

Changes to the Nonprofit Corporation Act

Public Act 9 of 2008 amended the Nonprofit Corporation Act, effective February 29, 2008, to add provisions regarding electronic transactions and remote communications. The amendment defines “electronic transmission” or “electronically transmitted” as any form of communication that meets all of the following:

- It does not involve the physical transmission of paper.
- It creates a record that may be retained and retrieved by the recipient.
- It may be directly reproduced in paper form by the recipient through an automated process.¹

Section 151² is the same as section 151 of the Business Corporation Act³ and permits the Corporation Division to provide written notice by electronic transmission regarding pending documents if the document was originally submitted by electronic transmission.

Some of the amendments are different from the provisions in the Business Corporation Act and require action by the nonprofit corporation. A nonprofit corporation may opt in by providing in its articles or bylaws that members or shareholders may participate in meetings by conference telephone or remote communication, subject to guidelines and procedures adopted by the board. When a nonprofit corporation adopts a provision to permit such meetings, a shareholder or member not physically present at a meeting of shareholders or members may participate by means of remote communication and is considered present in person and can vote if all of the following are met:

- The corporation implements reasonable measures to verify that each person considered present and permitted to vote at the meeting by means of remote communication is a shareholder or member.
- The corporation implements reasonable measures to provide each shareholder or member a reasonable opportunity to participate in the meeting and to vote on matters submitted to the shareholders or members, including an

opportunity to read or hear the proceedings of the meeting concurrently with the proceedings.

- If a shareholder or member votes or takes other action at the meeting by means of remote communication, a record of the vote or other action is maintained by the corporation.
- A shareholder or member may be present and vote at an adjourned meeting of the shareholders or members by a means of remote communication if he or she was permitted to be present and vote by means of remote communication in the original meeting notice.

The amendments provide that when notice is required or permitted by act to be in writing, electronic transmission is written notice. Section 404(1)(a) of the act⁴ provides for written notice to be given “by written notice, given personally, by mail or by electronic transmission.” Section 404(1) of the Business Corporation Act⁵ is broader and permits that “[n]otice may be given personally, by mail, or by electronic transmission.” Both the Nonprofit Corporation Act and the Business Corporation Act provide in section 143 that any notice or communication electronically transmitted must be “in a manner authorized by the person.”⁶

The amendments to section 441(1)⁷ provide that “[a] vote may be cast either orally or in writing, unless otherwise provided in the bylaws. In addition, the bylaws may provide for voting by electronic transmission.” If the corporation provides in its articles for participation in a meeting by remote communication and complies with section 405(4), it is unclear whether section 441(1) will require the corporation to also adopt a bylaw authorizing voting by electronic transmission. The conflict is avoided in the Business Corporation Act because there is no reference in section 441 to bylaws providing for voting by electronic transmission and, therefore, section 405 of the Business Corporation Act would control.⁸

If a nonprofit corporation provides for voting by electronic transmission,

written consents may also be given by electronic transmission. A nonprofit corporation may take action by unanimous written consent, without a meeting, and they may also provide in their articles for action by written consent of a minimum number of shareholders or members required if voting at a meeting. Section 407 of the act provides that when giving consent by electronic transmission, the date of electronic transmission is considered the date the consent was signed.⁹ A consent given by electronic transmission is delivered when reproduced in paper form, and the paper form is delivered to a corporation’s principal office in this state or to an officer or agent of the corporation.

Section 451 of the Nonprofit Corporation Act is similar to section 451 of the Business Corporation Act and permits a corporation to authorize in its articles for voting “in person, by proxy, or by electronic transmission” for election of directors. The amendments permit the board of directors or a committee of the board to participate in a meeting by conference telephone or remote communication. Action may be taken by written consent without a meeting if all members of the board then in office or of the committee consent to the action in writing or by electronic transmission.

Existing nonprofit corporations should review the amendments and determine if they would like to adopt any of the new procedures. An amendment to the articles or bylaws will be necessary to provide for meetings by remote communication. In addition, an amendment to the articles or bylaws will be needed to provide for voting by electronic transmission. New corporations can include the provisions in their articles and bylaws at the time of formation.

If the corporation wishes to implement these changes the board will need to adopt guidelines and procedures for remote communications, participation by remote communication, and voting. In addition, the corporation should keep a record of the manners of electronic notice and communication each shareholder or member has authorized the corporation to

use for contacting each shareholder or member.

Additional amendments to the Nonprofit Corporation Act are included in HB 5681, introduced on January 31, 2008. The bill would add a definition for “charitable corporation” to section 106. Addition of a new subsection (3) to section 404 of the act would clarify that an adjourned meeting may only conduct business that could have been conducted at the original meeting if notice of the adjourned meeting is not given.

HB 5681 amends section 505 of the act to increase the minimum size of the board of directors to three members. A new subsection (5) provides that 180 days after the effective date of the act, the boards of all existing corporations must consist of at least three directors. An amendment to section 548 permits a charitable purpose corporation to provide a loan to guarantee an obligation of an officer or director who is “also a client of the corporation and the loan or guaranty is necessary to carry out the corporation’s charitable purpose.”

There is no amendment to section 301(3) of the act,¹⁰ which provides “[a] corporation shall not pay dividends or distribute any part of its assets, income, or profit to its shareholders, members, directors, or officers, except” as provided in section 301(3). It is unclear how the restrictions in section 301(3) will be affected by section 548(4).

An amendment to section 611(4) adds a reference to voting by electronic transmission. Voting by shareholder or members by electronic transmission on an amendment will only be effective if the corporation has opted in under section 405 of the act and complies with the other requirements of the act to vote by electronic transmission.

The bill contains an amendment to section 922 of the act to require any charitable purpose corporation dissolved by operation of law for failure to file an annual report to provide notice of the dissolution to the attorney general within 60 days after the date of the dissolution. The provision also provides the dissolved charitable purpose corporation “shall not dispose of any of its assets without written approval of the attorney general.”

HB 5681 passed the House on April 29, 2008. It has been referred to the Senate committee on Economic Development and Regulatory Reform. The bill, legislative analysis, and status are available on the Michigan Legislature’s Web site at <http://legislature.mi.gov/doc.aspx?2008-HB-5681>.

Beneficial Owners of Corporations and LLCs

On May 1, 2008, the “Incorporation Transparency and Law Enforcement Assistance Act” sponsored by U.S. Senators Levin, Coleman, and Obama was introduced. The bill requires each state to require corporations and LLCs to report names and addresses of beneficial owners to the state no later than the beginning of fiscal year 2011. The supporters indicate the legislation is necessary because corporations and LLCs are being used to launder money and finance terrorist activities. Senator Levin stated the bill is necessary to “bring the United States into compliance with the FATF standard by requiring the States to obtain beneficial ownership information for the corporations formed under their laws. It would ensure that the United States met its international commitment to comply with FATF anti-money laundering standards.”

More information about the legislation is available at <http://levin.senate.gov/newsroom/release.cfm?id=297089>. The bill is available at <http://levin.senate.gov/newsroom/supporting/2008/bill.Incorporation.050108.pdf>.

Additional information, including a report from the National Association of Secretaries of State Task Force, is available on the International Association of Commercial Administrators Web site at <http://www.iaca.org/node/115>.

Miller v Allstate Insurance Co

On July 2, 2008, the Michigan Supreme Court decided the case of *Miller v Allstate Insurance Co*, http://courtofappeals.mijud.net/documents/OPINIONS/FINAL/SCT/20080702_S134393_97_MillervAllstate2Apr08-op.pdf.

The Court held that Allstate lacked standing to challenge the corporate status of PT Works because only the Attorney General has authority to pursue a claim that a corporation is improperly incorporated. The Court did not consider or decide whether physical therapists must organize under the Professional Service Corporation Act.

In light of the Supreme Court decision, effective immediately, the Corporation Division will resume its longstanding practice of requiring only corporations, consistent with OAG, 1989-1990, No 6592, p 166 (July 10, 1989). <http://www.ag.state.mi.us/opinion/datafiles/1980s/op06592.htm>.

NOTES

1. MCL 450.2106(3).
2. MCL 450.2151.
3. MCL 450.1151.
4. MCL 450.2404(1)(a).
5. MCL 450.1404(1).
6. MCL 450.2143 and MCL 450.1143.
7. MCL 450.2441(1).
8. MCL 450.1441(1) and 450.1405.
9. MCL 450.2407.
10. MCL 450.2301(3).

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