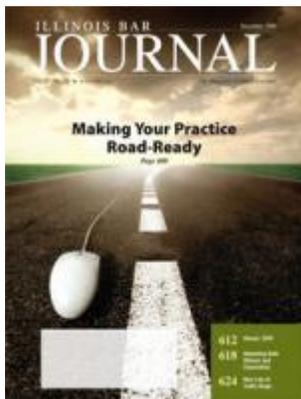


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Business Law

Electronic Voting for Nonprofits

Other changes to the Illinois General Not For Profit corporation act reduce restrictions on informal actions by members and provide more specific rules governing a member's right to examine corporate books.

By Michael J. Huft

On August 24, 2009, Governor Quinn signed into law a number of amendments to the Illinois General Not For Profit Corporation Act of 1986, 805 ILCS 105/101.01 et seq (the "Act"). They take effect January 1, 2010. This column summarizes the most important amendments.

Accommodating electronic communication

Several amendments bring not-for-profit corporations into the electronic age, recognizing that electronic communication is part of modern life.

Electronic transmission. Previously, section 101.80(p)¹ provided that when actions are required to be "written" or "in writing" or to have "written consent" or "written approval" and the like by or of members, directors or committee members, these words could be construed to permit such communications to be transmitted or received by electronic means only to the extent expressly provided in the articles of incorporation or the bylaws of the corporation. Under the new amendments, the expanded meaning of these terms is implied unless otherwise prohibited by the articles of incorporation or the bylaws.

Elections. Section 107.50 previously provided that elections of directors, officers or representatives by members could be conducted by mail, but only if the bylaws so provided. The new amendments provide that such elections may be conducted by mail, e-mail, or any other electronic means, unless otherwise prohibited by the articles of incorporation or the bylaws.²

These sensible changes allow the many not-for-profit corporations whose governing documents do not contain such express language to conduct more of their business electronically (or more likely, to ratify widespread practice). In addition, the definition of the term "delivered" in section 101.80(g) now encompasses transmission by electronic means to the email address, facsimile number, or other contact information on the records of the corporation.

Informal action by members entitled to vote

Under prior law, unless otherwise provided in the articles of incorporation or the bylaws, any action that may be taken at a meeting of the members may instead be taken without a meeting, and without a vote, if a written consent is signed either (i) by all the members entitled to vote on the matter, or (ii) by the members having not less than the minimum number of votes required to take such action at a meeting at which all members entitled to vote on the matter were present and voting. Section 107.10.

In an attempt to make informal action by members easier, particularly for corporations with many members and infrequent meetings, an amendment was proposed that would have substantially lowered the number of members required to approve an action. Concerns arose, however, that the proposed amendment had too few safeguards against a small number of active members approving an action without true majority approval.

The amendment now provides that any action that may be taken at a meeting of the members may be taken by ballot without a meeting by mail, e-mail, or any other electronic means whereby the members entitled to vote on the matter have an opportunity to vote for or against the proposed action, provided that the action is approved by a majority of the members casting votes or such larger number as may be required by the Act, the articles of incorporation or the bylaws, as long as the number of members casting a vote would constitute a quorum at a meeting of the members. The voting must remain open for at least five days from the date the ballot is delivered, or, for major issues such as the removal of a director, a merger, consolidation, dissolution or sale, or lease or exchange of assets, for at least 20 days.

These new provisions may seem cumbersome for organizations with just a few members who want to take informal action quickly. Thus, it seems reasonable to treat the five-day (or 20-day) waiting period as terminating earlier if all members have cast a vote.

Moreover, since these cumbersome provisions apply only if not "otherwise provided in the articles of incorporation or bylaws," any corporation may impose more stringent requirements for informal action through its bylaws. Note, however, that corporations without informal action provisions in their bylaws - i.e., those who rely on the Act to provide the default - may not be aware the default has changed. Such corporations should consider this issue carefully and, if appropriate, amend their bylaws.

Right of members to inspect books and records

Section 107.75 provides that any voting member of a not-for-profit corporation may inspect the corporation's books and records for any proper purpose at any reasonable time. The amendments do not alter this provision, but they clarify it and provide a procedural means for exercising this right.

First, a member may inspect the books in person or by an agent, and may make extracts from such records, but only for a proper purpose. A voting member wishing to exercise this right must make a written demand upon the corporation, stating with particularity the records to be examined and the purpose for the examination.

If the corporation refuses, the voting member may seek judicial assistance in compelling the examination. A member who seeks to examine records of account must show a proper purpose. If the member seeks to examine minutes, the burden is on the corporation to show lack of proper purpose.

Effect of a decrease in the number of directors

In general, a decrease in the number of directors, whether by board action or an amendment to the bylaws, may not shorten an incumbent director's term. Section 108.10(d). The new amendments modify this general rule by providing that when an amendment to the bylaws decreases the number of directors or eliminates the position of a director elected or appointed by persons or entities other than the members, the incumbent director's term may be shortened-but only if the amendment has been approved by the party with the authority to elect or appoint the directors whose terms would be shortened.

Several other amendments can be described more briefly:

- The director conflict-of-interest provisions in section 108.60 now do not apply where a director is directly or indirectly a party to a transaction involving a grant or contribution, without consideration, by one organization to another.
- Under section 108.70(b), directors of not-for-profit corporations organized for agricultural purposes, as a trade association, or as electrification or telephone cooperatives were exempt from liability based on the director's actions in that capacity

unless (i) they earn no more than \$5,000 per year as a director, or (ii) the act or omission involved willful or wanton conduct. The new amendments increase the dollar limit to \$25,000.

- Federal tax law imposes several restrictions on private foundations and requires that the restrictions either be stated in the private foundation's governing instrument or imposed by state law. Section 103.12 of the Act provides the state law requirements for private foundations that are Illinois not-for-profit corporations. The amendments belatedly update the reference to the federal tax law in this provision from the Internal Revenue Code of 1954 to the Internal Revenue Code of 1986.³

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1. Section references throughout this column are to the relevant sections of the Act.
2. SB 1285 was signed into law the same day as SB 1390 (SB 1390 contains the amendments discussed here). The bills contain different and mutually contradictory amendments to section 107.50 regarding voting by members for directors. SB 1390 provides for elections by e-mail or other electronic means unless the articles or bylaws prohibit it, while SB 1285 permits elections by electronic means only if permitted by the articles or bylaws. Perhaps the saving grace is that SB 1285 is effective on October 1, 2009, while SB 1390 becomes effective on January 1, 2010 (thus, evidently, this provision of SB 1285 will be law for three months only). More likely this is a case of the legislature's right hand not knowing what its left hand is doing. SB 1390 was dedicated to a large number of changes to the NFP Act, while SB 1285, which deals primarily with amendments to the Business Broker's Act, merely inserts this one amendment to the NFP as an extraneous item.
3. The legislature has not yet updated the similar reference in the corresponding provision in the Illinois statutes relating to trusts that are private foundations or are otherwise subject to some or all of the private foundation rules. 760 ILCS 60/1.