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

by Michael E. Malamut, PRP

Introduction

This Article is in three parts. Part I addressed 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 contained 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 discusses 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.

Issues for Parliamentarians in the D.C. Nonprofit Corporation Act

Although the Coalition for Democratic Process (CDP) was largely successful in its goal of enabling membership governance in a single provision, there are a few issues that parliamentarians need to be aware of.

Articles of Incorporation Provisions

Although member-governed organizations that meet the definition of D.C. Code § 29-401.50 (a) (2) are automatically covered by § 29-401.50, membership corporations that want to utilize the member-governed corporation provisions may want to adopt those provisions formally in their articles of incorporation or bylaws, just to ensure that the provisions apply. In addition, any membership corporation that uses an assembly of delegates as its primary governing body would not meet the statutory definition of a member-governed corporation, and would have to choose to adopt those rules specifically in its articles of incorporation or bylaws. Such a provision would state: "This corporation shall be a member-governed corporation subject to the provisions of D.C. Code § 29-401.50."

Perhaps more important, because of changes to the Model Nonprofit Corporation Act (3d ed. 2008) (MNCA) by the drafters of the D.C. Nonprofit Corporation Act, organizations cannot necessarily choose a member-governance philosophy simply because they fall under § 29-401.50 (by definition or by choice). Section 29-401.50 is primarily a procedural provision. It allows "member-governed corporations" to run in a traditional parliamentary way when the members are doing business assigned by the statute to the members, which is primarily electing directors (which would include officers with voting rights on the board), amending the bylaws, and approving other fundamental transactions.

Under the MNCA and the D.C. Nonprofit Corporation Act, virtually all other corporate action may only be taken by the board of directors or a "designated body." In order for the members, or an assembly of delegates,[2] to act as a "designated body" and be empowered to take any action for the corporation other than election of directors, amendment of bylaws, or approval of fundamental transactions, the members or delegates would have to be specifically empowered to do so in the articles of incorporation D.C. Code § 29-406.12 (a).

In an organization with only the members and a board, such a provision could read: "The statutory powers, authority, and functions of the board of directors shall be vested in the members as a 'designated body,' except to the extent explicitly granted to the board of directors by these articles of incorporation, the bylaws, or by action of the members."[3]

An organization that rests primary governance authority in an assembly of delegates should include a provision like this: "The statutory powers, authority, and functions of the board of directors shall be vested in the assembly of delegates as a 'designated body,' except to the extent explicitly granted to the board of directors or the members by these articles of incorporation, the bylaws, or by action of the assembly of delegates. The members may exercise, as a 'designated body,' such other statutory powers, authority, and functions of the board of directors as they may be granted in these articles of incorporation, the bylaws, or action of the board of directors or the assembly of delegates."

An organization with both a board of directors and an assembly of delegates, but that wants to rest the primary governance role on the members, could say: "The statutory powers, authority, and functions of the board of directors shall be vested in the members as a 'designated body,' except to the extent explicitly granted to the board of directors or the assembly of delegates by these articles of incorporation, the bylaws, or by action of the members or the board of directors. The assembly of delegates, as a 'designated body,' may exercise such other statutory powers, authority, and functions of the board of directors as they may be granted in these articles of incorporation, the bylaws, or action of the board of directors or the members."

Section 29-406.12 (a) also provides that some, but not all, of the statutory powers of the board may be delegated to a "designated body," in the articles of incorporation. General delegation language like that above should be sufficient, so long as the board retains some powers to act in the bylaws. *RONR* would allow a membership organization to function without a board of directors, or with a simple and powerless steering committee in lieu of a board of directors. The interaction between the "designated body" section and the "member-governed corporation" section,[4] however, indicates some caution on organizing a member-only organization without a board under the D.C. Nonprofit Corporation Act.[5]

Similarly, § 29-406.12 (b) provides that some, but not all, of the statutory powers of the members may be vested in a "designated body." Because the members have relatively few statutory powers under the MNCA and the D.C. Nonprofit Corporation Act—basically the right to elect directors, amend the bylaws, and approve fundamental transactions—the members' indirect right to elect the delegates who can take such actions should suffice under the law. In such organizations, it is important to remember to grant the delegate assembly the right to approve fundamental transactions, or that power will remain with the members at large, to be exercised on the rare occasions when it is called for.

Cautions on Statutory Limitations

Another possible concern for

parliamentarians is that, in some cases, the Act allows member-governed corporations the option of operating in a standard way (which is automatically applied by adoption of the parliamentary authority), but would prevent the adoption of a bylaw or special rule of order that would otherwise be in order under *RONR*. For example, § 29-401.50 (c) (5) allows the members to close the polls by a 2/3 vote. That would prohibit a special rule of order allowing the polls to be closed by a majority vote. Similar limitations are included in § 29-401.50 (d) (1) (membership meetings must take place at least every 2 years, unless there is a delegate assembly, in which case delegate meetings must take place at least every 5 years) and § 29-401.50 (d) (5) (maximum director term is 6 years). In both cases, standard parliamentary procedure would allow the bylaws to adopt time limits outside those prescribed by statute. Another limit is included in § 29-401.50 (d) (8), which allows a board to act by a majority of those present and voting, but not by a plurality. Plurality voting for elections by the board would, however, be a permissible bylaw provision under *RONR*.[6]

One particular area where the "designated body" rules are of particular concern for parliamentary organizations involves committees with power. A committee with power must be composed entirely of members of the body that delegates its powers to the committee. D.C. Code § 29-406.25 (a). For example, if the articles of incorporation grant statutory board powers to the assembly of delegates, and the bylaws specify that the delegates may organize an annual fundraiser, the delegates may create a committee of the delegate assembly with power to make arrangements for the annual fundraiser. If they do so, the fundraising committee must consist entirely of delegates. No ordinary members, who are not delegates, can participate in such a committee with power, because such a committee would, because of its "mixed" composition, be treated as a "designated body." Because under D.C. Code § 29-406.12 (a), designated bodies can only obtain statutory board powers if they are specifically mentioned in the articles of incorporation, ad hoc committees with statutory board powers cannot be designated bodies. Moreover, it would not be recommended for standing committees with "mixed" membership (hence "designated bodies") to be granted statutory board powers in the articles of incorporation because of the difficulty of changing provisions in the articles of incorporation.

Another concern is, even with § 29-401.50 (d) (10), committees remain limited in the actions that they can undertake. For example, committees cannot make distributions, amend bylaws, or fill vacancies in a board, designated body, or committee with power. D.C. Code § 29-406.25 (e) (1), (3) & (4). While committees ordinarily do not perform any of these actions in *RONR* organizations, a committee could do so under *RONR* if so empowered in the bylaws. Finally, D.C. Code § 29-406.25 (g) includes an unlimited power for the board or designated body that creates a committee to appoint alternative committee members to participate when a committee member is unable to attend a meeting. That means that, under the statute as written, a bylaw provision prohibiting the board or a designated body from appointing alternative committee members would not be effective. Few nonprofit organizations use alternative committee members, so the existence of this power to appoint alternate committee members creates a possible source of surprise and potential abuse.

A final concern caused by the "designated body" rules is that designated bodies, to the extent that they exercise statutory board powers, are subject to the duties and liabilities of board members. D.C. Code § 29-406.12 (a) (1) (A). See D.C. Code § 29-406.30 (standards of conduct for directors). Technically, that means that the delegates, or the individual members, if granted statutory board powers (in other words, doing anything except electing directors, amending bylaws, and approving other fundamental transactions), are subject to the same fiduciary obligations as board members. Thus, if the members or delegates are acting as a "designated body," they are subject to the statutory prohibition on loans, liability for improper distributions, and liability for usurping business opportunities of the corporation, just as board members are. See D.C. Code §§ 29-406.32, 29-406.33, 29-406.80. While it is unlikely that the members or the delegates would be sued for breach of fiduciary duty as a group, it is a theoretical possibility. More significant, from a procedural perspective, is that a delegate or individual member would be subject to board-level conflict-of-interest disclosure and abstention requirements. D.C. Code § 29-406.70. This is contrary to *RONR*, which advises abstention on conflicts of a personal or financial nature, but does not require it. *RONR* p. 394, l. 15–25.

Conclusion

The enactment of the new D.C. Model Nonprofit Corporation Act, together with the member-governed corporation provisions of § 29-401.50, adds tremendous flexibility to the governance possibilities for membership organizations. The principal provisions of the Act allow organizations to avail themselves of the latest thinking and practice in nonprofit governance. The membership governance provisions of § 29-401.50, together with the expanded "designated body" authority, allow member-governed corporations to act in their traditional deliberative manner without significant bylaw work-arounds and governance compromises in order to meet statutory requirements. The result is a much more member-friendly corporate governance regime than was possible under prior nonprofit corporation laws, which more closely followed business corporation models.

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End Notes

1 That is the official short name of this

Nonprofit Corporation Act
(continued from previous page)

chapter. It is also referred to in this article as the "D.C. Nonprofit Corporation Act" and the "Act."

2 In fact, an assembly of delegates is, by definition, a "designated body," D.C. Code §§ 29-404.30 (c), 29-406.12 (b), and can only act as such (at least in regard to statutory "board" powers) if it is explicitly empowered in the articles of incorporation. (Note that there is an apparent conflict between § 29-404.30 (c), which allows an assembly of delegates to become a designated body with some of the powers of the board in either the articles of incorporation or the bylaws, and § 29-406.12 (a), which requires a designated body to be named exclusively in the articles of incorporation.)

3 Arguably, because of the interaction between the "designated body" and "member-governed corporation" provisions of the D.C. Nonprofit Corporation Act, an organization that clearly chose a membership-governance philosophy through its bylaws and parliamentary authority could fall within the functional definition of § 29-401.50 (a) (2), even without specifically declaring the members to be a "designated body" in the articles of incorporation. Discretion would counsel such organizations to make the choice explicit in their articles of incorporation.

4 The member-governed corporation section several times refers to an organization with a board of directors, "if any," implying that member-governed corporations can choose not to have a board of directors. See D.C. Code § 29-401.50 (a) (2) (C), (c) (3).

5 Technically, a member-only organization could organize as a board-only corporation under D.C. Code § 29-404.01, but in that case all the statutory requirements applicable to boards would apply to the members. It would also be possible for a member-only organization to organize as an UNA under the D.C. Uniform Unincorporated Nonprofit Association Act. D.C. Code §§ 29-1101 et seq.

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

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