

Issues of Concern to Parliamentarians Raised by the 1988 Revised Model Nonprofit Corporation Act

by Michael E. Malamut, JD, PRP

This article is the third 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 The second article, “Issues of Concern to Parliamentarians Raised by the 1952 Model Nonprofit Corporation Act,” was published in the Third Quarter 2008 *National Parliamentarian*. It supplemented the first article by adding the sources of the nonprofit corporation acts of American overseas island territories and discussed how the 1952 first edition of the American Bar Association’s (ABA) Model Nonprofit Corporation Act (MNPCA) varied standard parliamentary procedure through mandatory or default provisions. This article reviews the ABA’s 1988 second edition of the MNPCA, referred to as the Revised Model Nonprofit Corporation Act (RMNPCA).² RMNPCA is the most common source of current state nonprofit corporation statutes.³

The administrative provisions and organizational scheme of the RMNPCA are largely derived from the 1984 Revised Model Business Corporation Act (RMBCA), with which it shares common article and section numbering (Moody 1989, 255–56; Moody 2007, 1342–43). The California nonprofit corporation acts were a principal basis for the RMNPCA’s nonprofit-specific provisions and for its tripartite division of nonprofits into public benefit, mutual benefit, and religious corporations.⁴ The RMNPCA therefore “emerged as something of a hybrid between the California Act and the Revised Model Business Corporation Act” (Moody 1989, 265). The 1988 RMNPCA is therefore drafted taking nonprofit practices more into account than the 1952 MNPCA, which is much more strongly modeled on the parallel 1950 Model Business Corporation Act (Moody 2007, 1346).

Lizabeth A. Moody, dean emeritus of Stetson University College of Law and author of several articles detailing the evolution of the ABA’s Model Nonprofit Corporation Acts, chaired the recent effort to prepare a third edition of the RMNPCA, which was formally promulgated by the ABA in August, 2008.

As discussed in the previous article in this series, it is important to note that, when reviewing statutory provisions relating to nonprofit governance, a reader should keep in mind that corporate laws often include a significant number of default provisions. Such provisions provide minimum governance infrastructure even if the corporation fails to draft comprehensive bylaws. These statutory defaults and the statutory mandates described in

the articles (mandates typically include basic safeguards for members' rights) are not necessarily bad. Many organizations would voluntarily undertake to include similar provisions in their governing documents, such as minimum notice provisions or a minimum number of members required to call a special meeting. Nevertheless, the statutory defaults and mandates may become a trap for the unwary, who might not be aware of the statute and may believe that a contrary standard rule of general parliamentary law or an adopted parliamentary authority applies instead.

Parliamentarians should consider the issues highlighted in this article only as a guide to procedural concerns raised by the RMNPCA. State incorporation statutes modeled on the RMNPCA typically do not retain the language of the model act verbatim. Only review of the specific statute will yield all the applicable details. For example, the North Carolina Nonprofit Corporation Act includes a default provision absent from the RMNPCA that any member may demand that an election of directors be by ballot unless the bylaws provide otherwise. *Compare* N.C. Gen. Stat. § 55A-8-04 with RMNPCA § 8.04.

A more broadly applicable example of non-verbatim adoption involves RMNPCA's simplified version of California's tripartite division of nonprofit corporations. Many state legislatures believed that the tripartite division was confusing, so they chose to treat all nonprofits uniformly—a decision adopted by the third edition of the MNPCA (Moody 2007, 1347). Parliamentarians working in a state that has based its nonprofit corporation act on RMNPCA may, nevertheless, find familiarity with the principal variances from standard parliamentary procedure contained in RMNPCA, as detailed below, to be helpful in their practices. Familiarity with the model acts will alert parliamentarians to statutory provisions contrary to standard parliamentary procedure that are likely to affect the governance of the organizations with which they work.

Statutory defaults in the 1988 Revised Model Nonprofit Corporation Act that require a specific contrary provision in the bylaws or articles of incorporation to operate in standard parliamentary fashion.

The RMNPCA provides the following default rules (opt-outs), which, unless otherwise noted, can be superseded by a provision in either the articles of incorporation or the bylaws:

- In case of emergency, only notice that is practicable need be given for board meetings, and officers may serve in place of directors if necessary to achieve a quorum (§3.03).
- Regular (including annual) and special membership meetings are to be held at the principal office of the corporation (§§7.01, 7.02).
- Any action that could be taken at a membership meeting may be taken by written consent of at least 80 percent of the membership (§7.04).
- The board may set future dates as record dates for determining which

Model Nonprofit Act
(continued from previous page)

members are entitled to notice of meetings and to vote at meetings (§7.07).

- Action may be taken by mail ballot (§7.08).
- Quorum for membership meetings is 10 percent of the membership. The board may amend the bylaws to decrease the quorum for membership meetings without a membership vote (§7.22).
- Proxies are permitted (§7.24).
- All power is vested in the board unless otherwise stated in the articles of incorporation (§8.01).
- Directors are to be elected by the membership at the annual meeting for one-year terms (§§8.04, 8.05).
- Terms of directors elected to fill a vacancy expire at the next occasion on which members elect directors (§8.05).
- Both directors and members may fill director vacancies (§8.11).
- Telephonic participation in meetings of the board may be permitted by the board (§8.20).
- Any action that could be taken at a board meeting may be taken by unanimous written consent (§8.21).
- Special meetings of the board require at least two days' notice, need not state any particular business in the call, and may be called by the president, the board's presiding officer (if different), or 20 percent of the directors (§8.22).
- The board may create and fill committees with some of the powers of the board, with limited statutory exceptions, by vote of the majority of directors then in office (this vote quantum is a floor that may be increased by a provision of the articles or bylaws); articles or bylaws may limit or prohibit creation of board committees (§§8.24, 8.25).
- The corporation shall have at least a president, treasurer, and secretary as officers (§8.40).
- The board may prescribe duties of officers and may authorize one officer to prescribe duties of another officer (§8.41).
- The corporation must indemnify directors and officers in certain circumstances unless otherwise provided in the articles of incorporation (§§8.52, 8.56).
- Directors and officers may petition the courts for indemnification, unless otherwise provided in the articles of incorporation (§§8.54, 8.56).

Safe harbor provisions of the 1988 Revised Model Nonprofit Corporation Act at variance with standard parliamentary procedure.

- The RMNPCA contains a statutory safe harbor notice provision, deeming member discipline (expulsion, suspension, or termination of membership) fair and reasonable if the member receives written notice at

least fifteen days in advance stating the basis of the discipline and if the member has an opportunity to respond (which may be limited to a written response) at least five days before the effective date of the discipline (§6.21).

- The RMNPCA contains a statutory safe harbor notice provision, deeming notice fair and reasonable if mailed no more than sixty and no less than ten days before the meeting (no less than thirty days before the meeting if mailed in a manner other than first-class mail) (§7.05 (c)).

Mandatory provisions of the 1988 Revised Model Nonprofit Corporation Act at variance with standard parliamentary procedure.

The RMNPCA provides the following mandatory rules:

- During an emergency, the board may modify lines of succession for directors, officers, and employees, and may move corporate offices (§3.03).
- Notice of resignation of a member, director, or officer is effective immediately, or at a later date stipulated by the individual. There is no acceptance process, except for prospective resignation of an officer (§§6.20, 8.07, 8.43).
- Annual membership meetings are required (§7.01).
- A special meeting of the members may be called by the board or by 5 percent of the membership. If the corporation does not give notice of a special meeting within 30 days of the demand for a special meeting, those calling for the special meeting may set the time and place of the meeting and send notice themselves (§7.02).
- The bylaws must provide for means of fixing the date, time, and place of regular meetings (including the annual meeting) that provides fair and reasonable notice of such meetings (§7.05).
- Notice is required for adjourned (continued) meetings if the adjournment is for more than seventy days past the previous record date for determining which members are entitled to notice of the meeting (§§7.05 (d), 7.07 (e)).
- Members entitled to call a special meeting are entitled to give previous notice; if given by a proper party, the notice must be included in the call if received by the secretary or president ten days or more before the call of the meeting is issued (§7.05 (e)).
- For a mail ballot to pass, at least a quorum must return ballots (§7.08).
- The corporation must provide a member with the membership list, upon request, prior to a meeting; except that for religious corporations, this requirement is merely the default (§7.20).
- Unless at least one-third of the membership is present at a membership meeting, only previously noticed items may be considered (§7.22).
- To be adopted at a membership meeting, a main motion must receive the vote of at least a majority of those present and voting, *and those voting in*

Model Nonprofit Act

(continued from previous page)

favor must number at least as many as a majority of the quorum requirement; the

articles or bylaws may impose a greater requirement (§7.23).

- The secretary or other designee tabulating ballots is final arbiter of validity of signatures (§7.27).
- Voting agreements among members are enforceable for up to ten years; except that in a public benefit corporation such agreements are valid only if they are consistent with the corporation's purposes (§7.30).
- Nonprofit corporations must have a board (§8.01)
- The board must consist of at least three persons (§8.03).
- Elected directors' terms may not exceed five years. Directors continue serving until their successors are appointed and qualified, unless removed. Directors' terms may not be shortened by a bylaw amendment decreasing the number of directors or the lengths of their terms (§8.05).
- Except in religious corporations (where this is the default position), the RMNPCA permits members to remove, without cause, both member-elected directors and directors elected by the directors to fill a vacancy in a member-elected director position. The RMNPCA permits the directors to remove a director-elected director, other than one chosen to fill a vacancy in a member-elected director position, without cause by a two-thirds vote of the directors. Directors can only be removed at a meeting with prior notice; removal by rescission without notice is not allowed (§8.08).
- The quorum for the board cannot be less than one-third of the total number of directors (§8.24).
- A vote of at least a majority of those present is required for board action; the articles or bylaws may impose a greater requirement. (§8.24).
- Committees that are delegated some of the powers of the board must include at least two directors. Meeting, notice, quorum, voting, and waiver provisions applicable to the board also apply to board committees (§8.25).
- The RMNPCA contains a statutory conflict of interest provision, with stronger provisions permissible (§8.31).
- All loans and loan guaranties to directors and officers are prohibited (§8.32).
- At least one officer must be given the traditional record-keeping duties of the secretary (§8.40).
- The board may remove any officer with or without cause and without notice (§8.43).
- The vote requirement for bylaws amendments is, at a minimum: (1) board approval (except for mutual benefit corporations, and certain board-related issues in other nonprofits) and (2) approval by either (a) two-

Update on the Revised Model Nonprofit Corporation Act

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Many NAP members have been following the drafting progress of the third edition of the American Bar Association's (ABA) Revised Model Nonprofit Corporation Act. An article published in the First Quarter 2008 issue of *NP* detailed concerns raised by the February 2006 Exposure Draft and the February 2007 Internal Draft ("ABA Code Revision Raises Concerns for Democracy and Parliamentary Law in Nonprofits," *National Parliamentarian*, Volume 69, No. 1, pp. 10–18). As the Model Act went through the drafting and commentary process, each progressive draft incorporated more of the suggestions from the perspective of organizations with regular deliberative meetings of the members.

The concerns addressed and remaining in the January 2008 Exposure Draft are discussed in the May 2008 issue of the NAP President's newsletter ("ABA Releases New Exposure Draft," *The Possibilitarian*, Volume 1, Issue 2, pp. 11–13). The American College of Parliamentary Lawyers coordinated parliamentary commentary at this stage. The ABA's Drafting Task Force released its Final Draft in July 2008. The Final Draft is available on the ABA website at <http://www.abanet.org/dch/committee.cfm?com=CL580000>. The special joint committee of NAP, AIP, and the Robert's Rules Association for commentary on the Revised Model Nonprofit Corporation Act prepared an update for NAP leaders on the changes between the January 2008 and July 2008 drafts that affected parliamentary issues. This update is available from the chairman of the joint committee.

The July 2008 Final Draft of the Model Act was formally adopted at the ABA's Annual Meeting in August 2008, without change, and will be officially promulgated shortly. The joint committee chairman has prepared a table of issues of concern for parliamentarians in the approved final draft, which is available from him upon request. This table will be expanded into an article to be published in the First Quarter 2009 *National Parliamentarian*. ★

thirds of the members voting (at a meeting or by mail) or (b) a majority of the entire membership. §10.21. The members or board can choose to condition approval of a bylaw amendment on a higher vote quantum.

- Distributions of corporate assets are prohibited except upon dissolution and, in case of mutual benefit corporations, purchase of memberships in certain circumstances (§§13.01, 13.02).
- Committees with some of the powers of the board must keep minutes (§16.01).
- In addition to minutes of meetings of members and board and accounting records, the corporation must maintain a membership list and

Model Nonprofit Act *(continued from previous page)*

copies of general communications with the members for the past three years (§16.01).

- Members have the right to inspect corporate records, except in religious corporations, in which the inspection right is a default provision (§§16.02).
- Members have the right to inspect the most recent corporate financial statements and accompanying accountant's report, if any, except in religious corporations, in which this right is the default (§16.20).

Procedural provisions of 1988 Revised Model Nonprofit Corporation Act with implications for parliamentary procedure not at variance with standard parliamentary procedure.

Because 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, so they are mentioned here.

- The vote requirement for internally generated fundamental changes is, at a minimum: (1) board approval (except for mutual benefit corporations, and certain board-related issues in other nonprofits) and (2) approval by either (a) two-thirds of the members voting (at a meeting or by mail) or (b) a majority of the entire membership (§10.03 [amendment of the articles of incorporation], §11.03 [merger], §12.02 [sale of substantially all assets], §14.02 [voluntary dissolution]). The fundamental change provisions indicate that the members or board can choose to condition approval on a higher vote quantum. For example, a bylaw provision may make it more difficult than this basic minimum requirement to amend the articles of incorporation. ★

Michael Malamut, PRP, a Massachusetts-based attorney, chairs the joint Committee of NAP, AIP, and the Robert's Rules Association for Commentary on the Revised Model Nonprofit Corporation Act and serves as Co-Chair of the American Bar Association's Nonprofit Governance Subcommittee and Vice Chair of the ABA's Nonprofit Organizations Committee. He is also a Certified Professional Parliamentarian-Teacher through the American Institute of Parliamentarians.

Notes

1. The table appended to the first article inadvertently indicated that North Dakota nonprofit corporation law was based on the 1988 RMNPCA rather than the 1952 MNPCA. Also, the table inadvertently listed “1952 RMNPCA” for Iowa instead of the 1988 RMNPCA. In 2004, Iowa replaced its 1952-MNPCA-based Nonprofit Corporation Act with a new act based on the 1988 RMNPCA, with some provisions derived from the 2002 edition of the RMBCA. The numbers included in the text of the article—12 states plus the District of Columbia based on MNPCA; 23 states based on

RMNPCA; and 3 states (California, Florida, and Illinois) closely related to the RMNPCA—are correct.

2. In these articles, the second edition of the Model Act, which was officially promulgated by the ABA in 1988, is referred to as the 1988 Revised Model Nonprofit Corporation Act. The version available online at www.muridae.com/nporegulation/documents/model_npo_corp_act.html is dated 1987, which is when the act was adopted by the revision committee.

3. The nonprofit corporation laws of the following states are based primarily on the 1988 RMNPCA: Alaska, Arizona, Arkansas, Colorado, Connecticut, Georgia, Hawaii, Idaho, Indiana, Iowa, Maine, Minnesota, Mississippi, Missouri, Montana, Nebraska, North Carolina, Oregon, South Carolina, Tennessee, Utah, Vermont, and Wyoming. In addition, the nonprofit corporation laws of Florida and Illinois are based on the business corporation laws of the respective states, which are in turn derived from the 1984 Revised Model Business Corporation Law that was a principal source for the RMNPCA.

4. The California Nonprofit Corporation Law (Division 2 of the California Corporations Code) contains some general introductory provisions applicable to all nonprofit corporations, Part 1, §§5002–5080. The principal operative provisions, however, are contained in three parallel parts of the Nonprofit Act: Public Benefit Corporations, Part 2, §§5110–6910; Mutual Benefit Corporations, Part 3, §§7110–8910; and Religious Corporations, Part 4, §§9110–9690. While the RMNPCA incorporates California's division of nonprofit corporations into public benefit, mutual benefit, and religious corporations, there are far fewer differences among the three categories in the RMNPCA, and the distinctions are included as provisos or exceptions within a unified statutory scheme applicable to all nonprofits.

Works Cited

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