

Issues of Concern to Parliamentarians Raised by the 1952 Model Nonprofit Corporation Act

by Michael E. Malamut, PRP

This article is the second in a series on the effect of nonprofit corporation statutes on parliamentary practice. The first article, *Summary of Sources of State Nonprofit Corporation Law*, was published in the Second Quarter 2008 *National Parliamentarian*. It reviewed the sources of nonprofit corporation law in all fifty states, the District of Columbia, and Puerto Rico.¹ This article reviews the American Bar Association's (ABA) 1952 Model Nonprofit Corporation Act (MNPCA), the first major effort at a model nonprofit corporation act with national scope and the second most common source of current state nonprofit corporation statutes.²

The MNPCA is largely derived from, and “almost slavishly” copies, the 1950 Model Business Corporation Act (MBCA), according to Lizabeth A. Moody, dean emeritus of Stetson University College of Law, who was a member of the team that revised and completely recodified the MNPCA in the 1988 Revised Model Nonprofit Corporation Act (RMNPCA) (Moody, p. 1346). Dean Moody chairs the current efforts to prepare a third edition of the RMNPCA, which is expected to be formally promulgated by the ABA in August 2008. The 1952 MNPCA itself went through several small updates through the 1950s and 1960s, based largely on parallel changes to the MBCA, but these changes are insignificant in light of the variations of the MNPCA as adopted in the various states.

When reviewing statutory provisions relating to nonprofit governance, it is important to keep in mind that the drafters of corporate laws generally intend to give corporations significant powers of self-government and leave most issues up to the corporation's governing body or bodies. Nevertheless, the drafters often include a significant number of “default” provisions in such statutes. Part of the reason is to cover essential governance topics that inexperienced drafters may unintentionally omit. Another reason is that a statutory default typically provides wording of known legal applicability, whereas more creative drafting, attempting the same or a similar result, may result in unintended interpretations in case of future disputes. Finally, as with computer programs, many are happy to stick with the defaults rather than spend time and energy (and legal or parliamentary expenses, in the case of bylaws) trying to vary from the defaults.

There are certain basic types of statutory provisions typically applicable to nonprofit corporation laws:

(a) *Mandates*. These are requirements from which an organization cannot vary, even if it does not like them. For example, MNPCA §13 requires nonprofit membership corporations to hold annual meetings.

(b) *Prohibitions*. These are negative mandates. They prohibit certain conduct even if the organization would like to do so. For example, MNPCA §18 prohibits shortening a director's term through a bylaw amendment.

(c) *Permissive provisions (opt-ins)*. Common law generally applies in interpreting corporation statutes. Generally, under the common law, whatever is not specifically prohibited is permitted. There are, of course, exceptions to that general rule. For example, common law came to prohibit proxy voting and cumulative voting. Because statutes are interpreted in light of the common law, even without a statutory prohibition on proxy voting or cumulative voting, implicit prohibitions based on common law will typically apply, unless there is a specific permissive provision allowing the organization to utilize these procedures. Often, when negating a common-law prohibition, statutory drafters merely grant organizations the right to make their own choice (opt-in) to adopt a new governance practice, rather than requiring the new practice as a mandate. For example, the 1988 RMNPCA allows for cumulative voting if the organization explicitly provides for the procedure in its bylaws (§7.25). Sometimes, statutory drafters like the new procedure that contravenes common law so much that they make it a default procedure. For example, MNPCA §15 allows proxy voting in membership meetings by default. Although MNPCA does not contain an explicit prohibition on proxy voting in boards, courts would likely enforce the common law against proxies in the board context because MNPCA does not explicitly override the common law in that regard.

(d) *Default provisions (opt-outs)*. For reasons explained above, nonprofit corporation statutes typically contain numerous default provisions that apply unless the organization explicitly chooses a different way of handling such situations. Often, the default provision can be superseded by a provision in either the articles of incorporation or the bylaws. Sometimes, the default provision is of such significance and so heavily favored by the drafters that it can be superseded only by an explicit provision in the articles of incorporation. For example, MNPCA §18 allows directors to be removed only if a removal procedure is included in the articles of incorporation.

(e) *Maximum (ceiling)*. A statutory provision may include a maximum (ceiling). This is a combination of a default and a mandate or prohibition. For example, MNPCA §14 says that notice of a meeting may be sent not more than fifty days before a meeting. An organization could choose in its bylaws to require that notice be sent not more than thirty days before a meeting, but it cannot choose to allow notice not more than seventy-five days before a meeting.

(f) *Minimum (floor)*. Similar to a maximum, but in the other direction. For example, MNPCA §14 says that notice must be sent at least ten days before a meeting. Therefore, a local organization with a small membership cannot choose in its bylaws to allow three days' notice of meetings,

Model Nonprofit Act

(continued from previous page)

because that is below the floor. It could, however, choose to require at least two weeks' notice.

(g) *Window*. If a provision has both a maximum (ceiling) and a minimum (floor), the safe area in the middle is called a “window” (even though a real window does not usually stretch from floor to ceiling!). For example, MNPCA §14 provides a forty-day window for the service of notice of a meeting.

(h) *Safeguard*. Safeguards are mandates or prohibitions that the drafters include to make sure that the organization's bylaws do not override certain basic elements of fairness. Maximums and minimums are forms of safeguards. Another example of a safeguard is the provision in MNPCA §18 that directors cannot be removed by a bylaw amendment shortening their term.

(i) *Safe Harbor*. Some statutes, to allow for some flexibility, intentionally contain somewhat vague provisions that incorporate fact-based standards, such as “reasonableness.” Knowing that some people—particularly lawyers—are more risk-averse than others, such open-ended statutes often contain explicit “safe harbor” provisions, which provide a liability shield if complied with. For example, RMNPCA §7.05 requires meeting notice to be “fair and reasonable.” It also says that notice sent at least ten days and not more than sixty days before a meeting will be deemed “fair and reasonable.” That window is a safe harbor. A small neighborhood organization could probably provide three days' notice and, if challenged in court, it would be held up as “fair and reasonable.” An international organization with many overseas members could provide notice 120 days before the meeting and a court would probably uphold that provision as reasonable. (A lawyer would probably suggest a redundant, additional notice within the safe harbor, just to be sure.)

(j) *Override*. An override is similar to a default, but it changes the typical hierarchy of rules. For example, RMNPCA §10.03 relates to amendment of the articles of incorporation, and it provides a default procedure for amendment of the articles. An explicit amendment procedure included in the articles of incorporation would supersede both this statutory default and any contrary amendment procedure provided in the bylaws. Section 10.03, however, allows the bylaws to prescribe a method for amending the articles of incorporation that overrides the statutory default, even though such a bylaw provision relates to a higher-ranking document.

Parliamentarians should consider the issues highlighted in this article only as a guide to procedural concerns raised by the MNPCA. A state's incorporation statute modeled on the MNPCA typically does not retain the language of the model act verbatim. Some state legislatures considerably modified the MNPCA when they originally adopted it. The Ohio Nonprofit Corporation Law is based on the MNPCA, but from its initial adoption

contained many unique provisions—for example, a default annual meeting date of the first Monday of the fourth month after the close of the fiscal year (Ohio Rev. Code §1702.12). Because of the passage of years since the MNPCA in particular, many jurisdictions have modified their original enactment over the years. For example, Ohio now permits electronic or telephonic presence at meetings with certain safeguards for contemporaneous communication (Ohio Rev. Code §1702.17(C)). Only review of the specific statute will yield all the applicable details.

Parliamentarians working in a state that has based its nonprofit corporation act on the MNPCA may find that familiarity with the principal variances from standard parliamentary procedure contained in MNPCA may alert them about which statutory provisions are most likely to affect them.

Defaults of the 1952 Model Nonprofit Corporation Act at variance with standard parliamentary procedure. The MNPCA includes the following default provisions that vary from standard parliamentary procedure; if a corporation wishes to operate in standard parliamentary fashion, it must make a specific contrary provision in its own bylaws or articles of incorporation:

- Power to amend the bylaws is vested in the board (§12).
- Special membership meetings may be called by one-twentieth of the membership (§13).
- Proxies are permitted (§15).
- Quorum for membership meetings is ten percent of the membership (§16).
- Directors are to be elected for one-year terms (§18).
- Directors fill director vacancies (§19).
- Officers are elected annually by the directors (§23).

In addition, under the MNPCA, any director removal procedure must be included in the articles of incorporation (§18).

Mandates of the 1952 Model Nonprofit Corporation Act at variance with standard parliamentary procedure. The MNPCA includes the following mandatory provisions that vary from standard parliamentary procedure:

- Management of the nonprofit's affairs is vested exclusively in the board (§§2(g), 18).
- Annual membership meetings are required; special membership meetings may be called the president or the board (§13).
- Notice of all membership meetings is required to be sent not less than ten and not more than fifty days before the meeting; notice may be sent by the president, the secretary, or the persons calling the meeting (§14).
- To be adopted at a membership meeting, a main motion must receive an affirmative vote of a majority of those present (§16).

Model Nonprofit Act *(continued from previous page)*

- The board must consist of at least three members.
- Directors, unless removed, continue serving until their successors are elected and qualified; directors' terms may not be shortened by a bylaw amendment decreasing the number of directors (§18).
- Directors elected to fill vacancies serve the remainder of the unexpired term (this prevents the board from filling a position temporarily until the next membership meeting); however, directors elected by the board due to an increase in board size serve only until the next general board election (§19).
- The quorum for the board cannot be less than one-third of the total number of directors (§20).
- To be adopted at a board meeting, a main motion must receive an affirmative vote of a majority of those present (§20).
- Committees to which some of the powers of the board are delegated must consist solely of directors and include at least two directors; committees of the board may be created and appointed only by a vote of the majority of the entire board (§21).
- The call for a special meeting of the board need not state any particular business in the call (§22).
- There are at least four mandatory officers: president, at least one vice-president, secretary, and treasurer; the offices of president and secretary cannot be held by the same person (§23).
- Officers' terms may not exceed three years (§23).
- Whoever elects or appoints an officer may remove the officer at any time "in the best interests of the corporation" (§24).
- Unanimous written consent of the members or board is the equivalent of a unanimous vote at a meeting (§95).

Procedural provisions of the 1952 Model Nonprofit Corporation Act not at variance with standard parliamentary procedure. Fundamental changes in corporate structure are always a matter of law; there is no "standard" parliamentary procedure regarding such changes. The vote requirements for such fundamental changes do have implications for meeting procedures, however, so they are mentioned here:

- The vote requirement for internally generated fundamental changes is: (1) board approval and (2) approval by two-thirds of the members present at a meeting, with notice of the proposed fundamental change included in the call (§34 [amendment of the articles of incorporation], §40 [merger and consolidation], §44 [sale of substantially all assets], §45 [voluntary dissolution]).

- The vote requirement for a simple restatement of the articles of incorporation that only clarifies the articles and does not change any substantive provisions is: (1) board approval and (2) approval by a majority of the members present at a meeting, with notice of the proposed restatement included in the call (§37). ★

Michael Malamut, JD, PRP, CPP-T, is a lawyer associated with Kopelman & Page, P.C., of Boston, Massachusetts. For more information about Mr. Malamut, see "From the Editor" on page 5.

Notes

1. Upon inquiry from a reader of the original article, the author researched the nonprofit corporation law of several additional United States territories. The nonprofit corporation laws of the Virgin Islands, American Samoa (where they are called "eleemosynary corporations"), and Guam appear to be based on a similar model, with a relatively short general corporation law aimed mostly at business corporations and only a bare-bones chapter relating to nonprofit corporations. The statutes do not encourage the incorporation within these territories of non-local entities. The Virgin Islands nonprofit corporation statute, for example, requires that the chief business of such corporations be located in the territory (V.I. Code tit. 13, §491).

2. The nonprofit corporation laws of Alabama, Kentucky, New Jersey, New Mexico, North Dakota, Ohio, Rhode Island, South Dakota, Texas, Virginia, Washington State, Wisconsin, and the District of Columbia are based primarily on the 1952 MNPCA. In addition, the nonprofit supplemental provisions to the Maryland and West Virginia general corporation laws are based on the 1952 MNPCA. The most common source of state nonprofit corporation law is the ABA's 1988 Revised Model Nonprofit Corporation Act.

Works Cited

Lizabeth A. Moody, *Revising the Model Nonprofit Corporation Act: Plus ça Change, plus c'est la même chose*, 41 Ga. L. Rev. 1335 (2007)