

Expediting Nonprofit Governance During Challenging Times

Nonprofit organizations need to be able to act quickly, while thoughtfully planning for an uncertain future. The good news is that nonprofit boards have a number of options to allow them to do this. More frequent meetings, meeting via conference call or video conference, reduced quorum requirements, decision-making via unanimous consent, and empowering Board committees are some of the key ways that Boards can work to meet a nonprofit's challenges in a timely manner. This Legal Alert describes each of these options and more in the questions and answers below.

Note: 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 Legal Alert addresses requirements applicable to corporations formed under the New York Not-for-Profit Corporation Law (N-PCL).

Meetings

1. 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.¹

2. 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 be called.²

3. 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.³

¹ N-PCL § 710.

² N-PCL § 710.

³ N-PCL § 711.

4. When and how would the process of calling meetings be different if our organization has governing members?

If the organization has governing members (meaning that they are eligible to elect the Board of Directors), then the process for calling meetings of those governing members is set forth in the N-PCL, the certificate of incorporation, and the bylaws.

Virtual Meetings, Electronic Votes, and Quorum Requirements

1. Can some or all members of the Board or a committee participate in a meeting virtually?

Under the 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.⁴ These rules also apply to Committees of the Board.

2. Can membership meetings be conducted virtually?

The N-PCL also explicitly allows membership meetings to be conducted by telephone or video conference call, unless doing so is prohibited by the certificate of incorporation or bylaws.⁵ The statute requires the board to take certain measures to ensure that members can participate in such meetings, including verifying that all participants are members, providing each participating member with a reasonable opportunity to participate, and recording and maintaining a record of all votes taken during the meeting.⁶

3. Can an organization subject to the Open Meetings Law hold a virtual meeting of the trustees?

Certain nonprofit corporations (for example, charter schools) are subject to the Open Meetings Law, which requires meetings of the board to be open to members of the public. Currently, the law allows a hybrid meeting framework, which permits limited remote participation under *extraordinary circumstances* while requiring an in-person quorum. This law may expire after July 15, 2028, unless the legislature takes further action. *Please refer to our other Legal Alert, [“New York Open Meetings Law – Current Requirements for Videoconferencing”](#) for a more detailed analysis of the current state of these rules.*

4. 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 written consent.”⁷ However, New York law *does not*

⁴ N-PCL § 708(c).

⁵ N-PCL § 603, 605.

⁶ N-PCL § 603, 605. The Charities Bureau of the New York Attorney General’s Office has also issued guidance for conducting virtual meetings of members.⁶ Nonprofit corporations should consult that guidance, which is available online at <https://pl.ag.ny.gov/sites/default/files/regulatory-documents/guidance-electronicmeetings.pdf>, to read the Charities Bureau’s recommended best practices for holding a virtual meeting of the members.

⁷ N-PCL § 708(b).

allow the Board to vote electronically unless *all* voting members of the Board consent in writing. Directors cannot vote by proxy.⁸ These rules also apply to Committees of the Board.

5. 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.⁹ For this reason, it is highly advisable to consult an attorney before reducing quorum requirements.

Board Committees

1. 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 is an Executive Committee that has been delegated the full authority of the Board, another committee of the Board (committees of the Board have the authority to enter into contracts or make other decisions that will bind the Board) or is solely an advisory committee (known as a committee of the corporation). In challenging times, committees of the Board may be most useful for accomplishing tasks and making decisions more quickly. The Board can create new committees of the Board by passing a resolution, or by amending the bylaws or certificate of incorporation.¹⁰

2. 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 a 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.¹¹

3. 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.¹² For instance, it is common for the bylaws to provide that the Treasurer will be a member of the finance committee.

4. What are the particular rules that apply to an Executive Committee?

⁸ Note that in membership corporations, governing members *may* vote by proxy, unless proxy voting is prohibited by the certificate of incorporation or bylaws.

⁹ N-PCL § 707.

¹⁰ The rules regarding creation of, appointment of members to, and powers that may be delegated to committees are found at N-PCL 712.

¹¹ N-PCL § 712.

¹² N-PCL § 712.

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).¹³

5. 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. The following actions 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).¹⁴

6. How can the Board create a Committee of the Corporation?

The bylaws set out the rules for forming committees of the corporation and appointing members. A committee of the corporation may only provide advice to the Board and cannot make binding decisions. As such, non-Board members can sit on committees of the corporation.

Issues to Consider During Challenging Times

What are some examples of issues that Boards should consider during challenging times?

As part of the duty of care, which requires directors and officers to be attentive to the way in which charitable assets are managed,¹⁵ directors will want to stay informed about significant changes

¹³ N-PCL § 712.

¹⁴ N-PCL § 712.

¹⁵ N-PCL § 717.

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.¹⁶ 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.¹⁷

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¹⁶ N-PCL §§ 202, 402(a)(2-a).

¹⁷ N-PCL §§ 715-717.