

# STATE BAR OF MICHIGAN BUSINESS LAW SECTION

## Nonprofit Corporations Committee Report December 6, 2008

### 1. Next Scheduled Meeting of the Committee

The full Committee met in October and will meet again in March or April of 2009. At the October meeting, the Committee agreed to establish a working group that will review and update the comprehensive amendments to the Nonprofit Corporation Act. That group is expected to begin meeting regularly after the first of the year.

### 2. Council Approval

The Committee is requesting Council approval of the legislation described below amending the Nonprofit Corporation Act and the statute governing dissolution of charitable purpose corporations.

### 3. Membership

The Committee is seeking active members, especially those who are able to work as part of the subgroup updating the comprehensive amendments to the Nonprofit Corporation Act. Those interested should contact one of the Committee Chairs.

### 4. Accomplishments Toward Committee Objectives

At its October meeting, the Committee discussed future activities and decided to proceed immediately with two projects: (i) the preparation of a relatively short set of amendments to the Nonprofit Corporation Act and to the statute on dissolution of charitable purpose corporations that addresses some of the substantive and technical issues raised by PA 9 of 2008 and PA 222 of 2008; and (ii) the preparation of an update to the proposed bill previously approved by the Council providing more comprehensive amendments to the Nonprofit Corporation Act (that include, among other things, many of the changes made to the Business Corporation Act since 1982). A draft of the shorter legislation will be presented to the Council for approval at its December meeting.

### 5. Meetings and Programs

See the information about Committee meetings and activities above.

### 6. Publications

The Committee has responsibility for the Summer 2009 issue of the *Business Law Journal*. Those wishing to suggest topics for articles, please contact one of the Committee Co-Chairs.

**7. Legislative/Judicial/Administrative Developments**

See the information about Committee activities above.

**8. Miscellaneous**

None.

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A bill to amend 1982 PA 162, entitled "Nonprofit Corporation Act" by amending sections 108, 110, 404, 405, 407, 441, 451, 505, 548, and 922, (MCL 450.2108, 450.2110, 450.2404, 450.2405, 450.2407, 450.2441, 450.2451, 450.2505, 450.2548, and 450.2922)

The People of the State of Michigan enact:

Sec. 108.

(1) "Member" means a person having a membership in a corporation in accordance with the provisions of its articles of incorporation or bylaws.

(2) "Nondirector volunteer" means an individual, other than a volunteer director, performing services for a nonprofit corporation who does not receive compensation or any other type of consideration for the services other than reimbursement for expenses actually incurred.

(3) "Nonprofit corporation" means a corporation incorporated to carry out any lawful purpose or purposes not involving pecuniary profit or gain for its directors, officers, shareholders, or members.

(4) "Person" means an individual, partnership, corporation, association, or any other legal entity.

(5) "Predecessor act" means an act or part of an act repealed by this act, or an act or part of an act repealed by an act that this act repeals.

(6) "Private foundation" means a corporation that is exempt or qualifies for exemption under section 501(c)(3) of the internal revenue code, 26 USC 501, and that is classified as a private foundation under section 509(a) of the internal revenue code, 26 USC 509.

Sec. 110.

(1) "Treasury shares" means shares which have been issued, have been subsequently acquired by a corporation, and have not been canceled. Treasury shares are issued shares, but not outstanding shares.

(2) "Type I supporting organization" means a corporation that is exempt or qualifies for exemption under section 501(c)(3) of the internal revenue code, 26 USC 501, and that is or could be classified as other than a private foundation under section 509(a)(3)(B)(i) of the internal revenue code, 26 USC 509.

~~(2)~~ (3) "Volunteer director" means a director who does not receive anything of more than nominal value from the corporation for serving as a director other than reasonable per diem compensation and reimbursement for actual, reasonable, and necessary expenses incurred by a director in his or her capacity as a director.

Sec. 404.

(1) Except as otherwise provided in this act, written notice of the time, place, if any, and purposes of a meeting of shareholders or members shall be given in any of the following manners:

(a) ~~By written notice, given personally~~ Personally, by mail, or by electronic transmission, not less than 10 nor more than 60 days before the date of the meeting to each shareholder or member of record entitled to vote at the meeting.

(b) By including the notice, prominently displayed, in a newspaper or other periodical regularly published at least semiannually by or in behalf of the corporation and addressed and mailed, postage prepaid, to a member or shareholder entitled to vote at the meeting not less than 10 nor more than 60 days before the meeting.

(2) If a meeting of the shareholders or members is adjourned to another time or place, it is not necessary, unless the bylaws otherwise provide, to give notice of the adjourned meeting if the time and place to which the meeting is adjourned are announced at the meeting at which the adjournment is taken. If after the adjournment the board fixes a new record date for the adjourned meeting, a notice of the adjourned meeting shall be given to each shareholder or member of record on the new record date entitled to notice under subsection (1).

(3) If a meeting of shareholders or members is adjourned under subsection (2), only business that might have been transacted at the original meeting may be transacted at the adjourned meeting if a notice of the adjourned meeting is not given. A shareholder, member, or proxy holder may be present and vote at the adjourned meeting by a means of remote communication if he or she was permitted to be present and vote by that means of remote communication in the original meeting notice.

(4) Attendance of a person at a meeting of shareholders or members, in person or by proxy, constitutes a waiver of objection to lack of notice or defective notice of the meeting, unless the shareholder or member at the beginning of the meeting objects to holding the meeting or transacting business at the meeting.

(5) If a shareholder, ~~or member, or proxy holder~~ is permitted to participate in and vote at a meeting by remote communication under section 405, the notice described in subsection (1) shall include a description of the means of remote communication by which a shareholder, ~~or member, or proxy holder~~ may participate.

Sec. 405.

(1) Unless otherwise restricted by the articles of incorporation or bylaws, a shareholder, member or proxy holder may participate in a meeting of shareholders or members by a conference telephone or by other means of remote communication through which all persons participating in the meeting may communicate with the other participants. All participants shall be advised of the means of remote communication and the names of the participants in the meeting shall be divulged to all participants. A corporation may provide in its articles of incorporation or in its bylaws for a shareholder's or member's participation in a meeting of shareholders or members by

~~a conference telephone or other means of remote communication by which all persons participating in the meeting may hear each other if all participants are advised of the means of remote communication in use and the names of the participants in the meeting are divulged to all participants.~~

(2) Participation in a meeting pursuant to this section constitutes presence in person at the meeting.

(3) Unless otherwise restricted by any provisions of the articles of incorporation or bylaws, the board of directors may hold a meeting of shareholders or members conducted solely by means of remote communication.

(4) Subject to any guidelines and procedures adopted by the board of directors, shareholders or members not physically present at a meeting of shareholders or members may participate in the meeting by means of remote communication and are considered present in person and may vote at the meeting if all of the following are met:

(a) 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.

(b) 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 substantially concurrently with the proceedings.

(c) If any 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.

~~(d) 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 that means of remote communication in the original meeting notice given under section 404.~~

Sec. 407.

(1) The articles of incorporation may provide that any action required or permitted by this act to be taken at an annual or special meeting of shareholders or members may be taken without a meeting, without prior notice, and without a vote, if consents in writing, setting forth the action taken, are signed and dated by the holders of outstanding stock or members having not less than the minimum number of votes that would be necessary to authorize or take the action at a meeting at which all shares or members entitled to vote on the action were present and voted. Prompt notice of the taking of the corporate action without a meeting by less than unanimous written consent shall be given to shareholders or members who have not consented in writing.

(2) If an action consented to under this section would have required filing of a certificate under any other section of this act if the action had been voted upon by shareholders or members at a meeting of the shareholders or members, the certificate filed under that other section shall state,

in lieu of any statement required by that section concerning a vote of shareholders or members, that both written consent and written notice have been given as provided in this section.

(3) Any action required or permitted by this act to be taken at an annual or special meeting of shareholders or members may be taken without a meeting, without prior notice, and without a vote, if all the shareholders or members entitled to vote on the action consent to the action in writing.

(4) An electronic transmission consenting to an action transmitted by a shareholder, ~~or~~ member, or proxy holder, or by a person authorized to act for the shareholder, ~~or~~ member, or proxy holder, is written, signed, and dated for the purposes of this section if the electronic transmission is delivered with information from which the corporation can determine that the electronic transmission was transmitted by the shareholder, ~~or~~ member, or proxy holder, or by a person authorized to act for the shareholder, ~~or~~ member, or proxy holder, and the date on which the electronic transmission was transmitted. The date on which an electronic transmission is transmitted is the date on which the consent was signed for purposes of this section. A consent given by electronic transmission is not delivered until reproduced in paper form and the paper form delivered to the corporation by delivery to its registered office in this state, its principal office in this state, or an officer or agent of the corporation having custody of the book in which proceedings of meetings of shareholders or members are recorded. Delivery to a corporation's registered office shall be made by hand or by certified or registered mail, return receipt requested. Delivery to a corporation's principal office in this state or to an officer or agent of the corporation having custody of the book in which proceedings of meetings of shareholders or members are recorded shall be made by hand, by certified or registered mail, return receipt requested, or in any other manner provided in the articles of incorporation or bylaws or by resolution of the board of the corporation.

#### Sec. 441.

(1) Each outstanding share or member is entitled to 1 vote on each matter submitted to a vote, unless otherwise provided pursuant to section 303 or 304. 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.~~

(2) When an action, other than the election of directors, is to be taken by vote of the shareholders or members, it shall be authorized by a majority of the votes cast by the holders of shares or members entitled to vote on that action, unless a greater plurality is required by the articles of incorporation or another section of this act. Except as otherwise provided by the articles, directors shall be elected by a plurality of the votes cast at an election.

#### Sec. 451.

The articles of incorporation may provide that a shareholder or member entitled to vote at an election for directors may vote, in person, or by proxy, ~~or by electronic transmission~~, for as many persons as there are directors to be elected and for whose election the shareholder or member has a right to vote, or to cumulate votes by giving 1 candidate as many votes as the number of those directors multiplied by the number of shares held by the shareholder or member, or by

distributing the votes of the shareholder or member on the same principle among any number of the candidates.

Sec. 505. (1) ~~Except as provided in subsection (5), the board shall consist of 3 or more directors.~~ The bylaws shall fix the number of directors or establish the manner for fixing the number, unless the articles of incorporation fix the number.

(a) The board of a private foundation or of a type I supporting organization shall consist of 1 or more directors.

(b) The board of a corporation that is not a private foundation or of a type I supporting organization shall consist of 3 or more directors, except as provided in subsection (5).

(2) The articles of incorporation or a bylaw adopted by the shareholders, members, or incorporators of a corporation organized on a stock or membership basis may specify the term of office and the manner of election or appointment of directors. If the articles of incorporation or bylaws do not so specify the term of office or manner of election or appointment of directors, the first board of directors shall hold office until the first annual meeting of shareholders or members. At the first annual meeting of shareholders or members and at each subsequent annual meeting the shareholders or members shall elect directors to hold office until the succeeding annual meeting, except in case of the classification of directors permitted under this act.

(3) The articles of incorporation or a bylaw of a corporation organized on a directorship basis shall specify the term of office and the manner of election or appointment of directors.

(4) A director shall hold office for the term for which he or she is elected or appointed and until his or her successor is elected or appointed and qualified, or until his or her resignation or removal. A director may resign by written notice to the corporation. A resignation of a director is effective when it is received by the corporation or a later time if set forth in the notice of resignation.

(5) Beginning 180 days after the effective date of the amendatory act that added this subsection, the board of a corporation that is in existence on the effective date of the amendatory act that added this subsection shall consist of 3 or more directors. This subsection shall not apply to a private foundation or to a type I supporting organization.

Sec. 548.

~~(1) Unless~~ Except as provided in subsection (4) and unless otherwise prohibited by law, a corporation may lend money to, or guarantee an obligation of, or otherwise assist an officer or employee of the corporation or a subsidiary, including an officer or employee who is a director of the corporation or subsidiary, if in the judgment of the board, the loan, guaranty, or assistance is reasonably expected to benefit the corporation. ~~(2) A loan, guaranty, or assistance described in subsection (1) may be with or without interest, and may be unsecured, or secured in a manner that the board approves. Nothing in this section shall be deemed to~~ ~~(3) This section does not deny, limit, or restrict the powers of guaranty or warranty of a corporation at common law or under any statute.~~ ~~(4) If a corporation is a charitable purpose corporation, the corporation shall not provide loans to or guarantee an obligation of an officer or director of the corporation or a~~

~~subsidiary of a corporation, unless the officer or director is also a client of the corporation and the loan or guaranty is necessary to carry out the corporation's charitable purposes.~~

Sec. 922. (1) If a domestic corporation neglects or refuses for 2 consecutive years to file the annual reports or pay the annual filing fee required by law, the corporation shall be automatically dissolved. The administrator shall notify the corporation of the impending dissolution not later than 90 days before the 2 years has expired. Until a corporation has been dissolved, it is entitled to issuance by the administrator, upon request, of a certificate of good standing setting forth that it has been validly incorporated as a domestic corporation and that it is validly in existence under the laws of this state.

(2) A charitable purpose corporation that is dissolved under subsection (1) ~~shall provide notice of the dissolution to the attorney general within 60 days after the date of the dissolution and shall either:~~

(a) renew its corporate existence under the provisions of section 925; or

(b) comply with the provisions of the Dissolution of Charitable Purpose Corporations Act, 1965 PA 169, MCL 450.251 to 450.253.

(3) If a foreign corporation neglects or refuses for 1 year to file the annual report or pay the annual filing fee required by law, its certificate of authority is subject to revocation in accordance with section 1042. Until revocation of its certificate of authority or its withdrawal from this state or termination of its existence, the foreign corporation is entitled to issuance by the administrator, upon request, of a certificate of good standing setting forth that it has been validly authorized to transact business in this state and that it holds a valid certificate of authority to transact business in this state.

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A bill to amend 1965 PA 169, entitled "Dissolution of Charitable Purpose Corporations" by amending section 1 (MCL 450.251)

The People of the State of Michigan enact:

Sec. 1.

No nonprofit corporation, foundation, trustee corporation or other corporation or entity organized under the laws of this state whose corporate purposes are to hold property for any charitable purpose, except when they are organized for religious purposes, shall be dissolved except by giving notice to the attorney general by registered mail at least 45 days prior to the filing of any paper or document in respect to such dissolution with any other state agency or court. A corporation that is subject to this act and that is automatically dissolved pursuant sections 801(1)(a) or 922 of the Nonprofit Corporation Act, 1982 PA 162, MCL 450.2801(1)(a) and 450.2922, shall give notice to the attorney general within 60 days after the automatic dissolution of the corporation. The attorney general may require the dissolution to be accomplished by proceedings in the circuit court for the county in which the registered office of the corporation is located, and the making of an accounting of its assets, administration and disposition of its assets. The attorney general is a necessary party to such proceedings and shall be given due notice thereof. The attorney general may consent to dissolution without court proceedings, provided however, that any other statutory provisions requiring court proceedings shall not be affected nor eliminated by such consent. The corporation and securities commission shall not accept for filing any notice of dissolution unless it is accompanied by a copy of the order of the circuit court dissolving the corporation or a certified copy of the written consent of the attorney general to such dissolution.

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