SENATE BILL 477:
Amend Bus. Corp. Act/Bus. Opp. Disclosures.

2023-2024 General Assembly

Committee:		**Date:**	September 21, 2023
Introduced by:	Sens. Galey, Overcash	**Prepared by:**	Bill Patterson
Analysis of:	Sixth Edition		Staff Attorney

OVERVIEW: Senate Bill 477 would:

- ***Amend the Business Corporation Act to:***
  - ***Update requirements for sending notices and other communications to shareholders electronically.***
  - ***Provide that for newly incorporated non-public corporations, unless otherwise provided in the articles of incorporation, action can be taken without meeting by written consent of shareholders having the number of votes necessary to take the action at a meeting at which all shareholders entitled to vote were present and voted.***
  - ***Dispense with the requirement that written consents to action to be taken without meeting bear the date of signature of the shareholder.***
  - ***Provide that a written consent to action to be taken without meeting expires if the corporation has not, within 60 days after the first date on which a written consent to the action is received by the corporation, received unrevoked written consents sufficient to take the action without meeting.***
  - ***Permit articles of incorporation to be amended without a shareholder vote to delete a class or series of shares created by the board and having no outstanding shares.***
  - ***Permit a corporation to restrict, in whole or in part, the right of the holders of outstanding shares of an existing class or series of a class to vote as a separate voting group on a proposed amendment to the articles of incorporation that would create a new class of shares that have rights with respect to distributions or to dissolution substantially equal or superior to the existing class.***
  - ***Modify statutory provisions governing the right of shareholders in a corporation to inspect the records of a subsidiary of that corporation.***
- ***Amend the Business Opportunity Act to permit franchisors to meet their disclosure and filing obligations using a document that complies with Federal Trade Commission disclosure requirements.***
- ***Standardize the evidence required to prove a debt in actions brought by collection agencies.***

CURRENT LAW AND BILL ANALYSIS:

Section 1 – Facilitating Communications with Shareholders by Email and Other Electronic Means

Under current law a corporation must obtain formal consent from its shareholders before sending notices to them by email or other forms of electronic communications.

An otherwise required notice to a shareholder does not have to be given under either of two circumstances involving failure of physical delivery of notices sent to the shareholder's address as shown on the corporation's records:

- Notice of two consecutive annual meetings, and all meeting notices between those two annual meetings, have been returned undeliverable.
- All (but not less than two) dividend payments during a 12-month period, or two consecutive dividend payments during a period of more than 12 months, have been returned undeliverable.

Section 1 would define the terms "email" and "email address" as used in the Business Corporation Act, and would provide that a corporation:

- Can communicate with a shareholder electronically using the email address shown in the corporation's current records, unless the shareholder has previously given the corporation a written objection to receiving communications electronically.
- Must stop communicating electronically with a shareholder upon becoming aware that two consecutive notices or other communications sent electronically have not been delivered.
- Must include, in the list of shareholders entitled to notice of a meeting, the email address of any shareholder to whom a notice or other communication regarding that meeting has been or will be sent by the corporation electronically.

Section 1 would add a third circumstance under which an otherwise required notice to a shareholder does not have to be given: the shareholder's address has not been provided to the corporation by or on behalf of the shareholder and the corporation has not otherwise obtained an address for the shareholder it believes to be reliable. Section 1 would also provide that the enumerated physical delivery failures do not relieve the corporation of its notice obligation if it is permitted to provide notice to the shareholder electronically.

Section 2: Use of Written Consent without a Meeting

Under current law, if the articles of incorporation of a nonpublic corporation so provide, action required or permitted to be taken at a shareholders' meeting may be taken without meeting by the corporation by written consent to the action bearing the date of signature of shareholders having at least the minimum number of votes needed to approve the action at a meeting at which all shareholders having a right to vote are present and voted.

Currently a written consent to action to be taken without meeting expires on the 61st day after the date of the shareholder's signature unless the corporation has, prior to the 61st day, received unrevoked written consents sufficient to take the action without meeting.

Section 2 would:

- Provide that for nonpublic corporations incorporated on or after October 1, 2023, unless otherwise provided in the articles of incorporation, action can be taken without meeting by written consent of shareholders having at least the minimum number of votes needed to approve the action at a meeting at which all shareholders entitled to vote were present and voted.
- Eliminate the requirement that written consents bear the date of the shareholder's signature.
- Provide that a written consent to action to be taken without meeting shall not be effective unless the corporation has, within 60 days after the first date on which it received a written consent for that action, received unrevoked written consents sufficient to take the action without meeting.

Section 3 – Deletion of Unused Classes of Shares Created by the Board

Under current law, if a corporation wants to amend its articles of incorporation to delete a class or series of stock that was included in the original articles, the amendment must be submitted to the shareholders for approval.

Section 3 would permit the board of directors to amend the articles of incorporation without shareholder action to delete a class or series of shares that was originally included in the articles without shareholder action, provided that there are no shares of that class or series, or rights to acquire such shares, outstanding.

Section 4 – Restricting Separate Votes by Voting Groups

Under current law, the holders of outstanding shares of a class of shares or series of a class of shares are entitled to vote as a separate voting group on a proposed amendment to the articles of incorporation that would either:

1) Create a new class of shares having rights or preferences with respect to distributions or to dissolution that are prior, superior, or substantially equal to the existing class; or
2) Increase the rights, preferences, or number of authorized shares of any class in a way that gives them rights or preferences with respect to distributions or to dissolution that are prior, superior, or substantially equal to the existing class.

Section 4 would permit a corporation to restrict or eliminate the right of a class or series to vote as a separate voting group under these two circumstances by inclusion of a provision to that effect in the original articles of incorporation, or in any amendment to the articles that is: 1) adopted prior to issuance of any shares of that class or series; or 2) approved by a majority of the votes of that class or series entitled to be cast on the amendment.

Section 5 – Eliminating State Disclosure Requirements for Business Opportunity Sellers Also Subject to Federal Franchising Disclosure Requirements

Franchisors subject to the Business Opportunity Act, Article 19 of Chapter 66 of the General Statutes, are required to give prospective purchasers a disclosure document containing information about the franchisor, its officers, and the services to be provided by the franchisor, and is required to file two copies of the disclosure document with the Secretary of State.

Under Federal Trade Commission regulations, franchisors are required to give prospective purchasers a franchise disclosure document containing substantially the same information as is required under the Business Opportunity Act.

Section 5 would permit a franchisor to meet its disclosure and filing obligations by using either a form meeting the requirements set forth in the Business Opportunity Act or one that complies with the FTC disclosure requirements.

Section 6 – Right of a Shareholder of a Corporation to Inspect Records of a Subsidiary Entity of that Corporation

Under current law a qualified shareholder of a corporation that has the power to elect, appoint, or designate a majority of the directors of another domestic or foreign corporation or of a domestic or foreign nonprofit corporation, has the inspection rights granted under G.S. 55-16-02 with respect to the records of that other corporation. The Business Corporation Act does not currently provide a definition of the term "subsidiary."

Section 6 would:

- Define "subsidiary," as used in Article 16 (Records and Reports) of Chapter 55, as any domestic or foreign entity directly or indirectly owned, in whole or in part, by the corporation of which the

shareholder is a shareholder and over the affairs of which the corporation directly or indirectly exercises control, including domestic and foreign corporations, including professional corporations and nonprofit corporations, partnerships, limited partnerships, limited liability partnerships, limited liability companies, business trusts, and joint ventures.

- Provide that a qualified shareholder of a corporation has the inspection rights provided under G.S. 55-16-02 with respect to the records of a subsidiary of the corporation to the extent that either of the following applies:
    - The corporation has actual possession and control of the records.
    - The corporation could obtain the records by exercising its control over the subsidiary so long as both of the following are true as of the date the demand to inspect is made:
        - Inspection of the subsidiary's records by the shareholder would not be a breach of an agreement between the corporation or the subsidiary and a person not affiliated with the corporation.
        - Applicable law does not grant the subsidiary the right to deny the corporation access to the records upon the corporation's demand.

Section 7 – Standardize the Evidence to Prove a Debt

Article 70 (Collection Agencies) of Chapter 58 (Insurance) of the General Statutes regulates the activities of collection agencies. Under current law a collection agency that violates Part 3 (Prohibited Practices by Collection Agencies Engaged in the Collection of Debts from Consumers) of Article 70 shall, in addition to actual damages sustained by the debtor, be liable to the debtor for a penalty of not less than $500 and not more than $4,000 for each violation. Under Part 3, a collection agency that is a debt buyer or acting on behalf of a debt buyer is prohibited from commencing a civil action or arbitration proceeding to collect on the debt without first giving the debtor written notice of the intent to file a legal action at least 30 days in advance of filing.

Section 7(a) would define the following terms as used in Part 3 of Article 70:

- Credit card debt. – A debt stemming from a revolving or open-end credit card account pursuant to which a creditor reasonably contemplates repeated transactions, which prescribes the terms of such transactions, and which provides for a finance charge which may be computed from time to time on the outstanding unpaid balance.
- Itemized accounting. – If the debt has not been charged-off, the itemized accounting is an accounting of the amount claimed to be owed, including the amount of the principal, the amount of any interest, fees or charges, and whether the charges were imposed by the original creditor, a debt collector, or a subsequent owner of the consumer debt. If the debt has been charged off, the itemized accounting is: (i) the charge-off balance; (ii) any post charge-off interest and fees; (iii) any post charge-off payments or credits; and (iv) the most recent twelve account statements sent to the debtor prior to charge off. For accounts less than one year old prior to charge off, the accounting must include every statement sent to the debtor prior to charge off.

Section 7(b) would provide that the debtor does not have to prove actual damages in order to recover the civil penalty to be assessed against the collection agency for a violation of Part 3 of Article 70 of Chapter 58, and that the civil penalty is in addition to any actual damages sustained by the debtor.

Section 7(c) would require a collection agency complaint to allege that it has given the debtor the required notice of intent to file the action in advance of filing and to incorporate documents sent with the notice.

Failure to comply with this requirement would result in dismissal of the action by the court upon motion of the debtor or sua sponte.

Under current law a debt buyer plaintiff's complaint must be accompanied by certain materials, including a copy of the contract or other writing signed by the defendant evidencing the debt and a copy of the writing establishing that the plaintiff is the owner of the debt. If the claim is based on credit card debt and no writing evidencing the debt signed by the defendant ever existed, then copies of documents generated when the credit card was actually used must be attached to the complaint.

Section 7(d) would require that when a debt buyer plaintiff's claim is based on credit card debt and the debt buyer alleges in the complaint that no writing evidencing the debt signed by the defendant ever existed, then the plaintiff must attach copies of documents generated when the credit card was actually used, such as a purchase or cash advance, to the complaint. Any complaint not accompanied by the required materials would be dismissed by the court upon motion of the debtor or sua sponte.

Under current law before obtaining a default judgement or summary judgment against a debtor in a complaint initiated by a debt buyer, the plaintiff must prove the amount and nature of the debt, by introducing authenticated business records including at least all of the following:

(1) The original account number.
(2) The original creditor.
(3) The amount of the original debt.
(4) An itemization of charges and fees claimed to be owed.
(5) The original charge-off balance, or, if the balance has not been charged off, an explanation of how the balance was calculated.
(6) An itemization of post charge-off additions, where applicable.
(7) The date of last payment.
(8) The amount of interest claimed and the basis for the interest charged.

Section 7(e) would make the current requirements pertaining to the documentation required to prove the nature and amount of a debt applicable only for claims that are not based on a credit card debt. For a claim based on a credit card debt, the required authenticated business records would be required to include at least all of the following:

(1) The original account number.
(2) The original creditor.
(3) An itemized accounting, as defined in G.S. 58-70-90.
(4) The date of last payment, if any.
(5) The basis for the interest charged.
(6) The date the account was opened.

If the debt buyer plaintiff fails to comply with these requirements, the motion for default judgment or summary judgment would be denied and any judgments entered in favor of the non-complaint debt buyer would be void.

Section 8 would require the Revisor of Statutes to print, as annotations to Chapter 55 of the General Statutes, all relevant portions of the Official Comments to the Model Business Corporation Act and all explanatory comments of the drafters of this act as the Revisor may deem appropriate.

EFFECTIVE DATE: Sections 1 through 4 and Section 6 of the act become effective October 1, 2023. Section 1 applies to notices provide on or after that date; Section 2 applies to written consents received on or after that date; and Section 6 applies to written notices of demand for inspection given on or after that date.

Section 7 of the act becomes effective January 1, 2024, and applies to debt collection activities undertaken and actions filed on or after that date.

The remainder of the act is effective when it becomes law, and Section 5 applies to required disclosure statements and filings provided on or after that date.