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Contradictory changes by P.A. 096-0648 and 096-0649 to Section 107.50 of Not For Profit Corporation Act cause uncertainty

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I. Introduction

On August 24, 2009, Governor Quinn signed Public Acts 96-648 (SB 1285) and 96-649 (SB 1390) into law. P.A. 96-649 is a comprehensive and thoughtful revision to numerous sections of the Illinois General Not For Profit Corporation Act that aspires to streamline the operations of Illinois nonprofits, particularly with respect to electronic voting for officers, directors, or representatives. Its effective date is January 1, 2010.

P.A. 96-648 is an act comprising nearly 42 pages, 41 of which deal with amendments to the Business Brokers Act, the Business Opportunity Sales Law, and the Franchise Disclosure Act. However, the first section of P.A. 96-648 contains an amendment to Section 107.50 of the General Not For Profit Corporation Act. The effective date of P.A. 96-648 is October 1, 2009.

II. Section 107.50 and Electronic Voting for Officers, Directors, and Representatives

The following text of P.A. 96-648 amends § 107.50 of the Act² to provide that Illinois not-for-profit corporations may "opt in" to conduct electronic voting for officers, directors, or representatives, provided that a provision in the corporation's bylaws expressly allows electronic voting:

Sec. 107.50. Proxies. A member entitled to vote may vote in person or, unless the articles of incorporation or the bylaws otherwise provide, by proxy executed in writing by the

member or by that member's duly authorized attorney-in-fact. No proxy shall be valid after 11 months from the date of its execution, unless otherwise provided in the proxy. Where directors, or officers, or representatives are to be elected by members, the bylaws may provide that such elections may be conducted by mail, email, or other electronic means.³

By contrast, the following text of P.A. 96-649, amending § 107.50 of the Act, reflects the objective of P.A. 96-649 to provide for an "opt-out" rule for electronic voting by members of Illinois not-for-profit corporations, not only in the case of member voting for corporate officers, directors, or representatives, but also in the broader case of any informal action by members entitled to vote:

Sec. 107.50 Proxies. A member entitled to vote may vote in person or, unless the articles of incorporation or the bylaws explicitly prohibit otherwise provide, by proxy executed in writing by the member or by that member's duly authorized attorney-in-fact. No proxy shall be valid after 11 months from the date of its execution, unless otherwise provided in the proxy. Unless otherwise prohibited by the articles of incorporation or bylaws, 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 subsection (a) of Section 107.10. Where directors or officers are to be elected

by members, the bylaws may provide that such elections may be conducted by mail.⁴

Section 107.10 of the Act,⁵ as revised by P.A. 96-649, will provide that, unless the bylaws or articles of incorporation otherwise provide, actions that may be taken by members of a not-for-profit corporation that are entitled to vote on that action can be taken informally by the members "in writing by mail, e-mail, or any other electronic means" and without a meeting, as long as all members entitled to vote are given the opportunity to vote for or against the action; voting remains open for five days or 20 days, depending on the type of action to be taken; the number of members casting votes would constitute a quorum if the action were taken at a meeting; and the action is approved by a majority of the members casting votes (or by the supermajority for that type of corporate action) prescribed in the Act, the articles of incorporation, or the bylaws.⁶

III. Possibilities for Resolution

Although Public Act 96-648 and its "opt-in" provision, by reason of its earlier effective date, will be the law from October 1, 2009, until December 31, 2009, an apparent contradiction will arise starting January 1, 2010, upon the effective date of Public Act 96-649 and its "opt-out" provision. Many of us who are not deeply involved in the legislative process on a regular basis have a gut feeling that these kinds of ambiguities are simply "taken care of" by the Legislative Reference Bureau before the Public Acts in question

become effective. The reality, as one might expect, is somewhat more complicated than that. The Legislative Reference Bureau does play a role in resolving ambiguities and contradictions in the enactments of the General Assembly, but the Bureau does not have the legislative power to change a Public Act or the judicial authority to interpret a Public Act. Therefore, its role is limited to reviewing the Public Acts in question and proposing a reconciliation of the contradictory enactments in the form of a revisory bill that is subsequently presented to and usually passed without further revision by the General Assembly, though this process would probably not be completed until the General Assembly's Spring 2010 session at the earliest. In crafting its proposed reconciliation, the Bureau uses Section 6 of the Statute on Statutes as a guideline. This less than perfectly clear provision reads in relevant part as follows:

Two or more Acts which relate to same subject matter and which are enacted by the same General Assembly shall be construed together in such manner as to give full effect to each Act except in case of an irreconcilable conflict. In case of an irreconcilable conflict the Act last acted upon by the General Assembly is controlling to the extent of such conflict. The Act last acted upon is determined by reference to the final legislative action taken by either house of the General Assembly An irreconcilable conflict between 2 or more Acts which amend the same section of an Act exists only if the amendatory Acts make inconsistent changes in the section as it theretofore existed.⁷

This is also the statute that would provide a court with guidance as to how to resolve the contradictions raised by the enactment of P.A. 96-648 and P.A. 96-649 if a case governed by Section 107.50 were to arise prior to the passage of a revisory bill.

IV. Do P.A. 96-648 and P.A. 96-649 Truly Create an Irreconcilable Conflict?

The first question that must be considered is whether the two amendments to Section 107.50 can be construed together and both given full effect or whether the two amendments create an irreconcilable conflict. The only guidance provided by the

statute on this question is that an irreconcilable conflict exists only if the two amendatory Acts make inconsistent changes in the section as it theretofore existed. In trying to solve the problem at hand, this guidance unfortunately amounts to little more than a legislative thesaurus.

Although the probable intent of the two provisions seems to create a fundamental conflict between an "opt-in" scheme and an "opt-out" scheme for electronic voting for member-elected officers and directors by non-profits, one way to reconcile the two provisions might be simply to accept both sets of changes, yielding a Section 107.50 that says that electronic voting will be allowed for the purpose of such elections unless otherwise prohibited in the corporation's articles of incorporation or bylaws and then also says that electronic voting for such elections will be allowed if provided for in the bylaws. This would require reading P.A. 96-648's "opt-in" provision as providing just one permissible option for a non-profit to allow electronic voting for member-elected officers and directors, but not the exclusive means by which such electronic voting would be allowed.

While this approach preserves the more practical "opt-out" scheme set forth in P.A. 96-649's amendments to Section 107.50 and several other sections of the Act, it would appear to render P.A. 96-648's amendments almost entirely superfluous.⁸ Rendering P.A. 96-648's amendments superfluous can hardly be said to "give full effect" to that Act, and the alternative solution of requiring non-profits to specifically authorize electronic voting for elections in their bylaws would fail to give full effect to P.A. 96-649's purpose of facilitating the use of modern communication methods to streamline not-for-profit corporation elections, without the necessity of a non-profit amending its bylaws.

V. What if the Amendments are Irreconcilable?

If it is determined that P.A. 96-648 and P.A. 96-649 truly make irreconcilable amendments to Section 107.50, then the Statute on Statutes provides a clear protocol, based on the date of the last legislative action taken with respect to each Public Act in question, as to which amendments to follow and which to discard. The last legislative action taken on Public Act 96-648 was the Senate's

concurrence in the House's amendments, which occurred on May 29, 2009. The bill was sent to the Governor on June 26, 2009, and he signed it on August 24, 2009. The last legislative action taken on Public Act 96-649 was the Senate's concurrence in the House's amendments, which occurred on May 27, 2009. That bill was sent to the Governor on June 25, 2009, and he signed it on August 24, 2009.

Although P.A. 96-648 was presumably signed by the Governor right before P.A. 96-649, the Statute on Statutes suggests that the time of the Governor's signature is irrelevant. The last legislative action regarding either act was taken by the Senate with respect to P.A. 96-648, and therefore, in the event of a truly irreconcilable conflict, then the "opt-in" provisions for electronic voting set forth in P.A. 96-648 are supposed to prevail. This result would create some further ambiguities between the provisions of Section 107.50 (as amended by P.A. 96-648 only), relating to voting by proxy and electronic voting for directors, officers, or representatives, and some further amendments made by P.A. 96-649 to Section 101.80(p), relating to the definition of a "writing," and Section 107.10, relating to the means of taking of informal action by members entitled to vote, each of which employ an "opt-out" approach to the use of electronic communications in non-profit corporate governance. These are difficult ambiguities to resolve since even the amendments set forth in P.A. 96-648 employ the term "writing" in their discussion of proxy voting, though the term "writing" is not used in the provision allowing for electronic voting for directors, officers, or representatives if the bylaws so provide.

VI. Conclusion

The contradictory amendments made to the Illinois General Not-For-Profit Corporation Act by P.A. 96-648 and 96-649 will, absent further clarification from the General Assembly, create some uncertainty for non-profits trying to discern whether electronic voting for their member-elected officers, directors, and representatives will be allowed after December 31, 2009, absent an explicit amendment to the corporation's bylaws allowing electronic voting in such elections as is required by Public Act 96-648 prior to January 1, 2010. For actions to be taken after December 31, 2009, until curative legislation is enacted, in

order to avoid the ambiguities created as of January 1, 2010, by these two Public Acts, practitioners should, for now, advise their non-profit clients that wish to conduct such voting by e-mail or other electronic media to amend their bylaws to specifically authorize electronic voting for member-elected officers, directors, or representatives. ■

1. The author also acknowledges valuable insight and suggestions contributed by Terry D. Anderson, WilliamsMcCarthy LLP, Rockford, Illinois, for this article.

2. 805 ILCS 105/107.50

3. 2009 Ill. Legis. Serv. P.A. 96-648 (S.B. 1285)

4. 2009 Ill. Legis. Serv. P.A. 96-649 (S.B. 1390)

5. 805 ILCS 105/107.10

6. As P.A. 96-648 does not address the use of electronic voting for any purpose other than member election of directors, offices, and repre-

sentatives, it appears that the "opt out" approach of P.A. 96-649 will govern all other informal actions by directors or members entitled to vote.

7. 5 ILCS 70/6

8. However, given the different effective dates of the two Public Acts, it appears that under this reconciliation approach, the "opt-in" scheme of P.A. 96-648 would operate from October 1, 2009, through December 31, 2009, before being effectively overshadowed by the "opt-out" scheme of P.A. 96-649 on January 1, 2010.

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