

THE REVISED ILLINOIS NOT-FOR-PROFIT CORPORATION ACT: WHAT YOU NEED TO KNOW

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ILLINOIS GOV. PATRICK QUINN RECENTLY SIGNED INTO LAW SENATE BILL 1390, NOW KNOWN AS PUBLIC ACT 96-0649. SIGNED ON AUG. 24 AND TAKING EFFECT ON JAN. 1, 2010, THE BILL UPDATES THE ILLINOIS GENERAL NOT-FOR-PROFIT CORPORATION ACT OF 1986.

The passage of SB 1390 marks the culmination of a nearly three-year public policy effort led by the Forum to bring about important change to the way in which not-for-profit organizations are governed.

Among the most important updates included in SB 1390 are provisions that: make it easier for associations to electronically hold elections; enhance board governance and operations; simplify the demonstration of actions taken by unanimous written consent of the board; and increase the amount not-for-profits can compensate volunteer directors without the loss of limited liability protection.

FORUM'S LEADERSHIP

In early January 2008, a task force of Forum members began critically reviewing the act to determine if and how it could be improved for the benefit of all not-for-profit organizations incorporated in Illinois. After conducting a comprehensive review of the act, with extensive input from not-for-profit executives, practitioners and others familiar with its workings, the task force identified the key provisions that it felt could and should be improved. The intent was to take the act — generally considered one of the best not-for-profit acts in the country — and update

it to reflect the realities of the not-for-profit arena, make electronic communications easier to use, and incorporate certain best practices. The task force developed specific statutory revisions and recommended to the Forum's Board of Directors that the Forum spearhead efforts to revise the act.

With the approval of the board, the task force prepared legislative language and enlisted the Forum's lobbyist, Randy Witter of Cook-Witter Inc., to garner support for the proposed amendments from other stakeholders, including the Illinois Society of Association Executives. Under the chief sponsorship of Illinois Sen. A.J. Wilhelmi (D-Crest Hill), SB 1390 was introduced with all of the Forum's proposed changes. Following adoption in the Senate, SB 1390 also passed the House under the chief sponsorship of Illinois Rep. John Fritchey (D-Chicago). After 18 months of hard work, Gov. Quinn signed SB 1390 into law. Thanks to the efforts of the Forum, ISAE and other key stakeholders, the entire Illinois not-for-profit community will reap the benefits of the improved act.

While the Forum believes that the act and its amendments provide an excellent set of statutory provisions under which to organize and operate a not-for-profit corporation, the Forum also felt that a number of the act's provisions could be improved by providing additional clarity and flexibility, or simplification.

The amended act includes changes to sections 101.80, 103.12, 107.10, 107.40, 107.50, 107.75, 108.05, 108.10, 108.35, 108.45, 108.60, 108.70 and 110.30. You can find a copy of SB 1390 reflecting all revisions to the act at <http://www.ilga.gov> (search SB 1390).

REVISIONS EXPLAINED

The following explains each revision to the act and a brief overview of its impact:

Section 101.80(g)(4). Definitions. The definition of "delivered" has been revised to clarify that notice required by the act will be effective if it is "transmitted by electronic means" to an e-mail address, fax number or any other type of contact information appearing on the records of the corporation that may be approved in the articles of incorporation or bylaws. The revisions to this section clarify that e-mail and fax are acceptable methods of delivery (without the need for the corporation to specifically approve such methods of communication), while specifically providing the necessary statutory flexibility to address potential future, currently unknown methods of communication (as may be authorized or approved in the articles of incorporation or bylaws).

Section 101.80(p). Definitions. Actions required to be "written," to be "in writing," to have "written approval" and the like by or of members, directors or committee members will now include any communication transmitted or received by electronic means unless specifically prohibited by the corporation's articles of incorporation or the bylaws. Before the act was amended, communications transmitted or received electronically could not be accepted as "writings" unless specifically permitted in the corporation's articles of incorporation or bylaws. Electronic communications will now be the statutory default provision in Illinois, automatically allowing not-for-profits to benefit from the electronic communication provisions without the need to specifically amend their articles of incorporation or bylaws.

Section 103.12. Private foundations. This section updates an outdated reference to the Internal Revenue Code of 1954 to reflect the 1986 amendment of the Internal Revenue Code.

Section 107.10. Informal action by members entitled to vote. In what will be an enormous benefit to not-for-profits, the revisions to this section make it much easier for members to take action without a meeting (referred to as "informal action"). Specifically, not-for-profits will now be able to conduct mail and e-mail ballots in a transparent and straightforward manner.

Unlike mail ballots for elections (see §107.50 of the current act), and unlike any matter that might come before a meeting of members, §107.10 of the current act states that a vote without a meeting requires consent by all of the members (not likely achievable) or by "the minimum number of votes that would be necessary to authorize or take such action at a meeting at which *all* members entitled to vote thereon were present and voting." Essentially, §107.10 currently requires that any member action taken by mail ballot (other than elections) requires a majority vote (or such other vote as required by the bylaws) of the entire membership. For example, a 1,000-member organization could take action at a meeting if

WHILE THE FORUM BELIEVES THAT THE ACT AND ITS AMENDMENTS PROVIDE AN EXCELLENT SET OF STATUTORY PROVISIONS UNDER WHICH TO ORGANIZE AND OPERATE A NOT-FOR-PROFIT CORPORATION, THE FORUM ALSO FELT THAT A NUMBER OF THE ACT'S PROVISIONS COULD BE IMPROVED BY PROVIDING ADDITIONAL CLARITY AND FLEXIBILITY, OR SIMPLIFICATION.

a simple majority of a quorum approved it. That also would apply to an election conducted by mail ballot. However, under the current act, if that organization wanted to take any other action by mail ballot, §107.10 of the current act would require that no less than 501 of those 1,000 members actually return ballots and that at least 501 vote in favor. This is a very high and prohibitive threshold that makes action by mail ballots impractical.

Under the revised act, informal actions (taken by mail or electronic ballot) must be approved by the same number of members as would be necessary to approve such action at a member meeting. For example, if the bylaws require a majority of the members present at a meeting at which a quorum is present to take action at a member meeting, then a vote taken via mail or electronic ballot would pass if it received the same number of votes as would have been required had the vote been taken at a meeting. If the quorum requirement is 100, and 200 members return ballots, the required vote for approval of the informal action would be 101.

The changes to §107.10 allow membership organizations to more easily conduct business by mail or electronically and organizations no longer will need to conduct "proxy meetings" in order to circumvent the constraints of §107.10 of the current act. The changes to the act recognize the convenience, efficiency and cost savings that electronic communications and voting provide to membership organizations, and encourage greater ease of participation through the greater use of electronic voting.

The revisions also impose the following restrictions on informal action by members:

- (i) Voting must remain open for no less than five days from the date the ballot is delivered; however, in the case of a removal of one or more directors, a merger, consolidation, dissolution or sale, lease or exchange of assets, the voting must remain open for no less than 20 days from the date the ballot is delivered.
- (ii) Such informal action shall become effective only if at least

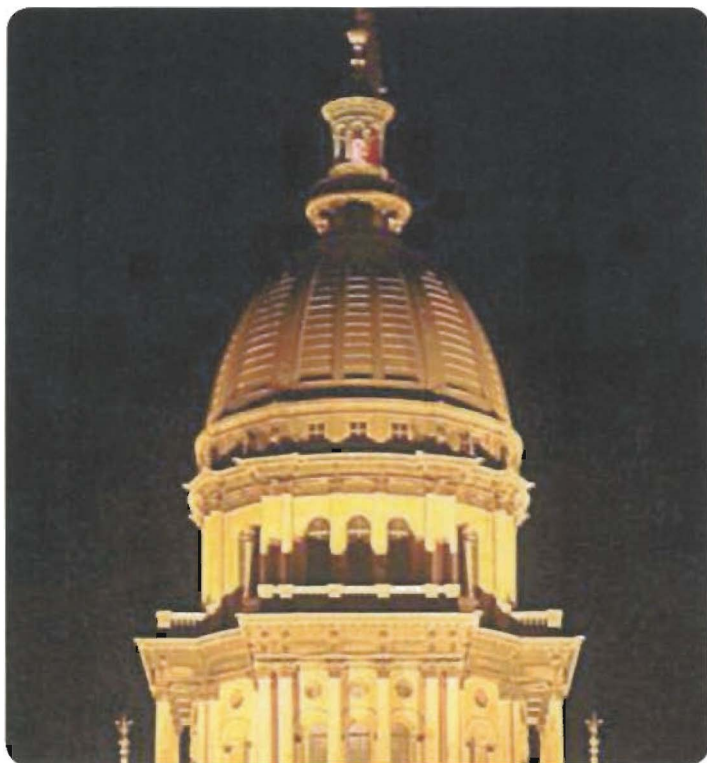
five days prior to the effective date of such informal action a notice in writing of the proposed action is delivered to all members entitled to vote on the subject matter of the vote (which can be accomplished by stating the effective date of such action on the ballot or materials accompanying the ballot).

Section 107.40(c). Voting. This section has been revised to clarify that in situations in which no members have a right to vote with respect to a particular matter, the board has the authority to act. This revision clarifies and reinforces the fact that the corporation has the right to limit voting rights.

Section 107.50. Proxies. The changes to this section provide that members may vote by proxy unless the articles of incorporation or bylaws explicitly prohibit proxy voting. In addition, language has been added specifically providing that the election of directors, officers or representatives by members may be conducted by mail, e-mail or any other electronic means as set forth in revised Section 107.10(a).

Section 107.75(a). Books and records. Revisions to this section bring it into conformity with the corollary provisions of the Business Corporation Act (which governs for-profit corporations). Specifically, the new language makes it clear that a voting member must have a proper purpose in order to make a valid and enforceable demand to examine the organization's books and records of account and minutes. Such demand must be in writing, and state with particularity the records sought to be examined and for what purpose. The revisions also specify that if the corporation refuses examination, the voting member may file suit to compel such examination and will bear the burden of proving such proper purpose if the purpose is to examine books or records of account. If the purpose is to examine minutes, the burden of proof will be upon the corporation to establish that the voting member does not have a proper purpose.

Section 108.05(b). Board of directors. Redundant language was deleted.



Section 108.10(d). Number, election and resignation of directors. The revisions to this section clarify who must approve amendments reducing the size of the board. Specifically, a bylaw amendment that decreases the number of directors or eliminates the position of a director elected or appointed by persons or entities other than the members may shorten the terms of incumbent directors provided that such amendment is approved by the party that otherwise has the authority to elect or appoint such directors.

Section 108.10m. Number, election and resignation of directors. Clarifies that if the articles of incorporation or bylaws authorize dividing the members into classes, then the articles or bylaws also may authorize the election of directors by one or more classes.

Section 108.35(a). Removal of directors. Clarifies the statutory language that all directors, of any class or category, can be removed with or without cause (including directors with staggered terms).

Section 108.45(b). Informal action by directors. Simplifies the provisions regarding demonstration of unanimous written consent of directors taking action without a meeting. Under the current act, action by unanimous written consent requires the actual signature of the person providing consent to meet the requirement of having a "written record of such approval." Under the revised act, an actual signature will no longer be required - a fax, e-mail or other written record of approval will suffice.

Section 108.60(e). Director conflict of interest. New section (e) has been added to address the situation where a director is "indirectly" a party to a transaction involving a grant or contribution, without consideration, from one organization to another by virtue of the fact that such director sits on the board of each such organization (e.g., a director that sits on the boards of both a supported and supporting organization). The intent of this section is to clarify that there are no grounds for invalidating such a transaction based on the involvement of such a "conflicted" director in the decision making process. Thus, in a proceeding contesting the validity of such a transaction, the burden of proving fairness would not automatically be shifted to the party asserting validity and the participation of such "interested director" would not be grounds for invalidation.

Section 108.70(b). Limited liability of directors, officers, board members and persons who serve without compensation. The change to this section increases the cap on what a director can be paid without losing the act's limited liability protection from \$5,000 to \$25,000.

Section 110.30(4)(ii). Articles of amendment. The change to this section reflects the revisions made to Section 107.10.

MORE INFORMATION

The Forum will continue to educate its members on how to prepare for, implement and take advantage of the new law through future education sessions at Forum on the River and additional articles when appropriate. Visit www.associationforum.org for more information on program offerings and other resources on the updated act. **A**

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