

Changes to Michigan Nonprofit Corporation Act Expand Liability Protection, Authorize New Election Procedures, Ease Voting Thresholds

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As you may have heard, *Michigan* recently enacted significant amendments to the ***Michigan Nonprofit Corporation Act (the "Act")***. The following is a brief overview of some of the more significant of the changes effected by the these amendments.

Liability Limitations

Perhaps the most significant change was to expand the limited liability protections available to directors and officers of nonprofit corporations. Prior to the amendments, a Michigan nonprofit corporation could – with the inclusion of proper language in the Articles of Incorporation – eliminate the personal liability of volunteer directors and volunteer officers for breaches of fiduciary duty. The new amendments now expand that liability protection to include any third-party claims for "money damages" for "any action taken or failure to take any action." It further extends that coverage to all directors, not just those serving on a volunteer basis. The new amendments also change the applicable standards for qualifying for this protection. Although some of the features are rather technical, in general they will be welcomed by nonprofit corporations, as they have the effect of expanding the already generous liability protections available under Michigan law.

It should be noted that the legislature included a rather unique provision in the amendments. That provision makes these expanded liability protections automatically applicable to nonprofit corporations that have already adopted the statutory liability limitations. If that is the case with your organization, you may not need to do anything to enjoy these expanded benefits. Nevertheless, we generally recommend that our clients review their Articles of Incorporation to ensure that the liability protections are included in the document and, if not, to promptly amend them to include appropriate language. Even if the Articles of Incorporation already include limited liability provisions, we nonetheless recommend updating the Articles of Incorporation to reflect the new (and beneficial) standards. This will make the Articles current and help avoid any potential confusion over to applicable standards.

Boards of Directors

The amendments also impact the operation of the Board of Directors. One of the more significant changes is that the Act now allows directorship-based nonprofit corporations, for the first time, to elect Board members by proxy or by electronic transmission (i.e., by e-mail). This represents a rather significant change, as proxies were historically limited to use by shareholders or members and were not available for director actions. Note, however, that the use of proxies in this manner is limited to the election of directors and does not apply to other Board actions.

Other changes also affect nonprofit boards. One amendment now allows any-size nonprofit corporation to reduce its quorum requirement to as low as one-third (1/3). Prior to the amendments, only larger boards were permitted to reduce their quorum requirements below a majority. In addition, the amendments now allow the Board of Directors of a private foundation to consist of a single, sole director, rather than the usual minimum of three. The Act continues to permit nonprofit corporations to create different and multiple classes of directors, if it so chooses.

Committees

The new statute also clarifies the rules with respect to the composition of committees. The Act now allows the Board of Directors to delegate its management prerogatives to an Executive Committee, provided that the Executive Committee consists exclusively of Board members. The Act also allows the formation of other committees, which may consist of a combination of Board members and non-Board members. However, such other committees may not execute the power or authority of the Board of Directors in the management of the corporation, although they may perform under the direction of the Board of Directors. Prior Michigan law – and many nonprofit bylaws – were somewhat vague on this score.

Membership-Based Organizations

A number of the recent amendments pertain uniquely to membership-based nonprofit corporations. One of these changes now validates a procedure which a number of nonprofit corporations have – incorrectly – already been using: the election of directors by ballot, which can be administered either by mail, by electronic transmission, or at a specific polling place. In the past, membership election required the calling of an actual meeting and the establishment of a quorum, or alternatively, the unanimous written consent of all members. This new rule will certainly simplify the director election process, especially for those membership-based nonprofits with a large membership roster.

The Act also now allows the members of a membership-based nonprofit corporation to approve certain actions by a simple majority vote of those present at a meeting, provided there are at least twenty (20) members present. In the past, certain corporate actions (e.g., a merger or dissolution) would require the vote of a majority of all of the corporation's members, which created an almost impossibly high threshold for nonprofit corporations with many members. This was often particularly a problem where membership involvement was tenuous or where members were disbursed across a wide geographic area.

Finally, the amendment now allows a nonprofit corporation to significantly limit the rights of members to inspect certain corporate records. More specifically, the Act now allows a nonprofit corporation to deny such access when doing so would impair the privacy or free association rights of members, or impair the lawful purposes of the corporation, or where it would not otherwise be in the best interest of the corporation. This can help avoid abuses of the inspection right by overreaching members.

Other Changes

Two other changes are of note. First, the statute now explicitly acknowledges what many practitioners had assumed to be permissible based on an old Michigan Attorney General opinion: nonprofit corporations may now employ licensed professionals and thereby engage, as a nonprofit corporation, in the corporate practice of these professions. Second, the statute now explicitly provides that a nonprofit corporation may not merge or convert to another entity (e.g., to a limited liability company) without prior Michigan Attorney General consent. Similarly, the statute now also makes it clear that a nonprofit corporation cannot simply dissolve through an amendment to its Articles of Incorporation, a practice which had allowed some nonprofit corporations to circumvent the requirement for Michigan Attorney General consent to dissolution. The Michigan Corporation Division will no longer accept such amendments for filing without the prior approval from the Michigan Attorney General's office.

In Conclusion

This post has highlighted some of the more significant changes to the Michigan Nonprofit Corporation Act. However, it is not intended to be exhaustive, as there are numerous other minor or more obscure changes throughout the statute. Nonetheless, we hope that you have found this overview to be useful.

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