

# COVINGTON & BURLING LLP

1201 PENNSYLVANIA AVENUE NW  
WASHINGTON, DC 20004-2401  
TEL 202.662.6000  
FAX 202.662.6291  
WWW.COV.COM

BEIJING  
BRUSSELS  
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November 28, 2011

## MEMORANDUM

To: Clients and Friends of Covington and Burling LLP

Re: Upcoming Changes to the D.C. Nonprofit Corporation Act

## INTRODUCTION

This memorandum outlines some of the principal changes in the corporation law applicable to District of Columbia nonprofit corporations that will take effect on January 1, 2012. More specifically, this memorandum highlights key changes in the following areas:

1. Incorporation;
2. Members;
3. Board of Directors;
4. Officers;
5. Major Corporate Transactions;
6. Corporate Records and Reports;
7. Authority of the Superior Court;
8. Old Act and Federally Chartered Corporations;
9. Charitable Corporations;
10. Religious Corporations; and
11. Electronic Communications.

Although the changes are intended to provide nonprofit corporations with greater flexibility, in some cases the new rules will change how such corporations are governed and operate internally. Thus, D.C. nonprofit corporations should review their articles of incorporation and bylaws now to determine if any amendments to their organic documents are necessary or desirable before the new law takes effect in January.

For purposes of this memorandum:

“2010 Act” refers the Nonprofit Corporation Act of 2010, which comes into effect on January 1, 2012.<sup>1</sup>

“1962 Act” refers to the existing District of Columbia Nonprofit Corporation Act, which was enacted in 1962.

“Old Act” refers to one or more general statutes of the District of Columbia that provided for the incorporation of nonprofit corporations prior to the enactment of the 1962 Act.

The following discussion, while lengthy, nevertheless represents only a summary of the changes, with some accompanying commentary. The full text of the 2010 Act is available [here](#) under Title 29.

## HIGHLIGHTS

Some of the key changes that are likely to be of significance or interest include the following (in no particular order):

- Entities chartered by special acts of Congress will be treated as foreign entities under the 2010 Act. As a consequence, they will be required to register to do business in DC if they have operations here.
- Old Act corporations will be required to opt out in order to avoid becoming subject to the 2010 Act. The precise reporting, registration or other requirements to be imposed on Old Act organizations that opt out are unclear and may be the subject of further legislation. Also, it is unclear if Old Act corporations that have opted out can later opt in.
- A nonprofit membership corporation will be able to levy dues, assessments and fees only to the extent authorized in the articles or bylaws.
- Strangely, the new law *prohibits* giving notice of member meetings to anyone other than the members entitled to vote at the meeting, unless the articles or the bylaws of the corporation provide otherwise.
- The liability of a director of a nonprofit corporation to the corporation or its members may be eliminated (except for certain bad acts) by including an appropriate provision in the articles of incorporation. (Charitable corporations need not include such a provision, as the directors’ liability is deemed eliminated.)

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<sup>1</sup> Unless otherwise noted, all references to sections herein refer to the 2010 Act.

- Most filings will be permitted to specify a future effective date not to exceed 90 days after the date of filing.
- The Mayor will have authority to permit electronic filings.
- Restated articles of incorporation will be permitted.
- Biennial reports will be due April 1, rather than January 15.
- Officers and employees of a nonprofit corporation will be permitted to serve as registered agent regardless whether they are D.C. residents, provided they have an office address in D.C.
- The minimum number of incorporators will be reduced to one. The minimum number of directors will remain three. Initial directors need not be specified in the articles of incorporation, although they may be.
- The 2010 Act will expressly permit member-governed corporations, in which the Board of Directors will have only the powers that are delegated to them by the members.
- The 2010 Act will permit the creation of so-called designated bodies which may exercise most of the powers, authority or functions of the Board. To the extent the Board's authority has been delegated to a designated body, the directors will be relieved of their duties and liabilities with respect to the delegated authority. Non-directors and even non-individuals may serve on designated bodies, unless the articles or bylaws provide otherwise.
- Directors' meetings will require notice. The articles or bylaws may provide otherwise with respect to regular meetings of the board.
- The minimum number of directors comprising a Board committee will be reduced to one (from two).
- The 2010 Act will reduce the minimum officers to two -- one responsible for the management of the corporation (e.g., a President) and one responsible for the financial affairs of the corporation (e.g., a Treasurer).
- The 2010 Act will expressly prescribe standards of conduct for directors and officers that appear to be intended to codify standards established by common law.

## DISCUSSION

### 1. Incorporation

The 2010 Act makes incorporating a nonprofit corporation easier.

More specifically, the 2010 Act requires only one incorporator,<sup>2</sup> whereas the 1962 Act required at least three incorporators, and the signature of the incorporator no longer needs to be notarized.<sup>3</sup>

Also, the 2010 Act requires less information to be provided in the articles of incorporation. The 2010 Act requires only the following information in the articles of incorporation: (1) the name of the entity; (2) the name and address of a registered agent; (3) a statement that the corporation is incorporated as a nonprofit corporation; (4) the name and address of the incorporator(s); and (5) whether the corporation will have members.<sup>4</sup> In contrast, the 1962 Act also required that the articles provide for the period of the corporation's duration, the corporation's purpose or purposes, information about classes of membership, the manner in which directors were elected, the number of directors on the initial board, and the names and addresses of the initial directors.<sup>5</sup> The 2010 Act *permits*, but does not *require*, this additional information in the articles of incorporation.<sup>6</sup> In some cases, of course, it will nonetheless be desirable to include some or all of the permissible information. For example, notwithstanding the 2010 Act, nonprofit corporations will in many cases want to include an appropriate statement of purpose in order to qualify for a federal income tax exemption.

In addition, the 2010 Act provides that the initial bylaws may be adopted by either the incorporator(s) *or* the board of directors,<sup>7</sup> whereas the 1962 Act required that the board of directors adopt the initial bylaws.<sup>8</sup>

### 2. Members

#### A. Voting Rights

The 2010 Act explicitly provides that a "member" is a person that has the right, in accordance with the articles or bylaws, to select or vote for the election of directors or delegates

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<sup>2</sup> § 29-402.01.

<sup>3</sup> 1962 Act, § 29-301.29; § 29-102.01(a)(4) and § 29-102.09.

<sup>4</sup> § 29-402.02(a). A nonprofit corporation need not have voting members. § 29-404.01.

<sup>5</sup> 1962 Act, § 29-301.30(a). The 2010 Act provides that every nonprofit corporation shall have perpetual duration unless its articles of incorporation provide otherwise. § 29-403.02.

<sup>6</sup> § 29-402.02.

<sup>7</sup> § 29-402.06.

<sup>8</sup> 1962 Act, § 29-301.13.

or to vote on fundamental transactions.<sup>9</sup> In contrast, the 1962 Act provided a somewhat narrower rule that members were *not* be entitled to vote *unless* the right was conferred by the articles of incorporation.<sup>10</sup> In addition, the 2010 Act contains a default rule that, in the absence of a contrary provision in the articles or bylaws, each member of a membership corporation will have the same rights and obligations as every other member.<sup>11</sup> Thus, membership corporations in which the members have differing voting rights will want to ensure that the articles or bylaws spell out the different voting rights.

B. Admission of Members

The 2010 Act provides that the articles of incorporation or bylaws *may* establish criteria or procedures for the admission of members.<sup>12</sup> The 1962 Act *required* membership corporations to set forth in the articles or bylaws the designation of classes of membership, the manner of election and appointment of members, and the qualifications and rights of members.<sup>13</sup>

C. Member Dues

The 2010 Act provides that a nonprofit corporation may levy dues and assessments on its members to the extent authorized by the articles or bylaws.<sup>14</sup> The 1962 Act did not contain an analogous provision. As a consequence, nonprofit corporations that levy dues or assessments on members will want to confirm that their articles or bylaws authorize the collection of dues and assessments.

D. Meetings

There are some distinctions between the 2010 and 1962 Acts with respect to member meetings. For example, the 2010 Act makes it more difficult for members to call a special meeting.<sup>15</sup> The 2010 Act also forgives failures to hold regular or annual member meetings to a greater extent than the 1962 Act. Such a failure under the 2010 Act does not affect the validity of *any* corporate action,<sup>16</sup> whereas the 1962 Act specified that the failure to hold a

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<sup>9</sup> § 29-401.02(24)(A).

<sup>10</sup> 1962 Act, § 29-301.16(a).

<sup>11</sup> § 29-404.10.

<sup>12</sup> § 29-404.02.

<sup>13</sup> 1962 Act, § 29-301.12.

<sup>14</sup> § 29-404.13.

<sup>15</sup> The default provision in the 2010 Act requires at least 10% of all votes entitled to be cast at a meeting to call for a special meeting. § 29-405.02. The 1962 Act's default provision permitted a special meeting to be called by 5% of the votes entitled to be cast. 1962 Act, § 29-301.14.

<sup>16</sup> § 29-405.01(d).

meeting would not result in forfeiture or dissolution.<sup>17</sup> The 2010 Act contains procedural rules regarding the conduct of member meetings that were largely absent under the 1962 Act.<sup>18</sup>

E. Notice

Significantly, although somewhat oddly, the 2010 Act provides that, except as provided by law, the articles or the bylaws, corporations shall give notice *only* to members entitled to vote at the meeting.<sup>19</sup> Thus, nonprofit membership corporations that hold meetings open to non-voting members should ensure that their articles or bylaws permit the giving of notice to non-voting members.

F. Quorum

There are several differences between the 2010 and 1962 Acts with respect to quorums at member meetings that are of potential significance. The 2010 Act provides that, unless the articles or bylaws provide otherwise, “a majority of the votes entitled to be cast on the matter by the voting group constitutes a quorum of that voting group for action on the matter.”<sup>20</sup> The 1962 Act provided that, absent a provision in the bylaws or articles, members with at least one-tenth of the votes entitled to vote constituted a quorum.<sup>21</sup> Membership corporations that want or need to retain a quorum of less than a majority should ensure that their articles or bylaws authorize the desired quorum.

In addition, the 2010 Act provides that once a member is represented at a meeting for any purpose, that member is deemed present for quorum purposes for the remainder of the meeting.<sup>22</sup> The 1962 Act contained a similar provision but permitted the articles or bylaws to alter the default rule.<sup>23</sup> As a consequence, articles or bylaw provisions rebutting the 1962 default rule will apparently no longer be valid.

The 2010 Act also provides that when a meeting has been adjourned for lack of a quorum, the same members can reconvene at a later meeting and constitute a quorum, even if

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<sup>17</sup> 1962 Act, § 29-301.14.

<sup>18</sup> *See, e.g.*, § 29-405.07 (Record date); § 29-405.08 (Conduct of meetings); § 29-405.09 (Action by ballot); § 29-405.23 (Acceptance of votes); § 29-405.28 (Inspectors of election).

<sup>19</sup> § 29-405.05(a).

<sup>20</sup> § 29-405.24(a). In the 2010 Act, a “voting group” is one or more classes of members that are entitled to vote and be counted together collectively on a matter or at a meeting of members; all members entitled by the articles, bylaws, or this chapter to vote generally on the matter are for that purposes a single voting group. § 29-401.02(38). *See also* § 29-405.25 (Action by single or multiple voting groups). The 1962 Act did not explicitly contemplate or authorize voting groups.

<sup>21</sup> 1962 Act, § 29-301.17(a).

<sup>22</sup> § 29-405.24(b).

<sup>23</sup> 1962 Act, § 29-301.17(b).

they are less than a quorum, unless the articles or bylaws provide otherwise.<sup>24</sup> The 1962 Act did not contain an analogous provision.

G. Voting

There are several new provisions with respect to voting that may change how members of D.C. nonprofit membership corporations vote. Under the 2010 Act, unless otherwise provided by the articles or bylaws, once a quorum exists, action on a matter (other than the election of directors) is approved if the votes favoring the action *exceed* the votes opposing it. With respect to directors, they are elected by a plurality of the votes cast by members entitled to vote in an election at a meeting at which a quorum is present.<sup>25</sup> The 1962 Act required a *majority of the votes entitled to be cast* by the members present at a meeting in which a quorum was established, unless the articles or bylaws provide otherwise.<sup>26</sup>

H. Delegates

The 2010 Act provides that a membership corporation may provide in its articles or bylaws for “delegates.”<sup>27</sup> Delegates are defined as persons “elected or appointed to vote in a representative assembly for the election of directors or on other matters.”<sup>28</sup> The 1962 Act did not address the use of delegates.

I. Member-governed Corporations

The 2010 Act defines “member-governed corporations” and lays out certain default rules for their governance. The 1962 Act did not address member-governed corporations.

A member-governed corporation is one that “provides in its articles of incorporation or bylaws that it is a member-governed corporation,” *or* “meets the following conditions: (A) holding regular meetings not less frequently than annually; (B) having activities governed by its members; and (C) a board of directors, if any, having only those powers delegated by the articles of incorporation, bylaws, or members.”<sup>29</sup>

The following rules (among others) apply to member-governed corporations unless the articles of incorporation or bylaws provide otherwise: (1) a member shall vote only in person and not by proxy; (2) voting agreements are unenforceable; (3) fundamental transactions

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<sup>24</sup> § 29-405.24(e).

<sup>25</sup> § 29-405.24(c) and § 29-405.27.

<sup>26</sup> 1962 Act, § 29-301.17(a).

<sup>27</sup> § 29-404.30(a).

<sup>28</sup> § 29-401.02(7).

<sup>29</sup> § 29-401.50(a).

may be approved by 2/3 vote of the members without the approval of the board; and (4) the qualifications of directors are determined by members.<sup>30</sup>

3. Board of Directors

A. Directors' Standard of Conduct

The 2010 Act explicitly defines standards of conduct and standards of liability for directors, unlike the 1962 Act which was silent. Under the 2010 Act, directors must exercise their duties in good faith and in a manner reasonably believed to be in the best interests of the organization, and with the care that a person in a like position would reasonably believe appropriate under similar circumstances. In discharging their duties, directors must disclose to other directors material information not already known to them.<sup>31</sup>

B. Elimination or Limitation of Liability

The 2010 Act, unlike the 1962 Act, expressly permits the elimination or limitation of the liability of a director of a nonprofit corporation vis-à-vis the corporation or its members, except for certain "bad acts," such as intentional infliction of harm and intentional violations of criminal laws, by including an appropriate provision in the corporation's articles. Charitable corporations need not include such a provision as the liability of directors of a charitable corporation to the corporation or its members is deemed eliminated under the 2010 Act.<sup>32</sup> Non-charitable corporations should consider whether the addition of such a provision is worthwhile.

C. Prohibition on Loans and Similar Payments

The 2010 Act contains the same general prohibition on a nonprofit corporation's loans or guarantees to directors as the 1962 Act.<sup>33</sup> Unlike the 1962 Act, however, the 2010 Act expressly excepts from the prohibition advances on reimbursable expenses reasonably expected to be incurred and advances on life insurance premiums.<sup>34</sup>

D. Indemnification

Indemnification provisions are substantially revised in the 2010 Act. The 2010 Act provides more detail on permissible indemnification<sup>35</sup> and also *mandates* indemnification when a director is successful on the merits in defending a suit.<sup>36</sup> The 2010 Act also prescribes

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<sup>30</sup> § 29-401.50(c).

<sup>31</sup> § 29-406.30.

<sup>32</sup> § 29-402.02(c); § 29-406.31(d).

<sup>33</sup> 1962 Act, § 29-301.28; § 29-406.32(a).

<sup>34</sup> § 29-406.32(b).

<sup>35</sup> § 29-406.51.

<sup>36</sup> § 29-406.52.

mandatory procedures for determining and authorizing indemnification<sup>37</sup> and advancing expenses.<sup>38</sup> The 1962 Act *permitted* indemnification of directors except where negligence or misconduct was involved, but provided few other details.<sup>39</sup>

E. Conflict of Interest Transactions

The 2010 Act contains provisions on conflict of interest transactions and business opportunities and specifies procedures by which such actions can be authorized such that they will not be voidable.<sup>40</sup> The 1962 Act was silent on these issues. As these new provisions apply in addition to any conflict of interest management procedures already in place at a nonprofit corporation, nonprofit corporations should examine their current policies to determine whether they are consistent with the new rules or need revision.

F. Board Committees and Meetings

The 2010 Act allows for the creation of one or more committees of the board, consisting of *one or more* directors, unless the articles or bylaws provide otherwise.<sup>41</sup> Creation of board committees and appointment of directors must be approved by the greater of a majority of directors in office when the action is taken, or the number of directors required by the articles or bylaws to take action under the 2010 Act's quorum requirements.<sup>42</sup> The 1962 Act provided that board committees could be created only if the articles or bylaws permitted it, required a majority vote of the directors then in office to create such a committee, and required that all committees of the Board have *at least two* directors.<sup>43</sup>

Under the 2010 Act, committees may have all the powers of the board of directors except that they cannot authorize distributions, fill board vacancies, or adopt, amend or repeal bylaws. In addition, in the case of a membership corporation, the committee cannot approve, or *propose* to members, action that requires member approval under the 2010 Act.<sup>44</sup> The 1962 Act did not expressly limit committee authority.<sup>45</sup>

The rules relating to advisory committees -- i.e., those committees that do not have or exercise any board powers -- remain essentially unchanged.

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<sup>37</sup> § 29-406.55.

<sup>38</sup> § 29-406.53.

<sup>39</sup> 1962 Act, § 29-301.05(14).

<sup>40</sup> § 29-406.70; § 29-406.80.

<sup>41</sup> § 29-406.25(a).

<sup>42</sup> § 29-406.25(b).

<sup>43</sup> 1962 Act, § 29-301.22.

<sup>44</sup> § 29-406.25(e).

<sup>45</sup> 1962 Act, § 29-301.22.

G. Notice

The 2010 Act contains several changes addressing notice of board meetings. The 2010 Act provides that, unless the articles or bylaws provide otherwise, notice of regular board meetings must be given, and such notice must specify the date, time, place and purpose of the meeting. The 2010 Act does not mandate how far in advance such notice must be given. Special meetings generally require at least 2 days' notice of the date, time and place of the meeting and, if the articles or bylaws provide, the purpose of the meeting.<sup>46</sup> The 1962 Act simply allowed for any notice as required by the bylaws or by a board resolution.<sup>47</sup> Thus, nonprofit corporations that want to avoid giving notice of directors' regular meetings should ensure that their articles or bylaws expressly waive the new requirement to give notice.

H. Emergency Powers

The 2010 Act grants substantial flexibility to a nonprofit corporation's board of directors in the event of a catastrophic event. More particularly, under the 2010 Act, the nonprofit corporation has emergency powers if the articles of incorporation or bylaws provide for the exercise of such powers.<sup>48</sup> In an emergency, the board of directors may modify lines of succession to accommodate the incapacity of directors, officers, employees or agents, and may relocate the principal office or designate alternative offices.<sup>49</sup> Notice of a board meeting need only be given to those directors it is practicable to reach, and officers of the corporation present at the meeting may be deemed directors for the meeting.<sup>50</sup> Corporate action taken in good faith during an emergency binds the corporation and cannot be used to impose liability on directors, officers, employees or agents.<sup>51</sup> The 1962 Act did not contemplate the exercise of "emergency powers."

I. Designated Bodies

The 2010 Act permits the establishment of "designated bodies" vested with some, but not all, of the powers, authority or functions of the board of directors or the rights or obligations of the members.<sup>52</sup>

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<sup>46</sup> § 29-406.22.

<sup>47</sup> 1962 Act, § 29-301.23.

<sup>48</sup> § 29-403.03(a).

<sup>49</sup> § 29-403.03(a).

<sup>50</sup> § 29-403.03(b).

<sup>51</sup> § 29-403.03(c).

<sup>52</sup> § 29-401.02(8); § 29-406.12. A "designated body" is a "a person or group, other than a committee of the board of directors, that has been vested by the articles of incorporation or bylaws with powers that, if not vested by the articles or bylaws in that person or group, would be required . . . to be exercised by the board or the members." Interestingly, members of a designated body need not be members, directors or officers of the corporation, or even (continued...)

4. Officers

A. Minimum Required Officers

The 2010 Act requires a minimum of two separate officers -- one responsible for the management of the corporation (e.g., a President) and one responsible for the financial affairs of the corporation (e.g., a Treasurer),<sup>53</sup> while the 1962 Act required a President, a Treasurer and a Secretary.<sup>54</sup> Under the 2010 Act, the offices of President and Secretary (if any) may be held by the same person, a situation which was prohibited under the 1962 Act.<sup>55</sup> The 1962 Act provided that if the articles or bylaws are silent, all officers are appointed annually,<sup>56</sup> but the 2010 Act has no such default provision.<sup>57</sup>

B. Standard of Conduct; Indemnification; Loans

The 2010 Act, unlike the 1962 Act, contains a provision defining the standards of conduct and duties of officers which are basically the same as those imposed on directors by the 2010 Act.<sup>58</sup> The 2010 Act's provisions on director indemnification and conflict of interest transactions also generally apply to officers. The 2010 Act contains the same general prohibition on loans and guarantees to officers that existed under the 1962 Act,<sup>59</sup> except that the 2010 Act permits loans for reasonable reimbursable expenses, advanced payment of premiums on life insurance policies, loans or advances pursuant to employee benefit plans, a loan pursued by the officer's principal residence and loans to pay an officer's relocation expenses.<sup>60</sup>

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individuals. A complete discussion of designated bodies goes beyond the scope of this memorandum.

<sup>53</sup> § 29-406.40(a).

<sup>54</sup> 1962 Act, § 29-301.24.

<sup>55</sup> § 29-406.40.

<sup>56</sup> 1962 Act, § 29-301.24.

<sup>57</sup> § 29-406.40.

<sup>58</sup> § 29-406.42.

<sup>59</sup> 1962 Act, § 29-301.28.

<sup>60</sup> § 29-406.32.

5. Major Corporate Transactions

A. Domestication

The 2010 Act provides a process by which a foreign corporation can become a domestic (i.e., D.C.) nonprofit corporation without merging into an existing (or newly formed) D.C. nonprofit corporation.<sup>61</sup> The 1962 Act had no such process.

B. Amendment of Articles of Incorporation

The 2010 Act has separate provisions for member and non-member corporations regarding the amendment of the articles of incorporation.<sup>62</sup> For membership corporations, the 2010 Act includes more detailed provisions on notice requirements, the manner of adoption, required votes for approval, and situations in which amendments need not be approved by members.<sup>63</sup> It also provides additional default requirements for adoption of amendments by a non-member corporation.<sup>64</sup> The 2010 Act also slightly alters the information required to be set forth in the articles of amendment for member and nonmember corporations.<sup>65</sup>

C. Restatement of Articles of Incorporation

The 2010 Act permits nonprofit corporations to restate their articles of incorporation, something most jurisdictions other than D.C. have long permitted.<sup>66</sup>

D. Amendment of Bylaws

Whereas the 1962 Act vested in the board of directors the power to amend the bylaws (unless otherwise provided in the articles or bylaws),<sup>67</sup> the 2010 Act explicitly extends this authority to the members, as well.<sup>68</sup> Moreover, for membership corporations, some amendments affecting members expressly require member approval.<sup>69</sup>

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<sup>61</sup> §§ 29-407.01-06.

<sup>62</sup> Compare § 29-408.03 with § 29-408.05.

<sup>63</sup> § 29-408.03.

<sup>64</sup> § 29-408.05.

<sup>65</sup> Compare § 29-408.06 with 1962 Act, §§ 29-301.36-37.

<sup>66</sup> § 29-408.07.

<sup>67</sup> 1962 Act, § 29-301.13.

<sup>68</sup> § 29-408.20.

<sup>69</sup> § 29-408.22.

E. Mergers

In comparison to the 1962 Act, the 2010 Act contains more detailed provisions governing mergers. Like the 1962 Act,<sup>70</sup> the 2010 Act authorizes mergers of two or more nonprofit corporations and requires certain information to be included in a plan of merger.<sup>71</sup> In addition, the 2010 Act also provides procedures and substantive restrictions on amendments to a plan of merger.<sup>72</sup> Unlike the 1962 Act, the 2010 Act requires that the plan of merger include information on the manner and basis of converting memberships in the merger if the corporation is a membership corporation.<sup>73</sup> In addition, whereas the 1962 Act required *two-thirds* of members to approve a merger of a membership corporation,<sup>74</sup> the 2010 Act provides that a *majority* vote will be sufficient for approval.<sup>75</sup>

F. Disposition of All or Substantially All of the Corporation's Assets by a Membership Corporation

The 1962 Act required the approval of members in all circumstances in which a membership corporation disposed of all or substantially all of its assets.<sup>76</sup> The 2010 Act adopts the same basic rule, but also provides that, unless the articles or bylaws provide otherwise, member approval is *not* required in the following circumstances: the disposition is in the usual and regular course of activities; the corporation and its consolidated subsidiaries (if any) retain an activity that represented or was supported by at least 33% of total assets at the end of the most recently completed fiscal year; the disposition is for the repayment of indebtedness; or the disposition is a transfer to one or more corporations or other entities all of the memberships or interests of which are owned by the corporation.<sup>77</sup>

G. Voluntary Dissolution by a Membership Corporation

The 2010 Act contains several minor deviations from the 1962 Act with respect to voluntary dissolution. The 2010 Act requires majority approval of members at a meeting at which a quorum is established, unless the articles, the bylaws, or a board resolution provides that

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<sup>70</sup> 1962 Act, § 29-301.39.

<sup>71</sup> § 29-409.02.

<sup>72</sup> § 29-409.02(e).

<sup>73</sup> § 29-409.02(d)(3).

<sup>74</sup> 1962 Act, § 29-301.41.

<sup>75</sup> § 29-409.04(5).

<sup>76</sup> 1962 Act, § 29-301.46.

<sup>77</sup> § 29-410.01.

a greater presence or vote is required.<sup>78</sup> The 1962 Act, in contrast, *required* a two-thirds vote by members to approve dissolution of a membership corporation.<sup>79</sup>

6. Corporate Records and Reports

The 1962 Act contained a single broad provision addressing corporate books and records.<sup>80</sup> The 2010 Act provides more detailed provisions, which include requirements for records maintenance, substantive rights of members and directors to inspect records, and the procedures to be followed for such inspections.<sup>81</sup> The 2010 Act also provides for the inspection of a nonprofit corporation's financial statements by members.<sup>82</sup>

7. Authority of the Superior Court

The 2010 Act expressly grants the D.C. Superior Court broader jurisdiction over nonprofit corporation transactions and governance issues than the 1962 Act. For example, the 2010 Act contains an entire subchapter on derivative proceedings,<sup>83</sup> whereas the 1962 Act did not expressly provide for such proceedings. The 2010 Act also provides detailed procedures for, and expressly grants jurisdiction to, the Superior Court over disputes regarding the following matters: inspection of books and records by members;<sup>84</sup> inspection of books and records by directors;<sup>85</sup> failures to hold meetings;<sup>86</sup> reviewing contested corporate actions;<sup>87</sup> access to the members list;<sup>88</sup> removal of directors;<sup>89</sup> indemnification of directors;<sup>90</sup> disposition of assets;<sup>91</sup> and corporate dissolution.<sup>92</sup>

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<sup>78</sup> § 29-412.02(e).

<sup>79</sup> 1962 Act, § 29-301.47.

<sup>80</sup> 1962 Act, §§ 29-301.26. Such provision provided: "Each corporation shall keep correct and complete books and records of account and shall keep minutes of the proceedings of its members, board of directors, and committees having any of the authority of the board of directors; and shall keep at its registered office or principal office in the District of Columbia a record of the names and addresses of its members entitled to vote. All books and records of a corporation may be inspected by any member having voting rights, or his agent or attorney, for any proper purpose at any reasonable time."

<sup>81</sup> §§ 29-413.01-07.

<sup>82</sup> § 29-413.20.

<sup>83</sup> §§ 29-411.01-09.

<sup>84</sup> § 29-413.04.

<sup>85</sup> § 29-413.05.

<sup>86</sup> § 29-401.21; § 29-405.03.

<sup>87</sup> § 29-401.22.

<sup>88</sup> § 29-405.20.

<sup>89</sup> § 29-406.09.

The 1962 Act's express grants of jurisdiction and procedures for the courts were limited to the following matters: enjoining ultra vires transactions;<sup>93</sup> involuntary dissolution;<sup>94</sup> liquidation proceedings;<sup>95</sup> and appealing the Mayor's decision not to approve corporate articles.<sup>96</sup>

8. Old Act and Federally Chartered Corporations

Under the 2010 Act, Old Act corporations that have not elected to become subject to the 1962 Act must apparently opt out before January 1, 2014, in order to avoid becoming subject to the provisions of the 2010 Act.<sup>97</sup> The precise reporting, registration or other requirements to be imposed on Old Act organizations that opt out are unclear and are likely, we are told, to be the subject of further legislation. Old Act corporations were generally not subject to the provisions of the 1962 Act unless they elected to be covered by the 1962 Act.

Corporations chartered by a special act of Congress that have not elected to become subject to the 1962 Act are treated as foreign corporations under the 2010 Act and are, therefore, subject to the requirements imposed on foreign corporations doing business within D.C. if they have operations in D.C.<sup>98</sup> Congressionally chartered corporations were generally not subject to the provisions of the 1962 Act unless they elected to be covered by the 1962 Act.

9. Charitable Corporations

Under the 2010 Act, a "charitable corporation" is a nonprofit corporation operated primarily or exclusively for one or more charitable purposes.<sup>99</sup> A "charitable purpose" is a purpose that would make a corporation operated exclusively for that purpose eligible for tax-exempt status under § 501(c)(3) of the Internal Revenue Code of 1986, as amended, or is a purpose that is otherwise considered charitable under other applicable law.<sup>100</sup> The 1962 Act

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<sup>90</sup> § 29-406.54.

<sup>91</sup> § 29-410.03.

<sup>92</sup> § 29-412.08 (voluntary dissolution); §§ 29-412.20-23 (judicial dissolution).

<sup>93</sup> 1962 Act, § 29-301.06.

<sup>94</sup> 1962 Act, §§ 29-301.53-54.

<sup>95</sup> 1962 Act, §§ 29-301.55-61.

<sup>96</sup> 1962 Act, § 29-301.94.

<sup>97</sup> § 29-107.01(b) ("A corporation that does not fully comply with these requirements within the specified period shall thereafter be barred from asserting that it is not subject to this title."); § 29-1209.01, Section 5.

<sup>98</sup> § 29-101.02(11).

<sup>99</sup> § 29-401.02(3).

<sup>100</sup> § 29-401.02(4).

provided that nonprofit corporations could be organized for charitable (among other) purposes,<sup>101</sup> but did not contain special provisions for charitable corporations.

The 2010 Act distinguishes charitable corporations from other nonprofit corporations in several ways. First, directors of charitable corporations “*shall not* be liable to the corporation or its members for money damages for any action taken, or any failure to take any action, as a director,” except for the receipt of improper financial benefits, an intentional infliction of harm or violation of criminal law, or for approval of unlawful distributions.<sup>102</sup> This liability shield protects directors of charitable corporations regardless of whether the articles of incorporation contain the liability shield permitted by the 2010 Act.<sup>103</sup>

The 2010 Act also provides that property held in trust or otherwise dedicated to a charitable purpose shall not be diverted from its purpose by any transaction unless the entity obtains an appropriate order from the Superior Court specifying the disposition of the property pursuant to the laws of the District of Columbia on cy pres or otherwise.<sup>104</sup>

The 2010 Act requires notice to the Attorney General prior to certain legal challenges or corporate transactions.<sup>105</sup> For example, plaintiffs contesting corporate action, petitioning the court for a meeting or initiating a derivative proceeding must notify the Attorney General within 10 days following commencement of the proceeding if the challenge involves a charitable corporation.<sup>106</sup> A charitable corporation must also notify the Attorney General of its intent to dissolve before it delivers its articles of dissolution.<sup>107</sup>

#### 10. Religious Corporations

The 2010 Act defines religious corporation<sup>108</sup> and expressly acknowledges canon law. More specifically, the 2010 Act provides that “[i]f religious doctrine or canon law

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<sup>101</sup> 1962 Act, § 29-301.04.

<sup>102</sup> § 29-406.31(d).

<sup>103</sup> § 29-402.02 (*permitting* the articles to include a provision limiting director liability for nonprofit corporations).

<sup>104</sup> § 29-401.05; *see also, e.g.*, § 29-408.09 (Effect of articles of amendment); § 29-410.03 (Restrictions on dispositions of assets); § 29-412.05 (Effect of dissolution).

<sup>105</sup> Note that the 2010 Act requires notice to the Attorney General for all actions brought by third persons that the Attorney General is authorized to bring under the 2010 Act. § 29-401.60.

<sup>106</sup> § 29-401.23; § 29-411.09; *see also, e.g.*, § 29-401.21 (Proceedings prior to corporate action); § 29-406.09(e) (Removal of directors by judicial proceeding).

<sup>107</sup> § 29-412.02.

<sup>108</sup> § 29-401.02(32) (“ ‘Religious corporation’ means a domestic nonprofit corporation that is a church or an integrated auxiliary of a church, as defined under the federal Internal Revenue Code or regulations promulgated thereunder, or any other such nonprofit corporation whose principal purpose is the advancement of religion.”).

governing the affairs of a religious corporation is inconsistent with this chapter on the same subject, the religious doctrine or canon law shall control to the extent required by the Constitution of the United States.”<sup>109</sup> The 2010 Act also specifically exempts religious corporations from its receivership and custodianship sections.<sup>110</sup> The 1962 Act provided that nonprofit corporations could be organized for religious (among other) purposes,<sup>111</sup> but did not contain any special provisions for religious corporations.

## 11. Electronic Communications

The 2010 Act contemplates the use of electronic communications in certain corporate actions. For example, the 2010 Act contains a provision authorizing notice by electronic communications and defines when such a communication is “received” for purposes of the Act.<sup>112</sup> Perhaps more significantly, the 2010 Act also provides that regular, annual and special meetings of *members* can be held on the Internet or other electronic communications technology as long as members may read *or* hear the proceedings substantially concurrently with their occurrence, vote, pose questions, and make comments.<sup>113</sup> The 1962 Act, as amended in 2001, contemplated the a somewhat narrower use of electronic communications with respect to voting by members.<sup>114</sup> In a move sure to disappoint many, the 2010 Act does not permit *directors’* meetings to be held by Internet or by any other electronic communications technology unless the directors can simultaneously *hear* each other.

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<sup>109</sup> § 29-401.40.

<sup>110</sup> § 29-412.22.

<sup>111</sup> 1962 Act, § 29-301.04.

<sup>112</sup> § 29-401.03. An electronic communication is received for purposes of this chapter when “it enters an information processing system that the recipient has designated or uses for the purposes of receiving records or information of the type” and “is in a form capable of being processed by that system.”

<sup>113</sup> § 29-405.01 (Annual and regular meetings) and § 29-405.02 (Special meetings).

<sup>114</sup> 1962 Act, § 29-301.16.