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Amendments to the Michigan Nonprofit Corporation Act – Electronic Communications

Michigan's Nonprofit Corporation Act (the "Act") was recently amended, effective February 29, 2008, by Public Act 9 of the Public Acts of 2008 expressly permitting various notices and communications through electronic transmissions. The Act now provides that an electronic transmission constitutes written notice when notice is required or permitted by the Act to be given in writing. Furthermore, the amendments permit notice of meetings to be electronically transmitted and allow shareholder or member meetings to be conducted solely by means of remote communication. Finally, among other provisions, the amended Act specifies conditions under which a shareholder or member can participate in a meeting and vote by means of remote communication.

The foregoing amendments to the Act are consistent with those found in the Business Corporation Act that govern for-profit corporations and generally reflect the way in which corporations function in today's electronic age.

As a result of the amendments, nonprofit organizations should review their existing articles of incorporation and bylaws to address the potential use of electronic communication for the following aspects of corporate governance: (1) notice to shareholders or members for meetings; (2) conducting meetings by means of remote communication; (3) voting by means of remote communication; (4) granting proxy authority through use of electronic transmissions; (5) prescribing conditions under which shareholders and members may consent by electronic transmission to actions taken without a meeting; and (6) allowing the corporation to distribute its annual financial report by electronic transmission.

Discussion

A. Electronic Transmission. The Act defines "electronic transmission" or "electronically transmitted" as any form of communication that meets all of the following:

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

Previously, when notice was required or permitted, the notice was required to be in writing. An electronic transmission is now considered written notice. For example, previously the Act required written notice of the time, place, and purposes of a meeting of shareholders or members to be given personally or by mail, or by publication in a newspaper or other periodical regularly published by or on behalf of the nonprofit corporation. The amendments authorize notice by means of electronic transmission.

B. Meetings. The amendments specify that, unless otherwise restricted by the articles of incorporation or bylaws, a nonprofit board of directors may hold a meeting of shareholders or members conducted solely by means of remote communication. Shareholders or members of the nonprofit corporation may participate by means of remote communication and would be considered present in person and eligible to vote at the meeting if all of the following conditions are satisfied:

- (a) The nonprofit corporation implements reasonable measures to verify that each person considered present and permitted to vote is a shareholder;
- (b) The nonprofit corporation implements reasonable measures to provide each shareholder and member a reasonable opportunity to participate in the meeting and to vote on matters submitted. This includes an opportunity to read or hear the proceedings substantially concurrently;
- (c) A record of the vote or other action taken by any shareholder or member; and
- (d) A shareholder or member may be present and vote at an adjourned meeting by means of remote communication if that individual was permitted to be present and vote by that means in the original meeting notice.

Previously, shareholders or members could participate in scheduled meetings through the use of electronic communications, but the Act did not provide that the meeting could be conducted solely through the use of remote communications. Thus, nonprofit corporations can now have shareholder or member meetings solely through the use of remote communications. It should also be noted that the amended Act uses the term "remote communications" which may include means other than merely the previously used term "conference telephone or similar equipment".

C. Action without a Meeting. In many instances, the nonprofit corporation's articles or bylaws may provide for shareholder or member action to be taken without a meeting if all of the shareholders or members entitled to vote on the proposed action consent to it in writing. The revised Act sets forth that such consent may be obtained by electronic transmission if the electronic transmission verifies the shareholder or member or authorized proxy, the date sent, and the electronic transmission is capable of reproduction in paper form for delivery to an officer of the nonprofit corporation or its registered office.

D. Proxy Authority. The Act sets forth the manner in which a shareholder or member may authorize another to act for him or her by proxy. Any one or more of the following methods is a valid means by which a shareholder or member may grant proxy authority:

- (a) Delivering to the person a writing authorizing that person to act for the shareholder or member as a proxy, executed by the shareholder or member; or
- (b) Transmitting or authorizing the transmission of an electronic transmission to the person who would hold the proxy.

Therefore, either a traditional written authorization or an electronic transmission is permitted under the Act if the nonprofit corporation's articles or bylaws allow proxy action.

Future Amendments to the Act

House Bill Number 5681 was introduced on January 31, 2008 (the "Bill") and it proposes significant revisions to the Nonprofit Corporation Act in addition to those amendments discussed above. Among them, the proposed Bill adds the following provisions: (a) a definition for "Charitable Purpose Corporation;" (b) requires that the Board of Directors consist of three (3) or more directors as opposed to one (1) or more directors; and (c) prohibits loans or guarantees to an officer or director of the corporation or a subsidiary of the 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. The proposed Bill currently remains in the Commerce Committee, but as changes are made to the

language throughout the legislative process, the potential impact to nonprofit corporations will need to be reviewed.

Conclusion

Under the revised Act, nonprofit corporations expressly have the opportunity to conduct meetings and take other corporate actions through electronic means similar to for-profit corporations. The revised Act will enhance the ability of nonprofit corporations to communicate and conduct business electronically and also aid in modernizing communication among shareholders, members, and directors. Nonprofit hospitals and health systems should review their current articles of incorporation and bylaws, and if necessary, amend the corporate documents to allow the organization to take advantage of the changes.

If your organization would like assistance reviewing and analyzing existing articles or bylaws to implement the new provisions of the Act, please contact Michael J. Philbrick or Arthur F. deVaux at (248) 740-7505 or via email at mphilbrick@hallrender.com or adevaux@hallrender.com

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