District of Columbia Enacts Member-Friendly Nonprofit Corporation Law, Part I

by Michael E. Malamut, PRP

Introduction

This Article is in three parts. Part I addresses the history and specific provisions of the recently enacted member-governed corporation section of Chapter 4 (the "Nonprofit Corporation Act of 2010")[1] of the District of Columbia Title 29 (Business Organizations) Enactment Act of 2010, D.C. Act Number A18-0724. Part II will contain a table comparing the specific provisions of D.C. Code § 29-401.50, the member-governed corporation section, with the standard provisions of the D.C. Nonprofit Corporation Act applicable to board-governed membership corporations. Part III will discuss suggestions for implementation of the Act by nonprofit membership organizations with a membership governance philosophy and issues that might raise concerns for parliamentarians drafting bylaws for such organizations.

In 2008, the American Bar Association promulgated the Model Nonprofit Corporation Act (3d ed. 2008) (MNCA). The final version of the model legislation was much more compatible with traditional parliamentary-based member-driven organizations than initial drafts, but there were a number of areas where the model legislation would require membership organizations to adopt specific bylaw provisions after careful review of the statute to work in a parliamentary way.[2] A few other provisions of the model legislature mandated that such organizations act in ways contrary to longstanding parliamentary practice, with no possibility of changing that procedure through an overriding bylaw amendment.[3] The new version of the MNCA is expected to be widely adopted, as were its predecessors.[4]

On October 20, 2009, District of Columbia Council members Muriel Bowser and Mary Cheh filed Bill B18-500, with the short title, "District of Columbia Title 29 (Business Organizations) Enactment Act of 2009" (Business Organizations Act).[5] The bill was intended to present a comprehensive and unified approach to entities law, and covered a large number of different entity types, including Business Corporations, Nonprofit Corporations, Professional Corporations, General Partnerships, Limited Partnerships, Limited Liability Companies, General Cooperative Associations, Limited Cooperative Associations, Unincorporated Nonprofit Associations, and Statutory Trusts. In addition to providing a comprehensive approach through common definitions and filing procedures, the drafters sought to update the various entity laws to provide the District of Columbia with the latest thinking on entity law.

Therefore, the District of Columbia had the opportunity to be the first jurisdiction to adopt the 2008 MNCA, which was incorporated, virtually verbatim, in Chapter 4 of the Business Organizations Act bill, with the short title, "Model Nonprofit Corporations Act of 2009."[6] Although the District of Columbia is a special federal district, it has been granted home rule by Congress, and its corporations are recognized under the full faith and credit clause of United States Constitution Art. IV, § 1.

During the hearing phase of the legislation, many individuals and organizations submitted written comments, and several hearings were held. The Coalition for Democratic

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Process (CDP)—composed of the National Association of Parliamentarians®, the American Institute of Parliamentarians, the American College of Parliamentary Lawyers, the Robert's Rules Association, the National Bar Association (a bar organization historically serving lawyers of African-American descent), and the Alpha Kappa Alpha Sorority Connection Committee—participated actively in the process. The CDP advocated for changes to the ABA MNCA to enhance member control in nonprofit corporations with a governance philosophy vesting primary control of the corporation in the members, rather than the board of directors.

The primary goals of the CDP were (1) to empower the members' ability to participate democratically in nonprofit membership organizations that choose to rest the primary governance responsibility in their members, rather than their boards (corporations with a member-governed governance philosophy) and (2) to improve the accessibility to the members of membership corporation governance by allowing them to operate based, as much as possible, on reference only to their own internal governing documents (bylaws and special rules of order) and their adopted parliamentary authority. These latter documents are much more understandable and readily accessible to the non-lawyer member of a membership organization than are statutory provisions. The existence of numerous statutory defaults and mandates that run counter to standard parliamentary procedure set traps for the unwary. Such provisions lead organizations that do not regularly check bylaw amendments for conformity with statute into situations where their actions may be subject to challenge.

The result of the CDP's efforts was the inclusion in the final version of the bill of Section 29-401.50, special provisions for member-governed corporations. The member-governed corporation provisions apply to nonprofit corporations (1) that actively choose, in their articles of incorporation or bylaws, to be governed by those provisions, or (2) that meet the functional definition of "member-governed" because: (a) they hold regular meetings not less frequently than annually; (b) their activities and affairs are governed by their members; and (c) their board of directors has only those powers delegated by the articles of incorporation, bylaws, or members. The new section largely, although not entirely, succeeded in accomplishing CDP's goals.[7]

On the goal of membership empowerment, because of changes in the D.C. Nonprofit Corporation Act to other provisions of the MNCA, member-governed nonprofits will need to include some specific language in their articles of incorporation (as described in greater detail below) to enable them to empower their members fully. On the goal of accessibility (ability to run the organization without reference to statute), there are a few provisions where the political expediency of consolidating all changes into one short section meant that in some circumstances, while member-governed corporations could choose to operate either in a standard parliamentary way or in the manner envisioned in the MNCA, they lost the flexibility to choose other options through specific bylaw provisions or special rules.[8]

Organizations seeking to run solely under their own bylaws, special rules, and adopted parliamentary authority, without having to review statutory procedural provisions in regard to any issues, should consider organizing as unincorporated nonprofit associations ("UNA") under the D.C. Uniform Unincorporated Nonprofit Association Act, §§ 29-1101 et seq. Under that Act, UNAs obtain many, but not all, of the benefits of incorporation, with much more flexibility in self-government.

The final version of the bill, including the member-governance provisions, was adopted by the District of Columbia Council on December 21, 2010 and signed by the Mayor on February 27, 2011. Under the District of Columbia Home Rule Act,[9] the bill will be submitted to Congress and will be enacted into law if Congress does not act within 60 days of receiving the approved bill. It becomes effective on January 1, 2012.

Provisions of the Member-Governed Corporations Section

Section 29-401.50 primarily turns some statutory mandates that run counter to standard parliamentary procedure into defaults or permissive provisions (allowing such action only if specifically provided). For example, in member-governed corporations, voting agreements (whereby 2 or more members bind themselves to vote a certain way in advance of a meeting, a device often used by shareholders of business corporations) are prohibited unless specifically allowed. D.C. Code § 29-401.50 (c) (2). Board-governed membership corporations, on the other hand, are required to recognize voting agreements. D.C. Code § 29-405.40. In addition, § 29-401.50 reverses one of the defaults of the MNCA that runs contrary to a strong principle of parliamentary governance in regard to proxy voting. Under § 29-401.50 (c) (1), in member-governed corporations, proxies are allowed only if specifically provided for in the articles of incorporation or bylaws. In board-governed nonprofit membership corporations, on the other hand, proxies are prohibited only if the articles of incorporation or bylaws explicitly so provide. § 29-405.22.

The final subsection of the member-governed corporations provision is a powerful tool to enhance accessibility of operation (ability to govern by reference to bylaws, special rules, and parliamentary authority, without resort to statute). Subsection (e) grants bylaw-level status to an adopted parliamentary authority, provided that it is a "generally accepted parliamentary authority."[10] In other words, by adopting a parliamentary authority, or a special rule of order on a specific procedural issue, the organization automatically overcomes contrary statutory defaults and incorporates parliamentary-friendly permissive provisions. Non-lawyer drafters of bylaws can feel comfortable that their organizations can operate in a traditional parliamentary way without constantly referring to statutory procedural provisions.[11]

For example, with subsection (e), simply by adopting a parliamentary authority to overcome the statutory default, the president of the organization (or vice president or member-elected president pro tem in his or her absence) would preside at membership meetings. *RONR* (10th ed.), p. 436, l. 21–26; p. 437, l. 13–17; p. 440, l. 19–25. Otherwise, the statutory default would apply and the board would determine who would preside over membership meetings. D.C. Code § 29-405.08 (a) (2). Similarly, with subsection (e), simply by adopting a parliamentary

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authority, the organization enables the permissive provision § 29-401.50 (d)(3), preventing members who leave a meeting from being counted towards a quorum. See *RONR* (10th ed.), p. 338, l. 8–19. Otherwise, the statutory mandate would apply and a meeting that started with a quorum would continue until all business was completed, regardless of the presence of a quorum. D.C. Code § 29-405.24 (b).

Another important provision of subsection (e) is to provide a safe harbor for organizations that adopt a generally accepted parliamentary authority. § 29-405.24 (c) requires that the conduct of a meeting be fair to the members, but does not detail what would constitute a fair set of rules. Subsection (e) provides a presumption of fairness to meetings run in accordance with an adopted parliamentary authority.

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References:

George Demeter, *Demeter's Manual of Parliamentary Law and Procedure* (Blue Book ed. 1969) ("*Demeter*")

Ray E. Keesey, *Modern Parliamentary Procedure* (rev. ed. 1994) ("*Keesey*")

Michael E. Malamut, "Issues of Concern to Parliamentarians Raised by the 2008 Revised Model Nonprofit Corporation Act," *NP* (1st Q 2009)

Michael E. Malamut, "Sample Bylaw Provisions for Overriding the Default Provisions of the 2008 Model Nonprofit Corporation Act, Part I," *NP* (2d Q 2009)

Michael E. Malamut, "Sample Bylaw Provisions for Overriding the Default Provisions of the 2008 Model Nonprofit Corporation Act," Part II, *NP* (3d Q 2009).

Michael E. Malamut, "Summary of Sources for State Nonprofit Corporation Laws," *NP* (2d Q 2008)

Paul Mason, *Mason's Manual of Legislative Procedure* (9th ed. 2000) ("*Mason*")

Henry M. Robert, *Robert's Rules of Order Newly Revised* (10th ed. 2000) ("*RONR*")

Alice Sturgis, *The Standard Code of Parliamentary Procedure* (4th ed. 2001) ("*TSC*")

Donald A. Tortorice, *Modern Rules of Order* (3d ed. 2007) ("*Tortorice*")

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[1]That is the official short name of this chapter. It is also referred to in this article as the "D.C. Nonprofit Corporation Act" and the "Act."

[2]See Michael E. Malamut, "Sample Bylaw Provisions for Overriding the Default Provisions of the 2008 Model Nonprofit Corporation Act, Part I," *NP* (2d Q 2009); Michael E. Malamut, "Sample Bylaw Provisions for Overriding the Default Provisions of the 2008 Model Nonprofit Corporation Act," Part II, *NP* (3d Q 2009).

[3]See Michael E. Malamut, "Issues of Concern to Parliamentarians Raised by the 2008 Revised Model Nonprofit Corporation Act," *NP* (1st Q 2009).

[4]Michael E. Malamut, "Summary of Sources for State Nonprofit Corporation Laws," *NP* (2d Q 2008), updated on website, www.michaelmalamut.com.

[5]This Bill, as amended, was subsequently enacted as D.C. Act Number A18-0724.

[6]This Chapter of the bill, as amended, became Chapter 4 of D.C. Act Number A18-0724.

[7]The lack of an opt-out provision for membership corporations that meet the functional definition of "member-governed corporation," may cause a minor inconvenience for some such corporations that want to take advantage of provisions applicable to board-governed membership corporations. All the procedural provisions in § 29-401.50 are optional, however, so the adoption of a board-governed provision, where § 29-401.50 reverses a statutory default or mandate, would only require a short additional bylaw provision. It is unlikely that a nonprofit membership corporation that chose to govern itself so as to meet the functional definition of a member-governed corporation would fall into a trap because it was unaware of the special member-governed corporation procedures of § 29-401.50, and read only the board-governed membership corporation provisions of the D.C. Nonprofit Corporation Act out of context.

[8]In an effort to consolidate changes in a short and simple single section, drafters allowed for a few situations, which are unlikely to occur frequently, where Section 29-401.50 does not address statutory mandates contrary to standard parliamentary practice. These mandates would continue to apply in the rare situations when they are applicable: (1) The board or at least 25 percent of the members may call a special meeting of the members, § 29-405.02. (a) (2); (2) Notice is required for both regular (including annual) and special meetings, § 29-405.05 (a), although notice in the bylaws or a standing order, if communicated to the entire membership, should suffice; (3) Notice is required for an adjourned meeting if the adjournment is for more than 120 days, §§ 29-405.05 (e), 29-405.07(c); (4) The record date for notice may not be more than 70 days before the date of meeting or other action (notice of meeting, mail ballot). § 29-405.07 (b); (5) The secretary, or whoever else tabulates the ballots, is the final arbiter of the validity of signatures on ballots. §29-405.23 (c); (6) Directors' terms may not be shortened by a bylaw amendment decreasing the number of directors. §29-406.05 (b); (7) Directors can only be removed by the members at a meeting with prior notice; removal by rescission without notice is not allowed §29-406.08 (a) (3); and (8) The board is authorized to appoint additional officers (without the powers of directors) that are not otherwise provided for in the bylaws §29-406.40 (a).

[9]Public Law 93-198, § 602 (c); 87 Stat. 774; D.C. Code § 1-206.02 (c).

[10]The legislative drafters preferred this language to mention of a specific parliamentary authority, such as *RONR*, as a default parliamentary authority, in order to enable organizations to choose a parliamentary authority suited to their own circumstances. The intent was to include well-recognized parliamentary authorities such as *RONR*, *Demeter, TSC, Mason, Keesey, or Tortorice.*

[11]On the other hand, non-parliamentarian lawyers might run into a reverse trap for the unwary when an organization's parliamentary authority reverses a statutory default, and a lawyer unfamiliar with the parliamentary authority might not be aware of the overriding effect of the parliamentary authority. The accessibility to the individual members of their familiar bylaws and parliamentary authority should assuage any concerns. A non-lawyer parliamentarian working with a parliamentary consultant should be able to address all applicable issues. The goal of good bylaw drafting should be that members do not have to refer to the statute to understand how their organization is governed.

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