

The Proposed Model Nonprofit Corporation Act, 3d Ed.

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issues to be aware of

- role of the attorney general
- elimination of classification scheme
- clarification of ability to use alternative governance arrangements
- fundamental transactions

attorney general

- provisions relating to the role of the attorney have been deleted from the act
- reason is that those provisions belong in a different location
 - nonprofits can also be organized as unincorporated nonprofit associations or (in some states) as LLCs
 - to cover those other forms of entities requires a statute with broader scope

classification scheme

- current act classifies nonprofit corporations into:
 - mutual benefit corporations (e.g., country clubs)
 - public benefit corporations (charities)
 - religious corporations
- classification has not met with wide acceptance
- eliminating the classification only affects a limited number of sections, mostly dealing with action by members

classification scheme (cont.)

- but elimination of the classification scheme does affect the required contents of public filings which will no longer identify which of the three types the corporation is
 - articles of incorporation
 - foreign qualification
 - annual report

classification scheme (cont.)

- although the classification scheme has been eliminated, the revision has special rules for a “select exempt organization”
- defined in § 1.40(49) as “an entity that is exempt from Federal income taxation under Section 501(c)(3) or (4) of the Internal Revenue Code of 1986 or that is exempt from income taxation under [*comparable provision of state law*].”

classification scheme (cont.)

- “select exempt organization” is used in the following sections:
 - §§ 1.51 and 1.52 [optional provision] giving the attorney general the right to seek review of corporate action
 - §§ 9.03(d), 11.02(h) and 11.03(i) prohibiting private inurement in fundamental transactions

classification scheme (cont.)

- two other restrictions also apply to charities:
 - §§ 9.03(b), 10.09(b), 11.01(b) and 12.03 provide that in a fundamental transaction property held in trust or otherwise dedicated to a charitable purpose may not be diverted from that purpose without an appropriate order
 - §§ 9.03(c), 10.09(b), 11.02(g) and 11.03(h) provide that, without an appropriate order, a fundamental transaction may not affect:
 1. a restriction imposed by the entity's organic documents
 2. a restriction imposed on the entity's property
 3. the existing rights of third persons

use of a “designated body”

- concept is in the current act in § 8.01(c):
“The articles may authorize a person or persons to exercise some or all of the powers which would otherwise be exercised by a board. To the extent so authorized any such person or persons shall have the duties and responsibilities of the directors, and the directors shall be relieved to that extent from such duties and responsibilities.”
- revision makes the concept more transparent

definition of a “designated body”

- defined in § 1.40(10) as:

“a person or group, other than the members, the board of directors, or a committee of the board of directors, that has been vested by the articles of incorporation or bylaws, pursuant to authority expressly conferred by this Act, with powers that, if not vested by the articles or bylaws in such person or group, would be required by this Act to be exercised by:

- (1) the board of directors;
- (2) the members; or
- (3) a convention or assembly of delegates.

effect of using a designated body

- § 8.12(a): some, but less than all, the powers, authority or functions of the board may be vested in a designated body
- § 8.12(b): provisions of law relating to the board of directors apply to the designated body
- § 8.12(c): directors are relieved from their duties and liabilities to the extent they have been replaced by a designated body

fundamental transactions

- revision contains the full set of cross-entity transaction provisions found in the MBCA
 - domestication
 - for-profit conversion
 - entity conversion
 - cross-entity mergers

fundamental transactions (cont.)

- member vote required to approve a fundamental transaction is “approval of the members at a meeting at which a quorum exists consisting of at least a majority of the votes entitled to be cast”
 - approval requires more votes “for” than “against” (§ 7.24(c))
 - abstentions are not “votes” (§ 1.40(56))
- this is a potentially very low vote