

D.C. Nonprofit Corporation Law Changes for 2012

Revisions to the District of Columbia Nonprofit Corporation Act affect the governance and internal operations of certain D.C. nonprofits.

January 3, 2012

Beginning January 1, 2012, nonprofit corporations formed in the District of Columbia will be subject to a revised District of Columbia Nonprofit Corporation Act (Act) that provides new requirements, modifies certain default rules, and clarifies many aspects of the law with respect to the governance of nonprofit corporations. D.C. nonprofits are encouraged to review their governing documents to confirm whether changes are necessary to comply with the Act or to take advantage of revised provisions of the Act.

Specific actions that D.C. nonprofits should consider in response to the revisions include the following:

- **Review and consider expanding indemnification provisions for directors and officers.** The Act now includes comprehensive guidance on the standards for indemnification and advancement of expenses for directors and officers, including the circumstances under which a corporation may provide indemnification. The Act allows corporations to authorize expanded indemnification of directors and officers in their articles of incorporation.
- **Confirm that the president and treasurer are different individuals.** A new requirement prohibits the same individual from serving as both president and treasurer. This is a change from a previous provision, which prohibited the same individual from serving as both president and secretary.
- **Confirm that committees with board authority are composed only of directors and are properly authorized by the board.** New rules apply to the formation and composition of board committees. The creation of board committees and appointment of directors to the committees must be approved by a majority of the directors in office (or by the number specified in the articles or bylaws if greater). Nondirectors may only serve on advisory committees that are not authorized to exercise any powers of the board. Alternatively, its articles of incorporation may authorize a nonprofit corporation to form a designated body that may have certain powers of the board and whose members may consist of nondirectors with the same fiduciary duties as directors.

- **Restate articles of incorporation that have been amended multiple times.** Previously, the Department of Consumer and Regulatory Affairs (DCRA) did not accept restated articles of incorporation, which often resulted in several amendments. The DCRA will now accept restated articles of incorporation; such documents no longer require notarization.

Member corporations should also consider the following:

- The Act revises default rules with respect to member meetings, including the percentage of members that may call a special meeting, the proportion of members constituting a quorum, and the number of votes required for members to elect directors. Members may also hold meetings electronically if that form of meeting is authorized by the articles or bylaws.
- The Act includes new recordkeeping obligations and new rights for members to inspect and copy records including the articles of incorporation, bylaws, minutes for the last three years, membership communications for the last three years, financial statements, the names and addresses of current officers and directors, and the most recent biennial report.

Additional highlights of the Act include the following:

- Codification of the common-law fiduciary duties of officers and directors, including the duties of care and loyalty. The Act also provides for expanded liability protection of directors of charitable corporations and allows noncharitable corporations to provide for expanded limitations on liability in their articles.
- Requirements for attorney general notification of certain events with respect to charitable corporations, such as an intent to dissolve (although the attorney general is not required to approve the dissolution).
- Limited exceptions to the general prohibition on loans and guarantees to directors and officers. For example, a corporation will be able to provide an advance to a director or officer to pay reimbursable expenses reasonably expected to be incurred.
- New governance structures allowing nonprofit corporations to become member-governed corporations (a form of governance that provides more expansive powers to members, such as approval over certain fundamental transactions without board action) and to designate certain powers of the board or members to designated bodies consisting of individuals or entities. It is important to note, however, that while these structures will now be permissible under D.C. law, organizations will separately have to determine whether the use of these structures is consistent with an organization's tax-exempt status.
- Two-year reports may be filed electronically and, beginning with 2012 filers, are now due on April 1.

“Old Act” corporations (those formed prior to 1962) that do not want to be subject to the Act must file a notice on or before December 31, 2013. Congressionally chartered corporations (except those required to be incorporated under the laws of the District of Columbia) are treated as foreign

corporations under the Act and must maintain a registered agent, obtain a certificate of authority to do business, and file two-year reports with the DCRA.

For more information regarding the topic discussed, please contact any of the following Morgan Lewis attorneys:

Washington, D.C.

Celia Roady	202.739.5279	croady@morganlewis.com
Matthew R. Elkin	202.739.5285	melkin@morganlewis.com
Kimberly M. Eney	202.739.5825	keney@morganlewis.com
Edward T. Chaney	202.739.5831	echaney@morganlewis.com

About Morgan, Lewis & Bockius LLP

With 22 offices in the United States, Europe, and Asia, Morgan Lewis provides comprehensive transactional, litigation, labor and employment, regulatory, and intellectual property legal services to clients of all sizes—from global Fortune 100 companies to just-conceived startups—across all major industries. Our international team of attorneys, patent agents, employee benefits advisors, regulatory scientists, and other specialists—nearly 3,000 professionals total—serves clients from locations in Beijing, Boston, Brussels, Chicago, Dallas, Frankfurt, Harrisburg, Houston, Irvine, London, Los Angeles, Miami, New York, Palo Alto, Paris, Philadelphia, Pittsburgh, Princeton, San Francisco, Tokyo, Washington, D.C., and Wilmington. For more information about Morgan Lewis or its practices, please visit us online at www.morganlewis.com.

IRS Circular 230 Disclosure

To ensure compliance with requirements imposed by the IRS, we inform you that any U.S. federal tax advice contained in this communication (including any attachments) is not intended or written to be used, and cannot be used, for the purpose of (i) avoiding penalties under the Internal Revenue Code or (ii) promoting, marketing or recommending to another party any transaction or matter addressed herein. For information about why we are required to include this legend, please see <http://www.morganlewis.com/circular230>.

This LawFlash is provided as a general informational service to clients and friends of Morgan, Lewis & Bockius LLP. It should not be construed as, and does not constitute, legal advice on any specific matter, nor does this message create an attorney-client relationship. These materials may be considered **Attorney Advertising** in some states. Please note that the prior results discussed in the material do not guarantee similar outcomes.

© 2012 Morgan, Lewis & Bockius LLP. All Rights Reserved.