

LEGAL ALERT

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USE OF ELECTRONIC COMMUNICATIONS BY NONPROFIT ORGANIZATIONS

Recent amendments to the Michigan Nonprofit Corporation Act permit nonprofit organizations to carry out matters of corporate governance via e-mail

By Scott D. Harvey, Attorney

The State of Michigan recently adopted long-anticipated amendments to the Michigan Nonprofit Corporation Act (the “Act”) to expressly permit nonprofit corporations to carry out matters of corporate governance with its shareholders, members or directors through the use of “electronic transmissions” (e.g., e-mail).

The amendments to the Act are intended to enhance the ability of nonprofits to communicate and conduct business electronically and also aid in modernizing communication among shareholder or members and directors given the prevalence of electronic communication today. While some nonprofits may already conduct business utilizing electronic transmission, these amendments provide specific authorization to do so as well as provide a legal framework for conducting business via 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 automatic process.

E-mail obviously fits within the definition of an “electronic transmission”. This definition may fit other types of electronic communications as well, and provides enough flexibility to adapt as forms of electronic communication continue to transform.

The principal purpose of the legislature in adopting these amendments, however, is to allow nonprofits to conduct business among shareholders or members and directors via e-mail.

While the amendments to the Act are particularly relevant to nonprofits organized upon a membership or shareholder basis, certain of the amendments have application to nonprofits organized upon a directorship basis as well.

Specifically, the amendments to the Act permit nonprofits to conduct business with its shareholders, members or directors via electronic transmissions in the following areas:

- Permits notices, including notices of meetings, to be provided to shareholders or members and directors via electronic transmission;
- Permits the conduct of meetings of shareholders, members or directors *solely* by means of remote communication;
- Permits members or shareholders to vote on matters via electronic transmission;
- Permits members or shareholders to grant proxy authority by means of electronic transmission;

- Permits shareholders or members to consent to an action without a meeting by electronic transmission, subject to certain conditions;
- Permits directors to consent to an action without a meeting via electronic transmission; and
- Permits an organization to distribute its annual report by means of electronic transmission.

These amendments will make it easier for nonprofits to conduct business with its shareholders, members or directors in today's mobile age, making it easier to schedule and conduct meetings and to vote on matters coming before nonprofits.

Generally, these provisions apply to all nonprofits, unless otherwise restricted by the organization's articles of incorporation or bylaws. In order to take advantage of these provisions, therefore, all nonprofit corporations are encouraged to update their articles of incorporation and bylaws to incorporate these provisions within their organizational documents. Note, however, that the use of electronic communications may not be advisable for all nonprofits in all permissible situations. That is why it is important to incorporate these provisions into these documents, or to craft policies outside of these documents, that address when and how the electronic communications are to be used, and when they are not advisable with regard to the organization and its

governance, taking into account the particular characteristics of the organization.

If you have any questions about how the amendments to the Act may affect your organization, or if you would like assistance in incorporating these amendments into your organization's articles of incorporation or bylaws, please do not hesitate to contact a member of Smith Haughey Rice & Roegge's Tax-Exempt Organizations Department.

Finally, please note that there is legislation pending in the state legislature that proposes other significant amendments to the Act. These proposed amendments include the following provisions: (i) defines what constitutes a "charitable purpose" corporation (which may have an impact upon property tax exemptions); (ii) requires that a board of directors consist of not less than three individuals; and (iii) prohibits loans or guarantees to an officer or director of the corporation or subsidiary of the corporation, unless the officer or director is also a client of the corporation and a loan or guarantee is necessary to carry out the corporation's charitable purposes. We will monitor the progress of these proposed amendments through the state legislature and will alert you should the proposed amendments be adopted.

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