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Changing From a Membership to a Non-Membership Structure

Historically, certain New York-incorporated nonprofits were required to have a membership structure.¹ However, for many organizations, this is no longer the case.² As a result, many nonprofits that were originally formed as membership nonprofits find that a membership structure is no longer appropriate for them and may wish to change.

Other nonprofits that have not been operating as membership organizations realize that they have provisions in their certificate of incorporation or bylaws about members. These organizations may wish to make the necessary updates to reflect actual practice and clarify that they are not, in fact, membership organizations.

This Legal Alert will provide information on how a New York nonprofit can change from having a membership structure to a non-membership structure.

How can we tell if our nonprofit has a membership structure?

Check your organization's certificate of incorporation and bylaws. Your organization is a membership organization only if specified in one or both of those organizational documents.

Our certificate of incorporation says that our organization has members. What should we do?

You will need to amend your certificate of incorporation to remove the membership requirement.

For a membership corporation, amendments of this type to the certificate of incorporation require either a majority vote of members at a member meeting or the unanimous written consent of all members.³

You should also check your bylaws to see if they impose any additional requirements or higher approval threshold for an amendment to the certificate of incorporation.

¹ For more information on the basics of membership structure under the New York Not-for-Profit Corporation Law ("NPCL") see our Legal Alert: [FAQs: Understanding Membership Structure for New York Not-for-Profits](#).

² For example, prior to the Nonprofit Revitalization Act ("NPRA") in 2013, Type C charitable organizations were required to have members. However, the NPRA eliminated the membership requirement for all charitable nonprofits, so these organization now have the option to discontinue a membership structure. Similarly, any organization formed under the pre-1970 New York Membership Corporations Law was, by definition, a membership corporation. However, such organizations are now governed by the NPCL and are no longer universally required to maintain a membership structure. Note that "non-charitable" nonprofits are still required to have members. NPCL § 601(a).

³ NPCL § 802, 614.

Once the amendment has been authorized, you can find a fillable Certificate of Amendment and instructions regarding filing and fees on the New York Department of State (“NYDOS”) website at: <https://dos.ny.gov/certificate-amendment-domestic-not-profit-corporations-0>.

Our bylaws say that our organization has members. What should we do?

You will need to amend your bylaws to remove the provisions regarding membership and provide for governance only by the board of directors. This is less difficult than amending the certificate of incorporation, as it does not require any filings with the NYDOS.

Under the NPCL, amendment to the bylaws of a membership organization can be made by either the board or the members.⁴ However, any amendment to the bylaws that eliminates the organization’s members or their voting rights should be authorized by the members and not only by the board.⁵

As with amendments to the certificate of incorporation, you should also check your current bylaws to see if they impose any special requirements or approval thresholds for this type of change. In addition, you should confirm that there are no additional limitations on bylaws amendments in your certificate of incorporation.

Both our certificate of incorporation *and* our bylaws say that our organization has members. What should we do?

You will need to amend both your certificate of incorporation and your bylaws. This can be done simultaneously. See the two preceding questions.

What if our organization was formed before 1970 under the predecessor to NPCL: the New York Membership Corporations Law (“MCL”)? Is it possible for us to change to a non-membership corporation?

Yes. The same general rules apply to organizations formed under the MCL. You must ensure that all references to members (other than any general references to the “Membership Corporations Law”) are removed from both your certificate of incorporation and your bylaws following the processes outlined above.

What if our certificate of incorporation and/or bylaws say we have members, but we don’t know who they are? How can we authorize the required changes?

In order to resolve this issue, you may need to track down the last known members of the corporation or the incorporator (that is, the person who originally formed the nonprofit by filing the certificate of incorporation). You must at least give your best efforts to locate and notify individuals who may have served as members. If these efforts fail, it may be necessary to appoint new members who can vote on the necessary changes.

⁴ NPCL § 602.

⁵ See *Gluck v. Chevre Liady Nusach Hoary*, 97 A.D.3d 787 (2012).

In any event, you should consult with an attorney since the specifics on how to proceed will depend on the facts and circumstances of your particular case.

This alert is meant to provide general information only, not legal advice. If you have any questions about this alert please contact Rafi Stern at rstern@lawyersalliance.org or visit our website at www.lawyersalliance.org for further information. To become a client, visit www.lawyersalliance.org/becoming-a-client.

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