at a meeting of the members or of the trustees can also be taken *without* a meeting, if certain requirements are met. The act expands this provision to include incorporators; consequently, an action that can be taken at a meeting of the incorporators can also be taken *without* a meeting, if those same requirements are met. (R.C. 1702.25.)

Sale or other disposition of assets: "mutual benefit" and "public benefit" corporations

Prior law generally permitted a lease, sale, exchange, transfer, or other disposition of any assets of a nonprofit corporation, without court authorization, upon terms that were authorized by the trustees. However, a disposition of *all or substantially all* of the assets could be made only if authorized by the voting members. (R.C. 1702.39(A).)

The act limits the application of this provision to *mutual benefit corporations.* A "**mutual benefit corporation**" is defined by the act as any corporation organized under the Nonprofit Corporation Law *other than* a public benefit corporation. A "**public benefit corporation**" is defined as a corporation that (1) is recognized as exempt from federal income taxation under section 501(c)(3) of the Internal Revenue Code or is organized for a public or charitable purpose and (2) upon dissolution, must distribute its assets to a public benefit corporation, the United States, a state or any political subdivision of a state, or a person that is recognized as exempt from federal income taxation under section 501(c)(3) of the Internal Revenue Code. A "**public benefit corporation**" does not include a nonprofit corporation that is organized by one or more municipal corporations to further a public purpose that is not a charitable purpose. (R.C. 1702.01(O) and (P) and 1702.39(A).)

The act prohibits a *public benefit corporation* from disposing of its assets with value equal to more than 50% of the fair market value of the net tangible and intangible assets, including goodwill, of the corporation over a period of 36 consecutive months in a transaction or series of transactions, including the lease, sale, exchange, transfer, or other disposition of those assets, that are outside the ordinary course of its business or that are not in accordance with the purposes for which the corporation was organized, as set forth in its articles or the terms of any trust on which the corporation holds those assets, *unless* one or more of the following apply (R.C. 1702.39(B)(1)):

(1) The transaction has received the prior approval of the court of common pleas of the Ohio county in which the principal office of the corporation is located, in a proceeding of which the Attorney General's Charitable Law Section has been given written notice by certified mail within three days of the initiation of the proceeding, and in which proceeding the Attorney General may intervene as of right;

(2) The corporation has provided written notice of the proposed transaction, including a copy or summary of the terms of the transaction, at least 20 days before consummation of the lease, sale, exchange, transfer, or other disposition of the assets, to the Attorney General's Charitable Law Section and to

the members of the corporation, *and* the proposed transaction has been approved by the voting members present in person or, if permitted, by proxy, at a meeting held for that purpose, by the affirmative vote of a majority of the voting members present if a quorum is present (or, if the articles or regulations provide or permit, by the affirmative vote of a greater or lesser proportion or number of the voting members) and if the articles or regulations require, by the affirmative vote of the voting members of any particular class.

(3) The transaction is in accordance with the purpose or purposes for which the corporation was organized, as set forth in its articles or the terms of any trust on which the corporation holds the assets, and the lessee, purchaser, or transferee of the assets is also a public benefit corporation or a foreign corporation that would qualify under the Revised Code as a public benefit corporation.

The Attorney General may require, pursuant to the enforcement provisions of the Charitable Trusts Law, the production of the documents necessary for review of a proposed transaction, and may retain, at the expense of the public benefit corporation, one or more experts, including an investment banker, actuary, appraiser, certified public accountant, or other expert, that the Attorney General considers reasonably necessary to provide assistance in reviewing a proposed transaction (R.C. 1702.39(B)(2)).

The Attorney General may institute a civil action, in the court of common pleas of the Ohio county in which the principal office of the corporation is located or in the Franklin County Court of Common Pleas, to enforce these requirements against a public benefit corporation. In addition to any civil remedies that may exist under common law or the Revised Code, a court may rescind the transaction or grant injunctive relief or impose any combination of these remedies. (R.C. 1702.39(C).)

Lastly, prior law authorized the trustees of a nonprofit corporation to abandon a proposed lease, sale, exchange, transfer, or other disposition of *all or substantially all* of the assets of the corporation, if the trustees had been granted such power. Any action to set aside a lease, sale, exchange, transfer, or other conveyance of *all or substantially all* of the assets of a corporation, on the ground that any applicable provision of the Revised Code was not complied with, was required to be brought within 90 days after the transaction. The act expands the application of these provisions by eliminating the phrase "*all or substantially all*," and extends the period within which to bring an action to *one year* after the transaction. The act also applies these provisions to a proposed disposition of the assets of a public benefit corporation. (R.C. 1702.39(D) and (E).)

Mergers and consolidations

Nonprofit corporations were permitted under prior law to merge into or consolidate with other nonprofit corporations. That law also allowed one or more domestic nonprofit corporations to merge or consolidate with one or more foreign nonprofit corporations. A charitable corporation, however, could only merge into or consolidate with another charitable corporation. (R.C. 1702.41(A) and 1702.45(A).)

The act removes this restriction on charitable corporations, and also removes the requirement in prior law that the agreement of merger or consolidation set forth "the purpose or purposes of the surviving or new corporation which, in case the constituent corporations are charitable corporations, must be such that the surviving or new corporation will also be a charitable corporation" (R.C. 1702.41(A)(1) and (B)(4) and 1702.45(A)). It provides that a *public benefit corporation* (see definition above), whether domestic or foreign, may merge or consolidate, without prior approval of the court of common pleas of the Ohio county in which the corporation's principal office is located, in a proceeding of which the Attorney General's Charitable Law Section has been given written notice by certified mail within three days of the initiation of the proceeding, and in which proceeding the Attorney General may intervene as of right, only with any of the following (R.C. 1702.41(B)(1) and 1702.45(A)):

(1) Another public benefit corporation;

(2) A foreign corporation that would qualify under the Revised Code as a public benefit corporation;

(3) A *mutual benefit corporation* (see definition above) or a *business corporation* (see "***Definitions***," below), provided that the public benefit corporation is the surviving corporation in the case of a merger and continues to be a public benefit corporation or that a public benefit corporation is the new corporation in the case of a consolidation.

(4) A business corporation or mutual benefit corporation, if all of the following apply:

(a) On or prior to the effective date of the merger or consolidation, assets with a value equal to the greater of the fair market value of the net tangible and intangible assets, including goodwill, of the public benefit corporation or the fair market value of the public benefit corporation if it is to be operated as a business concern, are transferred or conveyed to one or more persons that would have received its assets had it voluntarily dissolved.

(b) It returns, transfers, or conveys any assets held by it upon a condition requiring return, transfer, or conveyance, which condition occurs by reason of the merger or consolidation, in accordance with that condition.

(c) The merger or consolidation is approved by a majority of directors of the public benefit corporation who will not receive any financial or other benefit, directly or indirectly, as a result of the merger or consolidation or by agreement, and who are not and will not as a result of the merger or consolidation become members of, shareholders in, or officers, employees, agents, or consultants of the surviving or new business corporation or mutual benefit corporation.

With respect to a merger or consolidation described in (4) above, written notice, including a copy of the proposed plan of merger or consolidation, must be delivered to the Attorney General's Charitable Law Section at least 20 days before consummation of the merger or consolidation. The Attorney General's Charitable Law Section may review a proposed merger or consolidation. The Attorney General may require, pursuant to the enforcement provisions of the Charitable Trusts Law, the production of the documents necessary for review of that proposed merger or consolidation, and may retain, at the expense of the public benefit corporation, one or more experts, including an investment banker, actuary, appraiser, certified public accountant, or other expert, that the Attorney General considers reasonably necessary to provide assistance in reviewing the proposed merger or consolidation. The Attorney General may extend the date of any merger or consolidation under this provision for a period not to exceed 60 days and must provide notice of that extension to the public benefit corporation. The notice must set forth the reasons necessitating the extension. (R.C. 1702.41(B)(2).)

No member or director of a public benefit corporation in that person's capacity as a member or director may receive or keep anything as a result of a merger or consolidation (other than membership or directorship in the surviving or new public benefit corporation), without the prior written consent of the Attorney General or of the court of common pleas of the Ohio county in which the principal office of the corporation is located, in a proceeding in which the Attorney General's Charitable Law Section has been given written notice by certified mail within three days of the initiation of the proceeding, and in which proceeding the Attorney General may intervene as of right. The court must approve the transaction if it is in the public interest. (R.C. 1702.41(B)(3).)

The Attorney General may institute a civil action to enforce all of the requirements described above with respect to a merger or consolidation of a public benefit corporation, in the court of common pleas of the Ohio county in which the principal office of the corporation is located or in the Franklin County Court of Common Pleas. In addition to any civil remedies that may exist under common

law or the Revised Code, a court may rescind the transaction or grant injunctive relief or impose any combination of these remedies. (R.C. 1702.41(B)(4).)

Lastly, the act provides that a nonprofit corporation may be the surviving or new entity in a merger or consolidation with one or more business corporations, or a nonprofit corporation may merge or consolidate into one or more business corporations with a business corporation, a mutual benefit corporation, or a foreign corporation as the surviving or new entity, if the nonprofit corporation complies with the applicable provisions of the Nonprofit Corporation Law pertaining to the vote by the members on the merger or consolidation and the filing, effective date, and fee for the certificate of merger or consolidation, and the business corporation complies with the applicable provisions of the General Corporation Law pertaining to merger or consolidation with a noncorporate entity or merger or consolidation resulting in a noncorporate entity. (R.C. 1702.41(C).)

Dissolution; winding up

Prior law set forth procedures and other requirements for winding up the affairs of a nonprofit corporation when it was dissolved voluntarily, when its articles were canceled, or when the period of existence specified in its articles had expired. Some of these procedures determined the manner in which the remainder of the assets of the corporation were to be distributed, depending on whether it was a charitable corporation or other than a charitable corporation. (R.C. 1702.49(A) and (D)(2) and (3).)

Under the act, the distribution procedures applicable to charitable corporations apply instead to *public benefit corporations* (see definition above), and the procedures applicable to corporations other than charitable corporations apply instead to *mutual benefit corporations* (see definition above). The act additionally provides that, if no plan of distribution is adopted by the voting members or directors of a mutual benefit corporation, the remaining assets must be applied as directed (1) by the court of common pleas of the Ohio county in which the principal office of the corporation is located, in an action brought for that purpose by the corporation or any or all of its directors, (2) by the Attorney General in a court of competent jurisdiction, or (3) in an action brought as provided in current law for the purpose of winding up the affairs of the corporation under the supervision of the court. (R.C. 1702.49(D)(2) and (3).)

Continuing law's dissolution provisions do not impair the jurisdiction of courts of competent jurisdiction to enforce the duties of a charitable corporation regarding the application of its assets towards its *charitable purposes* or impair the state's power to require the assets to be applied towards its *charitable purposes*. The act adds *public purposes* regarding the duties of a *public benefit corporation*

(instead of a charitable corporation) in the application of its assets. (R.C. 1702.49(E).)

Applicability of Chapter 1702. to certain corporations

Under prior law, a corporation created before September 1, 1851, that did not take specified actions to make it subject to the laws passed since that date, could accept the Nonprofit Corporation Law by adoption of a resolution to that effect. The resolution had to be certified by the president or a vice-president and the secretary or an assistant secretary, and filed with the Secretary of State. Under the act, *any authorized officer* of the corporation can certify the resolution. (R.C. 1702.58(E).)

Deletion of "charitable corporation"

"**Charitable corporation**" was defined in the Nonprofit Corporation Law as a corporation organized and operated exclusively for religious, charitable, scientific, testing for public safety, literary, or educational purposes, exclusively for the prevention of cruelty to children or animals, or exclusively for a home for the aged (R.C. 1702.01(D)). The act deletes this definition of and references to "charitable corporation" in the Nonprofit Corporation Law and replaces "charitable corporation" with "corporation" or "public benefit corporation" in that Law (R.C. 1702.01(D), 1702.11(A)(4), 1702.15, and 1702.38(A)).

Definitions

"**Nonprofit corporation**" was defined as "a corporation that is not formed for the pecuniary gain or profit of . . . its members, trustees, officers, or other private persons . . . ." The act modifies this definition by (1) expressly stating that the corporation may be domestic or foreign, and (2) requiring that the corporation be *formed otherwise than* for pecuniary gain or profit, rather than *not formed* for such gain or profit. (R.C. 1702.01(C).)

Under prior law, the definition of "**articles**" included "agreements of merger or consolidation." Under the act, agreements of merger or consolidation are included "if and only to the extent that articles of incorporation are adopted or amended in the agreements." (R.C. 1702.01(E).)

The act modifies the definition of "**volunteer**." Under prior law, a "volunteer" was a trustee, officer, or agent of a *nonprofit* corporation, or another person associated with a *nonprofit* corporation, who satisfies specified requirements. The act removes the references to "nonprofit." (R.C. 1702.01(M)(1).)

The act defines "**business corporation**" as any *entity*, as defined in the General Corporation Law (see below), other than a public benefit corporation or a mutual benefit corporation, that is organized under the General Corporation Law, and generally replaces "for profit corporation" or "corporation for profit" with "business corporation" in the Nonprofit Corporation Law (R.C. 1702.01(A), (I), and (N), 1702.05(A)(1) and (D), 1702.06(A), 1702.12(E)(1), (2), (7), and (9), (F)(3), and (G), 1702.13(E), 1702.21(A), 1702.30(G), 1702.39(A), and 1702.58(G)).

The General Corporation Law defined "**entity**" as a for profit corporation existing under Ohio or other state laws or any of the following organizations existing under the laws of Ohio, the United States, or any other state: a business trust or association, a real estate investment trust, a common law trust, an unincorporated business or for profit organization, including a general or limited partnership, or a limited liability company (R.C. 1701.01(EE)). The act modifies this definition of "entity" in the General Corporation Law by adding "nonprofit corporation" to the list of organizations (R.C. 1701.01(EE)(2)(f)).

Miscellaneous provisions

The act provides that any trustee of a nonprofit corporation that was organized prior to the effective date of the act is considered a director of the nonprofit corporation and has the rights, privileges, and responsibilities of a director of a nonprofit corporation under the Nonprofit Corporation Law, and a nonprofit corporation that was organized prior to the effective date of the act is not required to take any action to convey these rights, privileges, and responsibilities of directors to trustees of the nonprofit corporation (Section 3).

The act states that the General Assembly declares that the General Assembly, by enacting any provision of this act, does not intend to repeal any provision of the laws pertaining to the transfers of assets of nonprofit health care facilities, the review of those transfers by the Attorney General, and the applicable penalties (Section 4).

Technical changes

The act also makes miscellaneous technical changes in other provisions of the Nonprofit Corporation Law. (R.C. 1702.03 and 1702.07.)

HISTORY

ACTION	DATE	JOURNAL ENTRY	
Introduced	03-07-00	p.	1637
Reported, H. Civil & Commercial Law	11-15-00	p.	2364
Passed House (90-0)	11-16-00	pp.	2385-2387
Reported, S. Judiciary	12-06-00	p.	2306
Passed Senate (33-0)	12-06-00	pp.	2340-2342

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