

The Proposed South Dakota Nonprofit Corporation Act Legislation

Background

The current Nonprofit Corporation Act was enacted in 1965. Diverse types of nonprofits are governed under the Nonprofit Corporation Act, such as religious organizations, private and community foundations, health care organizations, educational institutions, homeowners associations, cooperatives, and the list goes on. Although many of our nonprofits have pushed to be at the forefront and leaders in industries, our nonprofit laws have not kept pace. There have been no major updates to our nonprofit laws in over 50 years.

The proposed language in the bill is developed from the Third Edition of the Revised Model Nonprofit Corporation Act that was adopted by the American Bar Association in August of 2008. Most states have derived their nonprofit corporation laws from or are closely related to the various model legislation adopted by the American Bar Association. Domiciles that follow some version of the Model Nonprofit Corporation Act are generally viewed favorably as it provides for greater uniformity, richer sources of precedent, statutory interpretation and clarity of law. A prominent goal of the Third Edition of the Revised Model Nonprofit Corporation Act was to follow the Model Business Corporation Act to the extent possible; however, there are inherent differences that distinguish nonprofits from profits that necessitate distinctive treatment.

In 2010, a nonprofit law subcommittee of the Business Law Committee of the State Bar of South Dakota was assigned to analyze and modify the model legislation to tailor to the needs of South Dakota. After passing through the subcommittee and larger Business Law Committee, the proposed legislation was passed by the State Bar of South Dakota in June, 2014, to be recommended for consideration by the South Dakota State Legislature. The proposed revised Act was introduced in the legislature in 2015. Concerns were expressed regarding existing nonprofits, specifically smaller and rural nonprofits, which may not desire to have the advances proposed in the bill as they simply want to keep status quo. The proposed bill was tabled; and immediately thereafter, the nonprofit subcommittee of the Business Law Committee began revising the proposed law. The most significant change made being the current Nonprofit Corporation Act will stay in place as is and adding as separate Chapters, 47-22A *et seq.* reflecting the updated Revised Model Nonprofit Corporation Act. This will enable existing nonprofits the ability to elect if they want to be governed under the new law. Newly organized nonprofits will fall under the updated Act once it is in place and cannot elect to be governed under the old law. The subcommittee has further worked on provisions that although stray from the model act, are more tailored to meet the needs of South Dakota nonprofits.

Summary

The proposed legislation improves governance by updating the code to allow nonprofits to operate in the 21st century. The notice requirements are expanded in the proposed legislation to include multiple means of communication, including electronic communication. In contrast, current nonprofit laws only allow written notice in most circumstances. Meetings may occur by means of the Internet or other electronic communications technology so that members have the opportunity to read or hear the proceedings substantially concurrently with their occurrence, vote on matters submitted to the members, pose questions, and make comments.

Where possible, provisions are updated to mirror the for-profit sections of SDCL. For example, the proposed model legislation addresses whether or not a record of incorporation filed with the Secretary of State must be in English. Like many other provisions, this issue is not addressed in the current nonprofit law, but the issue is addressed within the for-profit sections of SDCL. Matters relating to the setting of a record date determining the members entitled to vote, addressing how directors conduct meetings, actions by ballots, and the formation of voting agreements are all provisions addressed in our for-profit sections and now addressed in the proposed legislation. The current Nonprofit Corporation Act is simply devoid in certain areas. The current law does not address nonprofit domestication, conversion, derivative proceedings, membership exchanges, or transition provisions, all of which are addressed in the proposed legislation and are currently addressed in our for-profit sections of SDCL. The other component to help place nonprofits on a more equal footing with for-profits is to amend SDCL § 37-11-1 so that nonprofits are allowed the opportunity to file a fictitious name statement to help protect their proprietary interests.

With regard to articles of incorporation and bylaws, few changes have been made. The proposed legislation allows one or more persons to act as incorporators of a nonprofit to align with the for-profit sections. The proposed legislation has fewer mandatory requirements to be set forth in the articles of incorporation than currently exist. However, the proposed legislation has additional optional provisions that nonprofits may select to set forth in the articles of incorporation. Likewise, the proposed legislation is similar to the existing law that mandates the corporation to adopt bylaws and the bylaws may contain any provision for managing the activities and regulating the affairs of the corporation that is not inconsistent with law or the articles of incorporation. The filing, service and copying fees remain similar to the current law. Another area that remains similar is liability protection afforded to nonprofits. Significantly, the current law does provide reduced liability exposure in comparison to the Third Edition of the Revised Model Nonprofit Corporation Act. Accordingly, the current law pertaining to liability is maintained in the proposed legislation so there is no liability change for nonprofits with regard to such statutes.

The general powers granted to a nonprofit under the current codified law were not changed by the proposed legislation and a few more powers were added for nonprofits. One difference is that the powers granted by the model legislation are limited by any contrary language in the articles of incorporation or bylaws, whereas the general powers granted under current law are generally not constrained by the articles or the bylaws. The proposed legislation gives great deference to the articles of incorporation and bylaws in determining the right to vote, voting procedures, and quorum requirements.

Because nonprofits may supersede the general provisions of the model legislation, they have great latitude to individually shape their governing requirements as they see fit and not put undue burden on nonprofit organizations. On the whole, the proposed legislation is more comprehensive to help improve governance by allowing nonprofits to operate in the 21st century and by reducing uncertainty and the inconsistency that exists with the absence of law.