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MICHIGAN NONPROFIT CORPORATIONS USE OF PROXIES

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To what extent may proxies be utilized for voting or other decision-making purposes by a Michigan nonprofit corporation? They may be used in certain situations by certain Michigan nonprofits. A Michigan nonprofit corporation is subject to the provisions of the Michigan Nonprofit Corporation Act of 1982 (the "Act"). The Act requires nonprofit corporations to be organized on a stock or nonstock basis. Nonstock corporations must be organized as either membership or directorship corporations.

The provisions of the Act applicable to nonprofit corporations organized on a stock basis are similar to those of the Corporations organized for profit under the Michigan Business Corporation Act regarding formation, issuance of shares and the rights and obligations of shareholders. Unless provided in the Articles or Bylaws, the shares of a corporation organized under the Act are nontransferable and are cancelled on the death or resignation of the Shareholder. The same is true as to memberships for nonprofit corporations organized on a membership basis with each member having one vote for membership votes unless its Articles or Bylaws provide otherwise.

The Act further provides that for stock or membership corporations organized under the Act, their Articles or Bylaws may provide rules for the governance of the organization which must be reasonable, germane to the purposes of the corporation, and equally enforced as to all.

A nonprofit corporation organized as a directorship corporation may, but need not, have members. If it does have members, the members are not entitled to vote. All matters requiring a membership vote according to the Act are subject to duly authorized action by the Board of Directors of a directorship corporation.

The Act provides that an annual meeting of shareholders or members shall be held as provided in the nonprofit corporation's Bylaws for the election of directors and for such other business as may come before the meeting. The Act provides that, if so provided in the corporation's Articles, such action may be taken by the written consent of a majority of shareholders or members entitled to vote if such is promptly noticed to all shareholders or members not consenting. This notice is not required if all shareholders or members have consented to the action in writing.

If the shareholders or members do not hold an annual meeting, this fact will not affect otherwise valid corporate acts or otherwise impair the corporation. However, if the shareholders or members are so divided in voting power as to be unable to vote on successors of directors whose terms expire so the corporation is unable to carry out its

purposes, such failure gives the appropriate circuit court jurisdiction to dissolve the corporation.

The Act states that unless a greater or lesser number is provided in the corporation's Articles or Bylaws, a majority of the shares or members of each class of shares or members entitled to vote shall constitute a quorum for a valid meeting and a majority of those voting is required for valid shareholder or member action unless again, the Articles or Bylaws specify a different amount of votes. The Act specifies that unless the Articles provide differently, a plurality of shareholder or member votes is required to elect directors. Please note, the Act contains a number of provisions regarding member and shareholder voting including the possibility of a shareholder or member voting agreement.

The Act contains very specific provisions regarding the use of proxies. Section 421 of the Act states:

"1) Except as otherwise provided in the Articles of Incorporation or in a Bylaw adopted by the shareholders or members, a shareholder or member entitled to vote at a meeting of shareholders or members or to express consent or dissent without a meeting may authorize other persons to act for the shareholder or member by proxy.

2) *A proxy shall be signed by the shareholder or member or an authorized agent or representative. A proxy is not valid after the expiration of three years from the date unless otherwise provided in the proxy.*

3) *A proxy is revocable at the pleasure of the shareholder or member executing it unless it is entitled "irrevocable" and the provisions of Sections 422 and 423 of the Act are met (generally dealing with transfers and credit arrangements).*

4) *The authority of the holder of a proxy to act is not revoked by the incompetence or death of the shareholder or member who executed the proxy unless before the authority is exercised, written notice of an adjudication of the incompetence or death is received by the corporate officer responsible for maintaining the list of shareholders or members."*

Consequently, the answer to the question as to the use of proxies in actions by shareholders of a stock nonprofit corporation or a membership nonstock nonprofit corporation in Michigan is yes they may be used within the parameters of the Act. This does not address the question of the use of proxies by a nonprofit directorship corporation.

Nowhere in the Act is there a provision enabling directors of a directorship nonprofit corporation to grant proxies. Actually, there is little in the Act specifically

addressing directors of a directorship nonprofit corporation. In such a corporation, the directors assume the governance role of members (in a directorship corporation with members, the members cannot vote). Yet the Act deals with the rights, authority, duty and obligations of directors in a similar fashion as directors of a for-profit corporation. Therefore, as the Act is silent, it must be concluded the director with the inherent fiduciary duty to the corporation is subject to the corporate law maxim that the director cannot delegate his or her fiduciary obligation and therefore cannot grant a proxy.

Given the extensive provisions for shareholder and member proxies and the notion that a director proxy would be a derogation of established legal principle, it must be concluded that if the Michigan Legislature intended directors of a nonprofit directorship corporation to have the authority to grant proxies, the Act would have so provided. Any action taken by directors of a directorship nonprofit Michigan corporation based on proxies granted to nondirectors is susceptible of challenge as not being properly authorized. This is one reason for the representation contained in Association contracts that the entry into such has been properly authorized by the governing body of the Association.