S T A T E  O F  N E W  Y O R K

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2009-2010 Regular Sessions

I N  S E N A T E

March 27, 2009

Introduced by Sen. PERKINS -- (at request of the Department of State) -- read twice and ordered printed, and when printed to be committed to the Committee on Corporations, Authorities and Commissions

AN ACT to amend the not-for-profit corporation law, in relation to the classification of type C not-for-profit corporations

THE PEOPLE OF THE STATE OF NEW YORK, REPRESENTED IN SENATE AND ASSEMBLY, DO ENACT AS FOLLOWS:

Section 1. Subparagraphs 7, 8 and 9 of paragraph (a) of section 112 of the not-for-profit corporation law, subparagraphs 7 and 9 as amended by chapter 1058 of the laws of 1971, are amended to read as follows:

(7) To enforce any right given under this chapter to members, a director or an officer of a Type B [or Type C] corporation. The attorney-general shall have the same status as such members, director or officer.

(8) [To compel the directors and officers, or any of them, of a Type B or Type C corporation which has been dissolved under section 1011 (Dissolution for failure to file certificate of type of Not-for-Profit Corporation Law under section 113) to account for the assets of the dissolved corporation.

(9)] Upon application, ex parte, for an order to the supreme court at a special term held within the judicial district where the office of the corporation is located, and if the court so orders, to enforce any right given under this chapter to members, a director or an officer of a Type A corporation. For such purpose, the attorney-general shall have the same status as such members, director or officer.

S 2. Subparagraph 4 of paragraph (a) of section 113 of the not-for-profit corporation law, as amended by chapter 415 of the laws of 1974, is amended to read as follows:

(4) That under section 201 (Purposes) it is a Type ..... (insert A, B[, C] or D) not-for-profit corporation as defined in this chapter.

EXPLANATION--Matter in ITALICS (underscored) is new; matter in brackets [ ] is old law to be omitted.

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S 3. Section 114 of the not-for-profit corporation law, as added by chapter 847 of the laws of 1970, is amended to read as follows:

S 114. Visitation of supreme court.

Type B [and Type C] corporations, whether formed under general or special laws, with their books and vouchers, shall be subject to the visitation and inspection of a justice of the supreme court, or of any person appointed by the court for that purpose. If it appears by the verified petition of a member or creditor of any such corporation, that it, or its directors, officers or agents, have misappropriated any of the funds or property of the corporation, or diverted them from the purpose of its incorporation, or that the corporation has acquired property in excess of the amount which it is authorized by law to hold, or has engaged in any business other than that stated in its certificate of incorporation, the court may order that notice of at least eight days, with a copy of the petition, be served on the corporation and the persons charged with misconduct, requiring them to show cause at a time and place specified, why they should not be required to make and file an inventory and account of the property, effects and liabilities of such corporation with a detailed statement of its transactions during the twelve months next preceding the granting of such order. On the hearing of such application, the court may make an order requiring such inventory, account and statement to be filed, and proceed to take and state an account of the property and liabilities of the corporation, or may appoint a referee for that purpose. When such account is taken and stated, after hearing all the parties to the application, the court may enter a final order determining the amount of property so held by the corporation, its annual income, whether any of the property or funds of the corporation have been misappropriated or diverted to any other purpose than that for which such corporation was incorporated, and whether such corporation has been engaged in any activity not covered by its certificate of incorporation. An appeal may be taken from the order by any party aggrieved to the appellate division of the supreme court, and to the court of appeals, as in a civil action. No corporation shall be required to make and file more than one inventory and account in any one year, nor to make a second account and inventory, while proceedings are pending for the statement of an account under this section.

S 4. Paragraphs (b) and (c) of section 201 of the not-for-profit corporation law, paragraph (b) as amended by chapter 847 of the laws of 1970 and paragraph (c) as amended by chapter 1058 of the laws of 1971, are amended and a new paragraph (d) is added to read as follows:

(b) A corporation, of a type and for a purpose or purposes as follows, may be formed under this chapter, provided consents required under any other statute of this state have been obtained:

Type A - A not-for-profit corporation of this type may be formed for any lawful non-business purpose or purposes including, but not limited to, any one or more of the following non-pecuniary purposes: civic, patriotic, political, social, fraternal, athletic, agricultural, horticultural, animal husbandry, and for a professional, commercial, industrial, trade or service association.

Type B - A not-for-profit corporation of this type may be formed for any one or more of the following non-business purposes: charitable, educational, religious, scientific, literary, cultural or for the prevention of cruelty to children or animals. [Type C - A] ADDITIONALLY, A not-for-profit corporation of this type may be formed for any lawful business purpose to achieve a lawful public or quasi-public objective.

Type D - A not-for-profit corporation of this type may be formed under this chapter when such formation is authorized by any other corporate law of this state for any business or non-business, or pecuniary or non-pecuniary, purpose or purposes specified by such other law, whether such purpose or purposes are also within types A[,] OR B[, C] above or otherwise.

(c) If a corporation is formed for purposes which are within both type A and type B above, it is a type B corporation. [If a corporation has among its purposes any purpose which is within type C, such corporation is a type C corporation.] A type D corporation is subject to all provisions of this chapter which are applicable to a type B corporation under this chapter unless provided to the contrary in, and subject to the contrary provisions of, the other corporate law authorizing formation under this chapter of the type D corporation.

(D) NOTWITHSTANDING THE PROVISIONS OF ANY LAW TO THE CONTRARY OR ANY CORPORATION'S CURRENT DESIGNATION AS A TYPE C CORPORATION, ANY SUCH CORPORATION DESIGNATED AS TYPE C SHALL BE A TYPE B CORPORATION SUBJECT TO ALL PROVISIONS OF THIS CHAPTER WHICH ARE APPLICABLE TO A TYPE B CORPORATION UNDER THIS CHAPTER.

S 5. Subparagraphs 2 and 4 of paragraph (a) of section 402 of the not-for-profit corporation law, subparagraph 2 as amended by chapter 847 of the laws of 1970 and subparagraph 4 as amended by chapter 679 of the laws of 1985, are amended to read as follows:

(2) That the corporation is a corporation as defined in subparagraph (a) (5) of section 102 (Definitions); the purpose or purposes for which it is formed and the type of corporation it shall be under section 201 (Purposes); and in the case of a Type [C] B corporation FORMED FOR ANY LAWFUL BUSINESS PURPOSE OR PURPOSES, the lawful public or quasi-public objective which each business purpose will achieve.

(4) In the case of a Type A[,] OR Type B[, or Type C] corporation, the names and addresses of the initial directors. In the case of a Type D corporation, the names and addresses of the initial directors, if any, may but need not be set forth.

S 6. Subparagraph 3 of paragraph (a) of section 510 of the not-for-profit corporation law, as amended by chapter 847 of the laws of 1970, is amended to read as follows:

(3) If the corporation is, or would be if formed under this chapter, classified as a Type B [or Type C] corporation under section 201, (Purposes) such sale, lease, exchange or other disposition shall in addition require leave of the supreme court in the judicial district or of the county court of the county in which the corporation has its office or principal place of carrying out the purposes for which it was formed.

S 7. Subparagraph (ii) of paragraph (a) of section 804 of the not-for-profit corporation law, as amended by chapter 139 of the laws of 1993, is amended to read as follows:

(ii) Every certificate of amendment of a corporation classified as type B [or type C] under section 201 (Purposes) which seeks to change or eliminate a purpose or power enumerated in the corporation's certificate of incorporation, or to add a power or purpose not enumerated therein, shall have endorsed thereon or annexed thereto the approval of a justice of the supreme court of the judicial district in which the office of the corporation is located. Ten days' written notice of the application for such approval shall be given to the attorney-general.

S 8. Paragraph (a) of section 907 of the not-for-profit corporation law is amended to read as follows:

(a) Where any constituent corporation or the consolidated corporation is, or would be if formed under this chapter, a Type B [or a Type C] corporation under section 201 (Purposes) of this chapter, no certificate shall be filed pursuant to section 904 (Certificate of merger or consolidation; contents) or section 906 (Merger or consolidation of domestic and foreign corporations) until an order approving the plan of merger or consolidation and authorizing the filing of the certificate has been made by the supreme court, as provided in this section. A certified copy of such order shall be annexed to the certificate of merger or consolidation. Application for the order may be made in the judicial district in which the principal office of the surviving or consolidated corporation is to be located, or in which the office of one of the domestic constituent corporations is located. The application shall be made by all the constituent corporations jointly and shall set forth by affidavit (1) the plan of merger or consolidation, (2) the approval required by section 903 (Approval of plan) or paragraph (b) of section 906 (Merger or consolidation of domestic and foreign corporations) for each constituent corporation, (3) the objects and purposes of each such corporation to be promoted by the consolidation, (4) a statement of all property, and the manner in which it is held, and of all liabilities and of the amount and sources of the annual income of each such corporation, (5) whether any votes against adoption of the resolution approving the plan of merger or consolidation were cast at the meeting at which the resolution as adopted by each constituent corporation, and (6) facts showing that the consolidation is authorized by the laws of the jurisdictions under which each of the constituent corporations is incorporated.

S 9. Paragraphs (a) and (f) of section 908 of the not-for-profit corporation law are amended to read as follows:

(a) One or more domestic or foreign corporations which is, or would be if formed under this chapter, a type A or type [C] B corporation under section 201 (Purposes) may be merged or consolidated into a domestic or foreign corporation which is, or would be if formed under the laws of this state, a corporation formed under the business corporation law of this state if such merger or consolidation is not contrary to the law of the state of incorporation of any constituent corporation. With respect to such merger or consolidation, any reference in paragraph (b) of section 901 [of this article] (POWER OF MERGER OR CONSOLIDATION) or paragraph (b) of section 901 of the business corporation law to a corporation shall, unless the context otherwise requires, include both domestic and foreign corporations.

(f) Where any constituent corporation is, or would be if formed under this chapter, a Type [C] B corporation under section 201 (Purposes), no certificate shall be filed pursuant to this section until an order approving the plan of merger or consolidation and authorizing the filing of the certificate has been made by the supreme court, as provided in section 907 (Approval by the supreme court).

S 10. Paragraphs (b) and (c) of section 1001 of the not-for-profit corporation law, as amended by chapter 434 of the laws of 2006, are amended to read as follows:

(b) If the corporation is a Type B[, C] or D corporation and has no assets to distribute and no liabilities at the time of dissolution, the plan of dissolution shall include a statement to that effect.

(c) If the corporation is a Type B[, C] or D corporation and has no assets to distribute, other than a reserve not to exceed twenty-five thousand dollars for the purpose of paying ordinary and necessary

expenses of winding up its affairs including attorney and accountant fees, and liabilities not in excess of ten thousand dollars at the time of adoption of the plan of dissolution, the plan of dissolution shall include a statement to that effect.

S 11. Paragraphs (a) and (d) of section 1002 of the not-for-profit corporation law, as amended by chapter 434 of the laws of 2006, are amended to read as follows:

(a) Upon adopting a plan of dissolution and distribution of assets, the board shall submit it to a vote of the members, if any, and such plan shall be approved at a meeting of members by two-thirds vote as provided in paragraph (c) of section 613 (Vote of members); provided, however, that if the corporation is a Type B[, C] or D corporation, other than a corporation incorporated pursuant to article 15 (Public cemetery corporations), and has no assets to distribute, other than a reserve not to exceed twenty-five thousand dollars for the purpose of paying ordinary and necessary expenses of winding up its affairs including attorney and accountant fees, and liabilities not in excess of ten thousand dollars at the time of adoption of the plan of dissolution, the vote required by the corporation's board of directors for adoption of the plan of dissolution of such a corporation or by the corporation's members for the authorization thereof shall be:

(1) In the case of a vote by the board of directors: (i) the number of directors required under the certificate of incorporation, by-laws, this chapter and any other applicable law; or

(ii) if the number of directors actually holding office as such at the time of the vote to adopt the plan is less than the number required to constitute a quorum of directors under the certificate of incorporation, the by-laws, this chapter or any other applicable law, the remaining directors unanimously;

(2) In the case of a vote by the members, (i) the number of members required under the certificate of incorporation, by-laws, this chapter and any other applicable law; or (ii) by the vote of members authorized by an order of the supreme court pursuant to section 608 of this chapter permitting the corporation to dispense with the applicable quorum requirement.

Notice of a special or regular meeting of the board of directors or of the members entitled to vote on adoption and authorization or approval of the plan of dissolution shall be sent to all the directors and members of record entitled to vote. Unless otherwise directed by order of the supreme court pursuant to section 608 [of this chapter] (QUORUM AT MEETING OF MEMBERS), the notice shall be sent by certified mail, return receipt requested, to the last known address of record of each director and member not fewer than thirty, and not more than sixty days before the date of each meeting provided, however, that if the last known address of record of any director or member is not within the United States, the notice to such director shall be sent by any other reasonable means.

(d) The plan of dissolution and distribution of assets shall have annexed thereto the approval of a justice of the supreme court in the judicial district in which the office of the corporation is located in the case of a Type B[, C] or D corporation, and in the case of any other corporation which holds assets at the time of dissolution legally required to be used for a particular purpose, except that no such approval shall be required with respect to the plan of dissolution of a corporation, other than a corporation incorporated pursuant to article 15 (Public cemetery corporations), which has no assets to distribute at

the time of dissolution, other than a reserve not to exceed twenty-five thousand dollars for the purpose of paying ordinary and necessary expenses of winding up its affairs including attorney and accountant fees, and liabilities not in excess of ten thousand dollars, and which has complied with the requirements of section 1001 (Plan of dissolution and distribution of assets) and this section applicable to such a corporation. Application to the supreme court for an order for such approval shall be by verified petition, with the plan of dissolution and distribution of assets and certified copies of the consents prescribed by this section annexed thereto, and upon ten days written notice to the attorney general accompanied by copies of such petition, plan and consents. In such case where approval of a justice of the supreme court is not required for a Type B[, C] or D corporation, a copy of such plan certified under penalties of perjury shall be filed with the attorney general within ten days after its authorization.

S 12. Subparagraph 2 of paragraph (b) of section 1003 of the not-for-profit corporation law, as amended by chapter 434 of the laws of 2006, is amended to read as follows:

(2) By the attorney general in the case of a Type B[, C] or D corporation, or any other corporation that holds assets at the time of dissolution legally required to be used for a particular purpose.

S 13. Subparagraph 6 of paragraph (a) of section 1012 of the not-for-profit corporation law, as amended by chapter 726 of the laws of 2005, is amended to read as follows:

(6) That, under section 201 (Purposes), it is a Type ..... (Insert A, B[, C] or D) not-for-profit corporation.

S 14. Subparagraph 4 of paragraph (a) of section 1304 of the not-for-profit corporation law, as amended by chapter 847 of the laws of 1970 and as renumbered by chapter 590 of the laws of 1982, is amended to read as follows:

(4) That the corporation is a foreign corporation as defined in subparagraph (a) (7) of section 102 (Definitions); the type of corporation it shall be under section 201 (Purposes); a statement of its purposes to be pursued in this state and of the activities which it proposes to conduct in this state; a statement that it is authorized to conduct those activities in the jurisdiction of its incorporation; and in the case of a Type [C] B corporation THAT WILL PURSUE ANY LAWFUL BUSINESS PURPOSE OR PURPOSES IN THIS STATE, the lawful public or quasi-public objective which each business purpose will achieve.

S 15. Subparagraph 3 of paragraph (a) of section 1321 of the not-for-profit corporation law, as amended by chapter 847 of the laws of 1970, is amended to read as follows:

(3) [The] NOTWITHSTANDING THE PROVISIONS OF SUBPARAGRAPH (A)(2) OF THIS SECTION, THE corporation is a Type [C] B corporation under this chapter AUTHORIZED TO PURSUE ANY LAWFUL BUSINESS PURPOSE OR PURPOSES IN THIS STATE; its principal activities are conducted outside this state; the greater part of its property is located outside this state; and less than one half of its revenues for the preceding three fiscal years, or such portion thereof as the foreign corporation was in existence, was derived from sources within this state.

S 16. Paragraph (b) of section 1411 of the not-for-profit corporation law is amended to read as follows:

(b) Type of corporation. A local development corporation is a Type [C] B corporation under this chapter.

S 17. This act shall take effect immediately.