



COMMITTEE ON NON-PROFIT ORGANIZATIONS

A. 8568-A
S. 5041

M. of A. Brodsky
M. of S. Liebell

An act to amend the Not-for-Profit Corporation Law, in relation to the non-judicial process of dissolution of not-for-profit corporations and dissolution of not-for-profit corporations for failure to file reports; and to repeal certain provisions of such law relating to procedure after dissolution.

THIS BILL IS APPROVED

This bill would amend the Not-for-Profit Corporation Law (“N-PCL”) to simplify the dissolution process for not-for-profit corporations and to empower the Attorney General to authorize the dissolution of certain “inactive” not-for-profit corporations. The most significant changes proposed by the bill would (i) expand to a larger class of corporations the present statute’s procedures for dissolving corporations with no assets without the consent of the Attorney General and the court (a “No Asset Dissolution”), and (ii) require other dissolving corporations to secure court approval only once during the dissolution process instead of the current two-step judicial approval. The Assembly version of this bill contains changes to the original proposed bill that are not reflected in the Senate version of the bill. The Committee approves the Assembly version of this bill and approves the Senate version subject to adopting the Assembly’s changes.

In July, 2001, this Committee objected to several provisions of earlier proposed legislation, and offered alternative legislation to address our concerns. While we continue to wish that the reform of the dissolution process for non-profit corporations were more extensive than this bill provides, we are satisfied with the current proposal as a significant improvement over the present statute.

The Committee’s specific comments to the proposed amendments are set forth below.

Section 1. N-PCL 102 (Definitions)

N-PCL 102(a) would be amended by adding a new definition of “Person”.

The Committee has no comments on this Amendment.

Section 2. N-PCL 608 (Quorum at Meeting Of Members)

N-PCL 608 would be amended by adding a new paragraph (e) which would permit a member, director or officer of a not-for-profit corporation (on notice to the Attorney General), or the Attorney General, to petition the court to dispense with normal quorum requirements for the conducting of a meeting of members (as prescribed by the corporation’s certificate or by-laws or by statute) in the case where it has proved to be impracticable or impossible for the corporation to obtain a quorum of its members. This new paragraph (e) would also require that the petition set forth the reasonable efforts that the corporation made to obtain a quorum (including the manner in which the corporation provided notice to its members of prior meetings) and that the corporation make at least one final attempt to make the requisite notifications in the manner prescribed by the court.

As this Amendment recognizes the practical difficulties not-for-profit corporations sometimes have in obtaining quorums while also providing for reasonable safeguards to ensure that this provision would not be used by not-for-profit corporations to avoid the otherwise applicable notice requirements, the Committee endorses this amendment.

Section 3. N-PCL 719 (Liability Of Directors In Certain Cases)

N-PCL 719(a)(4) would be amended so as to impose joint and several liability on those directors who vote for, or concur with, a distribution of assets in violation of newly-proposed N-PCL 1002-a (carrying out the plan of dissolution and distribution of assets) for damages suffered by creditors or members of a not-for-profit corporation, the ultimate beneficiaries of a not-for-profit corporation’s activities, or the not-for-profit corporation itself.

Because the Committee believes that the fiduciary duties of directors already encompass these provisions, it has no comments on this Amendment.

Section 4. N-PCL 1001 (Plan of Dissolution)

(i) N-PCL 1001(b)

N-PCL 1001(b) would be amended to provide that not-for-profit corporations with no liabilities at the time of dissolution (as well as no assets to distribute as provided in the present statute) include a statement to this effect in their plans of dissolution, and to include Type D organizations within its scope. The current statutory requirement in this subsection that the approved plan be filed with the Attorney General within ten days of authorization has been moved to N-PCL 1002(d).

The Committee approves this Amendment. The Committee notes that while corporations with a reserve not exceeding twenty-five thousand dollars and liabilities not

exceeding ten thousand dollars are now permitted to dissolve using the same procedures as corporations with no assets (see discussion of amendment to Section 1002 below), they must nonetheless describe those assets and liabilities in their plans of dissolution.

(ii) N-PCL 1001(c) (What Plan of Dissolution Shall Contain)

A new clause (c) would be added to N-PCL 1001 to specifically set forth what elements must be included in a not-for-profit corporation's plan of dissolution.

The Committee approves this Amendment as providing direction to a required step in the dissolution process which presently has no statutory guidance.

The Committee does have concerns about the requirement that the plan contain "a description with reasonable certainty of the assets of the corporation and their fair value, and the total amount of debts and other liabilities incurred or estimated by the corporation, including the total amount of any accounting and legal fees incurred or estimated, in connection with the dissolution process."

Unless the assets of the not-for-profit corporation consist only of cash and/or publicly-traded securities, the "fair value" of a not-for-profit corporation's assets may not be readily amenable to a "reasonably certain" valuation (*e.g.*, intangible property). Given the inherent uncertainty as to the "reasonable certainty" standard (especially with respect to the issue of valuation), a not-for-profit corporation may find itself compelled to undertake a formal appraisal of one or more of its assets and thereby subject itself to additional costs and additional delay, particularly at this stage of the dissolution process. And, even with an appraisal, a not-for-profit corporation could never be entirely certain that the results of the appraisal would constitute a "reasonably certain" valuation of the assets so appraised.

Similarly, while the Committee also concurs that it is appropriate to include in the plan a description of the not-for-profit corporation's debts and liabilities (whether fixed or contingent), and the amounts (to the extent known) of such debts and liabilities as of the time of adoption of the plan, the Committee has concerns about the requirement that an estimate of the debts and other liabilities, including the total amount of accounting and legal fees, also be included in the plan be made with "reasonable certainty", since in many cases, such an estimate would be prone to uncertainty and inaccuracy and, thus, not amenable to "reasonable certainty". It is hoped that the Attorney General will provide guidance on the standards for determination of amounts with "reasonable certainty".

Section 5. N-PCL 1002 (Authorization of Plans)

(i) N-PCL 1002(a) (Director and Member Approval of Plan; Notice Requirement)

N-PCL 1002(a) would be amended to provide that a No Asset Dissolution could be adopted and authorized by (1) the number of directors or members required under the N-PCL and any other applicable law; or (2) if there are fewer than three directors, the remaining directors unanimously or members required under the N-PCL and any other applicable law. N-PCL 1002(a) would also be amended to require that notice of a special or regular board meeting or meeting of the members entitled to vote on adoption and

authorization or approval of a dissolution plan be sent to all the directors and members of record entitled to vote by certified mail, return receipt requested, to the last known address of record of each director and member not fewer than 30, and not more than 60, days before the date of each meeting. Thus, a corporation with no assets may determine to dissolve even if its board does not meet statutory requirements.

In contrast, other dissolutions would continue to require approval at a meeting of the members by two-thirds vote, as provided in N-PCL 613(c), or, in the case of a non-membership corporation, by the board pursuant to the by-laws or statute.

Because this Amendment provides for more flexibility for No Asset Dissolutions, the Committee approves this Amendment.

(ii) N-PCL 1002(d) (Extending the Dispensation for “Judicial Approval” for No Asset Dissolution)

N-PCL 1002(d) would continue to dispense with the “judicial approval” requirement for corporations with no assets, and extend it to apply to corporations with no assets other than a reserve not exceeding \$25,000 to pay ordinary and necessary expenses of winding up its affairs, including attorney and accounting fees, and liabilities not exceeding \$10,000, so long as the dissolving corporation complies with the requirements of proposed N-PCL 1001 and 1002. A copy of the plan of dissolution certified under penalties of perjury must be filed with the Attorney General within ten days after its authorization.

The changes in this section extend the No Asset Dissolution procedure to many more corporations which have only minimal assets and liabilities and is a highly desirable change. The Committee approves this Amendment.

Section 6. N-PCL 1002-a (Carrying out the Plan of Dissolution and Distribution of Assets)

Newly proposed N-PCL 1002-a would specifically set forth the procedures for carrying out the plan of dissolution and distribution of assets. It would require that a dissolving corporation carry out its plan of dissolution, pay its liabilities and distribute its assets in accordance with said plan within 270 days from the date the plan is approved by the court or, if such approval is not required, from such date the plan is filed with the Attorney General (*i.e.*, which, under proposed N-PCL 1002(d), would be required to be done within ten days after its authorization). The newly proposed N-PCL 1002-a would also allow the Attorney General, upon good cause shown, to extend this period or any extended period of time by not less than 30 days nor more than one year.

If a dissolving corporation is unable to complete its dissolution within this 270-day (or extended) period (and the Committee can certainly envision a variety of reasons how this might occur and through no fault of the dissolving corporation), and is unable to obtain an extension (or additional extension) from the Attorney General, then the dissolving corporation would be foreclosed from completing its dissolution (after presumably having

undertaken many, if not most, of the steps in connection therewith, including the selling of its assets).

Because this new provision would explicitly provide what a dissolving corporation must do to carry out its plan of dissolution and distribute its assets while still leaving some flexibility in the timing of the procedure, the Committee approves of the provision as a measure intended to make clear to not-for-profit corporations (and their directors and officers) their duties and obligations.

Section 7. N-PCL 1003 (Certificate of Dissolution; Contents; Approval)

N-PCL 1003 would be amended to eliminate the requirement that a not-for-profit corporation (other than one qualifying for a No Asset Dissolution) obtain judicial approval of its certificate of dissolution after its plan has been carried out. The certificate of dissolution would continue to be subject to the approval of the Attorney General (by petition) except in the case of a No Asset Dissolution which only requires a statement on the Certificate of Dissolution that the Plan of Dissolution has been filed with the Attorney General.

The amended procedure eliminates a costly and often lengthy step in the dissolution process and is approved by the Committee.

Section 8. N-PCL 1005 (Procedure after Dissolution)

Under the Amended AG-78, N-PCL 1005 would be repealed.

The Committee has no comments on this Section.

Section 9. N-PCL 1006 (Corporate Action and Survival of Remedies after Dissolution)

N-PCL 1006 would be amended to provide that “[a]fter dissolution, a corporation shall not commence any new activities.

The Committee believes that since a corporation has no authority to act after it has been dissolved and, in effect, ceases to exist, this amendment would serve no purpose and that this provision is unnecessary, but does not object to it.

Section 10. N-PCL 1007 (Notice to Creditors)

N-PCL 1007(a) would be amended to provide that the corporation may notify creditors of its dissolution prior to filing its certificate of dissolution, instead of the present provision that such notice may be provided after filing.

The Committee approves this Amendment as an appropriate re-ordering of this step of the dissolution process.

Section 11. N-PCL 1008 (Jurisdiction of Supreme Court to Supervise Dissolution and Liquidation)

The Committee has no comments on the proposed amendments to this Section.

Section 12. N-PCL 1009 (Applicability to Dissolution under other Provisions)

The Committee has no comments on the proposed amendments to this Section.

Section 13. N-PCL 1012 (Certificate of Annulment of Dissolution and Reinstatement of Corporate Existence)

The Committee has no comments on the proposed amendments to this Section.

Section 14. N-PCL 1109 (Judgment or Final Order of Dissolution)

The Committee has no comments on the proposed amendments to this Section.

Section 15. N-PCL 1115 (Applicability of other Provisions)

The Committee has no comments on the proposed amendments to this Section.

Section 16. N-PCL 1212 (Disposition of Moneys Retained; Surplus; Unclaimed Distributions)

The Committee has no comments on the proposed amendments to this Section.

Section 17. N-PCL 1014 (Dissolution of Domestic Corporations by Proclamation)

Amended AG-78 would add a new section, N-PCL 1014, which would authorize the Attorney General, under certain circumstances, to seek dissolution of a not-for-profit corporation by proclamation. In general, under the proposed statute, the Attorney General would be permitted, without court application or approval, to dissolve a not-for-profit corporation that had (a) failed to file annual financial reports for five successive years; and (b) been notified by the Attorney General at least six months prior to the date that the corporation may be certified for dissolution of such failure in each of the last two years of such five-year period and had failed to file *all* delinquent reports and complete all registration requirements within three months of the date of such notification, so long as the Attorney General used reasonable diligence to identify the corporation's current address (and, thus, presumably, the corporation would not need to actually receive the notice). Any assets of the dissolved corporation that are located would be dealt with in accordance with Article 10 and 11 of the N-PCL.

Also, under proposed N-PCL 1014, the dissolved corporation's name would be reserved for a period of one year, after which the name would be available for use by another organization. Finally, proposed N-PCL 1014 would permit the dissolved corporation to file for reinstatement with the department of state upon payment of a \$50 fee, so long as the dissolved corporation submits all of its annual financial reports and fees

(and penalties and interest charges related thereto), as well as a certificate of name change if its name is being used by another organization.

Although the Committee has some reservations about dissolution by agency action, it recognizes that many corporations without assets simply cease to conduct activities without legally dissolving and that the proposed procedure will benefit both them and the regulatory authorities. For these reasons, this Amendment is approved.

Respectfully Submitted,

M. Antoinette Thomas
Chair

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^{*} Mr. Kushner dissented from the Committee's approval of the foregoing comments.

^{**} Mr. Siegal abstained from the Committee's vote on the foregoing comments.