

Resources

Significant Changes Made to Michigan Laws Governing Nonprofit Corporations

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On January 15, 2015, Acts Nos. 557, 558 and 559 of the Michigan Public Acts of 2014 became law. These acts make significant changes to the Michigan statutes that govern nonprofit corporations and should be of great interest to nonprofit organizations and their advisors.

Act 557

Act 557 makes numerous substantive amendments to the Michigan Nonprofit Corporation Act (1982 PA 162) (the "Act"). Nonprofit corporations organized under prior law should carefully consider whether it is advisable to update practices or amend current articles of incorporation or bylaws to take advantage of the various benefits afforded under the new law. The following is a summary of some of the most important changes made by Act 557:

Director Liability

Act 557 expands the circumstances under which a nonprofit corporation may indemnify its officer and directors. The Act now permit the Articles of Incorporation of a nonprofit corporation to include a provision that eliminates or limits the liability of a director (whether or not serving in a volunteer capacity) or volunteer officer to the corporation, its shareholders, or its members, with respect to any act (or the failure to act), other than liability related to the following:

1. Financial benefits received by a director or volunteer officer to which he or she is not entitled;
2. Intentional infliction of harm on the corporation, its shareholders, or members;
3. Improper dividends or distributions to shareholders or members or improper loans to a director, officer, or employee;
4. Intentional criminal acts; and
5. The payment of court ordered expenses related to a derivative proceeding brought in bad faith.

Prior law permitted only the limitation of liability of a volunteer director or volunteer officer related to a good-faith breach of the director's fiduciary duties, other than a breach of the duty of loyalty or any breach that resulted in an improper personal benefit to the director or officer. (Section 209(c)).

It should also be noted that these expanded provisions will automatically be read into any existing Articles of Incorporation which expressly limits the liability of volunteer directors and officers to the greatest extent permissible under prior law.

Directed Powers

New provisions in the Act now permit the Article of Incorporation of a nonprofit corporation to reserve any corporate power or authority to one or more members, shareholders or other persons. Under the amended Act, any such reservation that serves to restrict the discretion or power of the board of directors will also simultaneously serve to transfer liability to the person in whom the power or discretion is conferred. On its face, these additional provisions are quite expansive. There does not appear to be any limit placed on the extent to which control of the nonprofit corporation may be vested in persons other than directors or shareholders. (Section 209(f)).

Committees

Newly added provisions provide the board of directors, by default, with the power to create nonexecutive committees. Nonexecutive committees, which may consist of persons other than members, shareholders, directors or officers, are

prohibited from exercising the power or authority of the board of directors in the management of the business and affairs of the nonprofit corporation. (Section 527).

Traditional committees, which are now termed “executive committees,” are now granted, by default, the authority to appoint one or more subcommittees consisting of one or more members of the executive committee. An executive committee may then delegate to a subcommittee any or all of the powers and authority of the executive committee. (Section 528).

Corporate Name

The word “Foundation” may now be used in the name of any charitable purpose corporation (that is, a nonprofit corporation that is or could be exempt from federal income tax under section 501(c)(3) of the internal revenue or is otherwise organized exclusively for one or more charitable purposes). Prior to amendment, the Act did not permit the use of the word “Foundation” in the name of a nonprofit corporation unless the corporation were incorporated for the sole purpose of receiving, administering, and paying funds for various charitable purposes. (Section 212(3)).

Two or more nonprofit corporations, or a combination of nonprofit corporations and business corporations, LLCs, or Limited Partnerships are now permitted to assume the same name for a joint venture. (Section 217).

Electronic Notice

The Department of Licensing and Regulatory Affairs is now permitted to send notices to a resident agent through electronic means if authorized by the Corporation.

Professional Services

In the past, there has been active debate about the question of whether nonprofit corporations were empowered to employ members of the “learned professions,” particularly physicians. The Michigan Attorney General issued a ruling in 1993 finding that nonprofit corporations had this right under then-existing law. The amendments to the Act explicitly provide that nonprofit corporations are permitted to provide services “in a learned profession,” and to employ and enter into arrangements with duly licensed individuals to furnish those services on behalf of the corporation. Any person who renders such services on behalf of a nonprofit corporation will retain liability for negligent or wrongful acts committed by him or her or by any individual under his or her direct supervision and control. (Section 261(6), (7)). Nonetheless, the nonprofit corporation that employs a duly licensed or authorized individual may indemnify him or her for any resulting liabilities and expenses.

Changes to Provisions Governing Directors

Various changes are made to portions of the Act that govern corporate directors, including provisions that create a new method for removing directors for cause through a court action (Section 514) and expanded provisions to permit a director to rely upon the advice of others (Section 541).

Changes to Provisions Governing Corporations Formed on a Shareholder or Membership Basis

Extensive changes are made to the sections of the Act that govern the organization of both stock and membership based nonprofit corporations, which now more closely align with the business corporation act in many respects.

Derivative Proceeding

The sections governing derivative actions are modified to more closely align with the business corporation act.

Mergers

The merger rules under Chapter 7 of the Act are amended to more closely align with the business corporation act.

Foreign Corporations

The Act now explicitly states that a foreign corporation will not be treated as conducting affairs in Michigan merely as the result of soliciting or obtaining donations within the state. (Section 1012).

Act 558

Act 558 amends 1965 PA 169, which is now called the “Dissolution of Charitable Purpose Corporations Act,” to provide the Attorney General authority to oversee the dissolution, merger, or conversion of nonprofit corporations. This is an expansion of the previous act, which only explicitly covered the dissolution of nonprofit corporations.

As amended, no nonprofit corporation may do any of the following acts without giving prior written notice to the Attorney General:

1. Merge with another entity, whether nonprofit or for-profit;
2. Amend or restate its Articles of Incorporation to become a for-profit corporation;
3. Convert any entity that it controls into another type of for-profit entity; or
4. Dissolve.

Once notified, the Attorney General may request that the nonprofit corporation first submit an accounting of the assets of the nonprofit corporation. The Attorney General also has the discretion to (i) require that the notified action be accomplished through a proceeding in the Circuit Court or (ii) consent to the action without an additional court proceeding.

To ensure that the foregoing procedure is accomplished, Act 558 also amends the statute to provide that the Department of Licensing and Regulatory Affairs may not accept any filing that would effectuate one of the foregoing actions (including an amendment to the Articles of Incorporation that would change its term of existence to a specific date) unless it is accompanied by an order of the Circuit Court, the written consent of the Attorney General, or an affidavit stating that the Attorney General failed to respond to a request for consent within 120 days of filing.

Act 559

Act 559 amends the Michigan Limited Liability Company Act (1993 PA 23) to authorize the merger of a domestic limited liability company with a nonprofit corporation.

Conclusion

As a result of the various amendments made by Acts 557, 558, 559, organizations formed under the prior version of the Nonprofit Corporation Act should review their governing documents to determine whether changes are necessary or beneficial. Of most immediate importance to most organizations may be those provisions that now permit nonprofit corporations to more broadly limit the liability of directors, including paid directors, and volunteer officers. Nonprofit corporations should confirm that existing Articles of Incorporation allow for these broader limitations, where appropriate, and review current officer and director liability insurance policies to ensure they are suitably tailored.

Dykema will continue to monitor issues raised by these Acts and provide further updates and analysis. If you have questions about the matters raised in this alert, you may contact Gina M. Torielli (gtorielli@dykema.com or 734-214-7630), Anthony Frasca (afrasca@dykema.com or 734-214-7614), Mike Cumming (mcumming@dykema.com or 248-203-0740), Eric Klein (eklein@dykema.com or 248-203-0891), or your relationship attorney.

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Significant Changes Made to Michigan Laws Governing Nonprofit Corporations (Cont.)

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