

Issues of Concern to Parliamentarians Raised by the 2008 Revision of the Model Nonprofit Corporation Act

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In August 2008, the American Bar Association (ABA) adopted the third edition of the Model Nonprofit Corporation Act (MNPCA or MNPCA [3d ed.]). This was the second major revision of what was originally promulgated in 1952 as the Model Non-Profit Corporation Act. In 1988, the ABA officially published the Revised Model Nonprofit Corporation Act (RMNPCA), the first major revision. The most recent revision had been referred to as the Revised Model Nonprofit Corporation Act during the drafting stages, but at the time of adoption, it was felt that that title might cause confusion with the 1988 revision, so the title was changed to Model Nonprofit Corporation Act (3d ed.).

The MNPCA (3d ed.) changed the RMNPCA in several significant ways that affect parliamentary procedure. For example, the MNPCA eliminated the division of nonprofits into “public benefit,” “mutual benefit,” and “religious” corporations, which was taken from California nonprofit law (Moody 1346–47). Just a few provisions remain where charitable or religious corporations are treated differently from other nonprofit corporations (Moody 1347; see MNPCA §§1.40(5), 160). MNPCA §7.27(b) also eliminated cumulative voting in nonprofits as a failed experiment from RMNPCA §7.25 (Moody 1349).

Another significant difference is the creation of the “designated body” concept (Moody 1350). This is a development that expands on a kernel of an idea in the 1988 RMNPCA and utilizes the Pennsylvania nonprofit law concept called, rather inelegantly, an “other body” (15 Pa. C.S. §5103). A “designated body” is any internal, organized body, other than the board or a board committee, that exercises some of the powers assigned to the board by statute. Because the MNPCA vests in the board virtually all the management power of the organization (MNPCA §8.01), any management or oversight role to be exercised by the members or by a house of delegates would be done as a “designated body” under the MNPCA. The “designated body” concept is unique to the MNPCA and is not included in the 2002 Revised Model Business Corporation Act (RMBCA [3d ed.]), on which the new provisions of the MNPCA are largely based. While the “designated body” concept adds tremendous flexibility to nonprofit corporate governance, as virtually all of the statutory powers of the board can be vested in one or more designated bodies, the concept also adds some complexity to the statute and calls for careful drafting of articles of incorporation and bylaws.

A final significant change in the MNPCA is the inclusion of the concept of a “fundamental transaction,” an overall category for significant changes in governance structure, which includes: domestication; for-profit conversion; entity conversion to an unincorporated entity (such as a limited

liability company [LLC] or association recognized by the Uniform Unincorporated Nonprofit Association Act [UNA] or similar legislation); merger or membership exchange; sale of substantially all assets; dissolution; and amendment of the articles of incorporation or the bylaws. The multiplication of new entity possibilities (such as LLCs and UNAs), competition among states for nonprofit incorporations, and the growth of similar entity changes in businesses for business advantage prompted the addition of a significant number of new articles to the MNPCA dealing with different forms of fundamental transactions (Moody 1349). The RMNPCA only addressed merger, sale of substantially all assets, dissolution, and amendment of the articles of incorporation or the bylaws.

This is the fourth in a series of articles describing the various editions of the MNPCA and how their provisions vary from standard parliamentary procedure.¹ To date, no states have adopted the MNPCA (3d ed.), but it is likely that a number of states will eventually do so, some with more modifications than others. Even in states that do not adopt a new nonprofit corporation code modeled on the full MNPCA (3d ed.), individual provisions are likely to be adopted verbatim or in modified form. The comments below may be helpful in states where parliamentarians practice if they want to propose amendments during the statutory adoption process.

It should be kept in mind that, unlike in the past, the ABA intends to keep the MNPCA current through a continuing revision process, much like the RMBCA. Therefore, it is possible that MNPCA provisions cited here might change in future updates or that additional provisions may be added that vary from standard parliamentary procedure.

Statutory defaults in the 2008 MNPCA that require a specific contrary provision in the bylaws or articles of incorporation to operate in standard parliamentary fashion.

In the 2008 MNPCA, any default provision (i.e., any statutory provision that the organization is permitted to “opt out” of) can be superseded by a provision either in the articles of incorporation or in the bylaws, except for limitations on corporate purposes or powers, which must be in the articles of incorporation (§2.02(b)(6), Official Comment 4; §§3.01, 3.02).

- In case of emergency, only notice that is practicable need be given for board meetings, and officers may serve in place of directors unable to attend (§3.03).
- No termination or suspension of membership is permitted unless a procedure is adopted in the bylaws or articles of incorporation (§6.21).
- Regular (including annual) and special membership meetings take place at principal office of corporation (§§7.01, 7.02).
- 10 percent of the membership can call a special meeting. (The percentage figure is variable between a 10 percent of the membership floor and a 25 percent of the membership ceiling.) (§7.02)

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- Any action that could be taken at a membership meeting may be taken by unanimous written consent of the members (§7.04).
- Notice is to be provided no more than 60 and no less than 10 days before a membership meeting (§7.05).
- The board chooses the membership meeting chair; if the board fails to choose, the members may choose the chair (§7.08).
- The chair of a membership meeting sets the meeting rules and agenda (§7.08).
- A mail ballot is permissible on any action (§7.09).
- Proxies are permitted (§7.22).
- If meeting adjourns for lack of a quorum, any adjourned meeting set by the original meeting has no quorum requirement (§7.24).
- Directors are elected by plurality (§7.27).
- All power is vested in the board. Some, but not all, powers of the board may be vested in another body, called a “designated body,” which may include the members. A designated body by default follows the statutory procedures applicable to the board (§§8.01, 8.12).
- 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 end of the unexpired term (§8.05).
- Directors continue serving until a successor is elected and qualified unless removed earlier (§8.05).
- Members may remove, without cause, a member-elected director or a director elected by the directors to fill a vacancy in a member-elected director position (§8.08).
- Directors may remove a member-elected director, but only for very limited reasons, such as loss of eligibility for office and failure to attend bylaw-mandated minimum number of meetings (§8.08).
- Directors may fill director vacancies, except for director positions elected by a member group (a default provision allows the member group to fill vacancy within three months), appointed (a default provision allows the appointing authority to fill vacancy), or specifically

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mandated in the articles of incorporation or bylaws (the vacancy is filled as indicated in articles of incorporation or bylaws) (§8.10).

- The board of directors may set the compensation of its own members (§8.11).
- Telephonic participation in meetings of the board is permitted, if desired 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, are not restricted to business in the call, and may be called by chair of the board, the highest-ranking officer, or 20 percent of the board. The default provision requires written notice of special board meetings, but the bylaws may permit oral notice. (§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 bylaw provision). The articles of incorporation or the bylaws may limit or prohibit creation of board committees. (§§8.24, 8.25)
- The board is responsible for the designation and election or appointment of the officers of the corporation (§8.40).
- The board may prescribe duties of officers and may authorize one officer to prescribe duties of another officer (§8.41).
- The board may remove any officer, with or without cause, and without notice (§8.43).
- By default, the corporation may provide (and in certain cases is mandated to provide) indemnification for its directors and officers in certain circumstances and to petition the court for indemnification in other circumstances (§§8.52, 8.54, 8.56). What the Model Act terms "mandatory indemnification" can, in fact, be limited by the bylaws or articles of incorporation (§8.58(c)). The corporation can, with certain exceptions, authorize more broad indemnification for the directors and officers (specifying either that it is permissible or obligatory); but for directors this can be done only by provision of the articles of incorporation, whereas for officers this can be done by provision of the articles of incorporation, the bylaws, a resolution of the board of directors, or contract (§2.02(b)(8), Official Comment 3(h); §§8.51, 8.56).
- There is a statutory conflict-of-interest provision that can be varied only by amendment to the articles of incorporation or the bylaws (§8.60).
- The members may amend the bylaws by majority vote without notice (§§7.24, 7.26, 10.20). In addition to and separate from member amendment of bylaws, the board may amend the bylaws, except certain bylaws

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relating to member rights, director quorum and vote requirements, and director removal. In regard to those items, the default is that only the members can amend those items (§§10.20–22).

- Individual members have the right to inspect and copy corporate records of the nature kept by the secretary (§16.02).

Permissive provisions of 2008 MNPCA that allow significant changes from standard parliamentary procedure.

- Regular (including annual) and special membership meetings must be held in a geographic place, but the bylaws or articles of incorporation may provide for an electronic meeting with members having only rights to hear or read proceedings, ask questions, make comments, and vote (§§7.01, 7.02).

Mandatory provisions of the 2008 MNPCA at variance with standard parliamentary procedure.

- During an emergency, the board may modify lines of succession for directors, officers, and employees, and may move corporate offices (§3.03).
- Notice of the resignation of a member, director, or officer is effective immediately or at such later date as stipulated by the individual. There is no acceptance process, except for prospective resignation of an officer. (§§6.20, 8.07, 8.43)
- Distributions of corporate assets to the members, directors, or officers are prohibited except upon dissolution and, in case of noncharitable nonprofit corporations, purchase of memberships in certain circumstances if authorized by the bylaws (§§6.22, 6.40, 6.41).
- Annual members meetings are required (§7.01).
- The board or at least 25 percent of the members may call a special meeting of the members (§7.02).
- Notice is required for both regular (including annual) and special meetings (§7.05).
- Notice is required for an adjourned meeting if the adjournment is for more than 120 days (§§7.05(e), 7.07(c)).
- The record date for notice may not be more than 70 days before date of meeting or other action (notice of meeting, mail ballot) (§7.07).
- The chair at a membership meeting announces when the polls are closed, and if he/she fails to do so, the polls close at adjournment sine die of the meeting (§7.08).
- At least a quorum must return ballots for a mail vote to be valid (§7.09).
- The corporation must provide a member with the membership list, upon request, prior to a meeting, or provide the requesting member with an alternative method of achieving the member's purpose (§7.20).

- The secretary, or whoever else tabulates the ballots, is the final arbiter of the validity of signatures on ballots (§7.23).
- Once a quorum has been obtained at a meeting, the meeting (and any adjournment of that meeting, unless a new record date is set) may continue despite the disappearance of a quorum (§7.24).
- Cumulative voting is prohibited (§7.27).
- Inspectors of elections (tellers) are the final arbiters of the number of eligible voters; the number of voters present; the validity of votes, ballots, and proxies; the counting of all votes; and the determination of results at meetings of the members (§7.28).
- Voting agreements among members are enforceable for up to ten years if they do not violate the purposes of the nonprofit corporation (§7.30).
- Nonprofit corporations must have a board, which must consist of at least three members (§§8.01, 8.03).
- Elected directors' terms may not exceed five years (§8.05).
- Directors' terms may not be shortened by a bylaw amendment decreasing the number of directors (§8.05).
- Directors can only be removed by the members 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 the greater of (1) one-third of the total number of directors, or (2) two directors (§8.24).
- A vote of a majority of the directors present is required for board action, unless the articles of incorporation or the bylaws require some *greater* vote (§8.24).
- Directors have a statutory right to dissent from board action (§8.24).
- The board may create committees with some of the powers of the board, which must be composed entirely of directors. Boards may appoint directors as alternate committee members to sit when a full committee member is absent (§8.12 Official Comment, §8.25). (A "committee" created by the board with one or more non-directors is a "designated body.")
- The board may create advisory committees (§8.25).
- Meeting, notice, quorum, voting, and waiver provisions applicable to the board are also apply to board committees (§8.25).
- Directors of charitable nonprofits are entitled to limited liability except in certain circumstances (§8.31(d)). For directors of noncharitable nonprofits, such limited liability is permissive (allowed if explicitly stated in the bylaws or articles of incorporation) (§§2.02(c), 2.06).
- The MNPCA contains an optional provision that, if adopted by a state, prohibits certain loans and loan guaranties to directors and officers (§8.32).
- At least one officer, by whatever title, must be given the traditional record-keeping duties of the secretary (§8.40).

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- The board is authorized to appoint additional officers that are not otherwise provided for in the bylaws (§8.40).
- Committees with some of the powers of the board must keep minutes (§16.01).
- In addition to keeping minutes (of meetings of the members and of the board) and accounting records, the corporation must maintain a membership list and copies of general communications with the members for the past three years (§16.01).
- Directors have the right to inspect and copy corporate records (§16.05).
- 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 only a default provision (§16.20).

Procedural provisions of the 2008 MNPCA with implications for parliamentary procedure that do not vary standard procedures.

Because fundamental changes in corporate structure are always a matter of law, there is no “standard” parliamentary procedure to vary from when making 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, except amendment of articles of incorporation, is, at a minimum: board approval and approval by a majority vote by the members. (§§9.21 [domestication], 9.31 [for-profit conversion], 9.52 [entity conversion to unincorporated entity, such as limited liability company or association recognized by Uniform Unincorporated Nonprofit Association Act or similar legislation], 11.04 [merger or membership exchange], 12.02 [sale of substantially all assets], 14.02 [voluntary dissolution]). The vote requirement for amendments to the articles of incorporation is, at a minimum: (1) board approval and approval by a majority vote by the members; or (2) upon petition by the number or percentage of members set in the articles of incorporation (10 percent of the members is the default if no number or percentage is set in the articles of incorporation), approval by a majority vote by the members (§10.03). The fundamental change provisions indicate that the board (except in the case of a member-initiated amendment to the articles of incorporation), articles of incorporation, or bylaws can choose to condition approval on a higher vote quantum. ★

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Notes

1. "Summary of Sources of State Nonprofit Corporation Laws," *National Parliamentarian*, Second Quarter 2008 (Vol. 69, No. 2), p. 8; "Issues of Concern to Parliamentarians Raised by the 1952 Model Nonprofit Corporation Act," *National Parliamentarian*, Third Quarter 2008 (Vol. 69, No. 3), p. 16; "Issues of Concern to Parliamentarians Raised by the 1988 Revised Model Nonprofit Corporation Act," *National Parliamentarian*, Fourth Quarter 2008 (Vol. 69, No. 4), p. 22.

Works Cited

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