

March 23, 2020

### **Expediting Nonprofit Board Governance During the Coronavirus Emergency**

During the coronavirus outbreak, nonprofit organizations need to be able to act quickly, while thoughtfully planning for an uncertain future. This Legal Alert describes techniques a Board of Directors can use to meet and act expeditiously. It is always a good idea to work with an attorney to understand what the law and an organization's governing documents allow before changing how the Board operates. The law of the state in which the entity was incorporated will contain specific requirements for Board operations. This Alert addresses the requirements of the New York Not-for-Profit Corporation Law.

#### **1. What can the Board of a New York not-for-profit corporation do to react more quickly during an emergency?**

The Board can meet more frequently, meet via conference call or video conference, reduce quorum requirements, make decisions without a meeting via unanimous consent, and empower Board committees to make certain decisions. Each of these options is described below.

#### **2. How can the Board meet more frequently?**

If the Board needs to start meeting more frequently, it can pass a resolution or amend the bylaws to increase the number of regular meetings. Alternatively, the Board can call a special meeting, as described below.<sup>1</sup>

#### **3. How can the Board call a special meeting?**

Check the bylaws, which may describe the process for calling a special meeting of the Board. If there is no such provision in the bylaws, the default rule is that the most senior officer of the Board (e.g., the president or chair) can call a special meeting. In addition, in a non-membership corporation, one-fifth or more of the directors can demand in writing that a special meeting should be called.<sup>2</sup>

#### **4. What notice must be provided regarding a special meeting?**

Notice of a special meeting must be provided to each director. The bylaws may describe how notice should be given. However, a special meeting can be held even if the necessary notice has not been provided, so long as each director who did not receive notice does one of the following: a) attends the meeting without protesting the lack of notice, or b) submits a written or electronic waiver of notice, either before or after the meeting.<sup>3</sup>

#### **5. Can some or all members of the Board or a committee participate in a meeting via conference call?**

Under New York Not-for-Profit Corporation Law, a nonprofit Board can meet via conference call or video conference unless doing so is prohibited by the certificate of incorporation or bylaws. Any technological solution can be used to facilitate the call, so long as everyone on the call can hear each other and participate.<sup>4</sup> These rules apply to Committees of the Board too.

**6. Given the social distancing recommendations, how can an organization subject to the Open Meetings Law hold a meeting of the trustees?**

Certain nonprofit corporations, like charter schools, are subject to the Open Meetings Law, which requires meetings of trustees to be open to members of the public. In light of the challenges the coronavirus presents in meeting these requirements, Governor Cuomo’s Executive Order 202.1, issued March 13, 2020, suspends the applicability of the Open Meetings Law and allows trustees to participate in meetings by telephone or video conference call for purposes of quorum, and allows the public to attend virtually as well. The order provides that notices of such meetings must include information on how the public can view or listen to the meeting live. Charter schools taking advantage of this flexibility must record and transcribe any such virtual meeting. The order will remain in effect until at least April 11, 2020.<sup>5</sup>

**7. Can the Board or a committee vote electronically without holding a meeting?**

The Board can make decisions without a meeting if all voting members of the Board consent in writing. This is called making a decision via “unanimous consent.”<sup>6</sup> However, New York law *does not allow* the Board to vote electronically unless all voting members of the Board consent in writing. Directors cannot vote by proxy. These rules also apply to Committees of the Board, which are committees with the power to bind the corporation.

**8. How can the Board reduce quorum requirements?**

For many types of actions, it is possible to reduce the quorum requirements by amending the certificate of incorporation or bylaws. However, the rules around how low quorum requirements can be set are quite technical. They depend on the size of the Board and the type of action the Board wants to take.<sup>7</sup> For this reason, it is highly advisable to consult an attorney before reducing quorum requirements.

**9. During the coronavirus outbreak, what are some examples of timely issues for the Board to consider?**

As part of the duty of care, which requires directors and officers to be attentive to the way in which charitable assets are managed,<sup>8</sup> directors will want to stay informed about significant changes concerning revenues and expenses, personnel, investments, and service contracts, and participate actively in governance discussions related to such matters. As part of the duty of obedience, directors of organizations that are modifying their services to respond to current events should review and, if appropriate, update the charitable purposes clause of the certificate of incorporation to ensure it encompasses current and planned operations.<sup>9</sup> Concrete steps for observing the duty of loyalty include reminding directors to follow the organization’s conflict of interest and confidentiality policies, even in difficult times.<sup>10</sup>

**10. How can the Board create a new Committee of the Board?**

When a Board of Directors needs to make quick decisions, delegating certain decisions to a committee can help. The rules about creating and appointing people to committees depend on whether the committee has the authority to enter into contracts or make other decisions that will bind the Board (known as a “Committee of the Board”), is an Executive Committee that has been delegated the full authority of the Board, or is solely an advisory committee (known as a “Committee of the Corporation”). The Board can create new Committees of the Board by passing a resolution, or by amending the bylaws or certificate of incorporation.<sup>11</sup>

**11. Who can sit on a Committee of the Board, and how many members must there be?**

Only voting members of the Board of Directors can serve as voting members of the Committee of the Board. People who are not voting members of the Board of Directors can be allowed to attend

and speak at the meetings, but they cannot vote. A Committee of the Board must have at least three voting members.<sup>12</sup>

#### **12. How are members of a Committee of the Board selected?**

The members of the committee can be appointed by the Board. They cannot be appointed by the president or Board chair alone. Frequently, the bylaws will provide that the president or Board chair may select members, and then the Board will confirm the selection. Alternatively, the bylaws can place certain people on committees because they hold a particular position in the corporation.<sup>13</sup> For instance, it is common for the bylaws to provide that the Treasurer will be a member of the finance committee.

#### **13. What are the particular rules that apply to an executive committee?**

An executive committee is one that can exercise the full authority of the Board between Board meetings, if appropriately delegated such authority by the certificate of incorporation, bylaws, or a resolution. As with other committees of the Board, the bylaws may place certain people on an executive committee because they hold a particular office in the corporation. If the Board appoints the members of the executive committee, it must do so by a majority of the entire Board. However, if the Board has 30 or more members, then the appointment can be made by at least 3/4 of the directors present at the time of the vote (so long as a quorum is present).<sup>14</sup>

#### **14. What powers can be delegated to a Committee of the Board?**

A Committee of the Board can be authorized to exercise any of the powers that the Board itself has, with a few exceptions. Here is a list of the things that must be handled by the Board itself and cannot be delegated to the Executive Committee or any other committee:

- Electing or removing officers and directors, or filling vacancies on the Board or on a Committee of the Board.
- Fixing compensation of directors for serving on the Board or on any committee.
- Adopting, amending, or repealing the bylaws.
- Amending or repealing any Board resolution if the resolution states that it cannot be amended or repealed by a committee.
- Approving amendments to the certificate of incorporation.
- Approving a merger or plan of dissolution.
- Authorizing the sale, lease, exchange, or other disposition of all or substantially all the assets of the corporation.
- In a membership corporation, no committee can submit to the members any action requiring the members' approval (including recommending that the members act on the sale, lease, exchange, or other disposition of all or substantially all the assets of the corporation).<sup>15</sup>

#### **15. How can the Board create an advisory committee?**

If the committee only provides advice to the Board (known as a "Committee of the Corporation"), then non-Board members can sit on the committee. The bylaws can set out the rules for forming and appointing people to these committees.

#### **16. When and how would the process be different if our organization has governing members?**

If the organization has governing members (meaning that they are eligible to elect members of the Board of Directors), then the process for calling meetings of those governing members is set forth in the New York Not-for-Profit Corporation Law, certificate of incorporation, and bylaws. For instance, at a meeting of the governing members, the governing members can vote by proxy, unless proxy voting is prohibited by the certificate of incorporation or bylaws.<sup>16</sup> While the New York Not-for-

Profit Corporation Law is silent on whether membership meetings can be conducted by telephone or video conference call, the statute does not explicitly prohibit them, and a compelling case can be made during this public health crisis that this is a reasonable step for nonprofits to take unless doing so is prohibited by the certificate of incorporation or the bylaws.<sup>17</sup>

*Lawyers Alliance for New York may be able to help eligible nonprofit organizations change their governance procedures, including by amending their bylaws or certificate of incorporation. Existing clients can reach out to their usual staff attorney contact or Client Relations Associate Gina Pujols-Johnson for assistance at [gpujols-johnson@lawyersalliance.org](mailto:gpujols-johnson@lawyersalliance.org) or (212) 219-1800 ext. 278. Information about becoming a client is available at <https://lawyersalliance.org/becoming-a-client>.*

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<sup>1</sup> N-PCL § 710.

<sup>2</sup> N-PCL § 710.

<sup>3</sup> N-PCL § 711.

<sup>4</sup> N-PCL § 708(c).

<sup>5</sup> The order is available at <https://www.governor.ny.gov/news/no-2021-continuing-temporary-suspension-and-modification-laws-relating-disaster-emergency>

<sup>6</sup> N-PCL § 708(b).

<sup>7</sup> N-PCL § 707.

<sup>8</sup> N-PCL § 717.

<sup>9</sup> N-PCL §§ 202, 402(a)(2-a).

<sup>10</sup> N-PCL §§ 715-717.

<sup>11</sup> The rules regarding creation of, appointment of members to, and powers that may be delegated to committees are found at N-PCL 712.

<sup>12</sup> N-PCL § 712.

<sup>13</sup> N-PCL § 712.

<sup>14</sup> N-PCL § 712.

<sup>15</sup> N-PCL § 712.

<sup>16</sup> N-PCL § 609.

<sup>17</sup> N-PCL § 603.