

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

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”)<sup>1</sup> of the District of Columbia Title 29 (Business Organizations) Enactment Act of 2010, D.C. Act Number A18-0724. Part II contains 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.*

The table below details provisions of § 29-401.50 that vary procedural defaults and mandates of the Model Nonprofit Corporation Act (3d ed. 2008) (MNCA) and D.C. Nonprofit Corporation Act:

Member-governed provision	Issue	Default, permissive provision, or mandate	Provision applicable to other nonprofit corporation	Issue	Default, permissive provision, or mandate
§ 29-401.50 (c) (1)	No proxy voting	Default	§ 29-405.22	Proxy voting allowed	Default
§ 29-401.50 (c) (2)	No voting agreements	Default	§ 29-405.40	Voting agreements recognized	Mandate
§ 29-401.50 (c) (3)	Fundamental transactions <sup>2</sup> require a 2/3 vote of the members, without board action	Default; other flexible procedures for approving fundamental transactions are possible	§ 29-204.03, § 29-407.03, § 29-408.03, § 29-408.20, § 29-409.04, § 29-410.02, § 29-412.02	Board approval, in addition to membership approval, required for all fundamental transactions except amendment to articles of incorporation and bylaws	Mandate

Member-governed provision	Issue	Default, permissive provision, or mandate	Provision applicable to other nonprofit corporation	Issue	Default, permissive provision, or mandate
§ 29-401.50 (c) (4)	Members may set a record date (date by which a member must be in good standing) for an adjourned meeting	Default	§ 29-405.07 (c)	Board sets record date for an adjourned meeting	Mandate
§ 29-401.50 (c) (5)	Members may close polls by a 2/3 vote	Default	§ 29-405.08 (d)	Chair closes polls	Mandate
§ 29-401.50 (c) (6)	Members are judges of validity of ballots	Default	§ 29-405.28	Appointed inspectors are judges of validity of ballots	Mandate
§ 29-401.50 (c) (7)	Members may remove directors for noncompliance with technical requirements <sup>3</sup>	Default	§ 29-406.08 (c) (5)	Board may remove directors for noncompliance with technical requirements	Mandate
§ 29-401.50 (d) (1)	Member meetings may be held as infrequently as biennially; delegates meetings as infrequently as quinquennially	Limitation	§ 29-405.01	Member meetings must be held at least annually	Mandate
§ 29-401.50 (d) (2)	Articles of incorporation or bylaws may set the quorum, if any, for a mail ballot	Permissive provision	§ 29-405.09	Number of ballots returned for a mail ballot must come to at least a meeting quorum	Mandate

continues . . .

Member-governed provision	Issue	Default, permissive provision, or mandate	Provision applicable to other nonprofit corporation	Issue	Default, permissive provision, or mandate
§ 29-401.50 (d) (3)	Articles of incorporation or bylaws may treat members who leave as no longer present for quorum purposes	Permissive provision	§ 29-405.24 (b)	Once present at a meeting, a member is counted as present for quorum purposes for the rest of the meeting, and any adjournments	Mandate
§ 29-401.50 (d) (4)	Articles of incorporation or bylaws may allow cumulative voting	Permissive provision	§ 29-407.27 (b)	Cumulative voting prohibited	Default <sup>d</sup>
§ 29-401.50 (d) (5)	Maximum term of a director is up to six years (to allow for flexibility in rotation)	Permissive provision; limitation on maximum term	§ 29-406.05	Maximum term of a director is up to five years	Limitation
§ 29-401.50 (d) (6)	Articles of incorporation or bylaws may provide that resignation of a director is not effective until approved by the members <sup>5</sup>	Permissive provision	§ 29-406.07	Resignation effective upon delivery <sup>6</sup>	Mandate
§ 29-401.50 (d) (7)	Articles of incorporation or bylaws may set any quorum for the board	Permissive provision	§ 29-406.24(b)	Quorum for the board may not be less than 1/3 of directors in office or 2 directors	Limitation

Member-governed provision	Issue	Default, permissive provision, or mandate	Provision applicable to other nonprofit corporation	Issue	Default, permissive provision, or mandate
§ 29-401.50 (d) (8)	Board may act by a majority of directors present and voting	Permissive provision	§ 29-406.24 (c)	Board must act by at least a majority of directors present	Mandate
§ 29-401.50 (d) (9)	Articles of incorporation or bylaws may provide a method for directors to object to board action	Permissive provision	§ 29-406.24(d)	Prescribes specific method for directors to object to board actions	Mandate
§ 29-401.50 (d) (10) <sup>7</sup>	Articles of incorporation or bylaws may provide method for creation and approval of committees with power; committees may propose action to the members even if statute requires board to do so	Permissive provision	§ 29-406.25 (b), (e) (2), & (h)	Creation and appointment of committees with power must be by majority of directors present; committees may not propose action to be taken by the members if statute requires board to do so	Mandate
§ 29-401.50 (d) (11)	Articles of incorporation or bylaws may restrict an individual to holding only one office at a time	Permissive provision	§ 29-406.40 (c)	Same person may hold more than one office simultaneously	Mandate, if same person elected to more than 1 office

continues . . .

Member-governed provision	Issue	Default, permissive provision, or mandate	Provision applicable to other nonprofit corporation	Issue	Default, permissive provision, or mandate
§ 29-401.50 (d) (12)	Articles of incorporation or bylaws may provide that resignation of an officer is not effective until approved by the members <sup>8</sup>	Permissive provision	§ 29-406.43	Resignation effective upon delivery	Mandate

*Michael M. Malamut, PRP, is one of the few attorneys nationwide who has also obtained the highest credentials as a professional parliamentarian and is currently serving as Chair of the Opinions Committee of the American Institute of Parliamentarians, Chair of the National Parliamentarian Review Committee of the National Association of Parliamentarians, and President and past Treasurer of the American College of Parliamentary Lawyers. He is admitted to practice law in Massachusetts, New York, and the District of Columbia and has been active in nonprofit issues in the American Bar Association, serving as Vice Chair of the Business Law Section's Nonprofit Organizations Committee and Co-Chair of the Nonprofit Governance Subcommittee.*

<sup>1</sup> 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.”

<sup>2</sup> Fundamental transactions are fundamental changes in the nature of the corporation, such as amendment of the articles of incorporation or bylaws, merger, membership exchange, sale of substantially all assets, conversion to another form of entity, domestication to a different jurisdiction, and voluntary dissolution.

<sup>3</sup> Note that the MNCA and the D.C. Nonprofit Corporation Act grant the members the right to remove directors for most reasons that would constitute cause, and for no cause if that is permitted by the bylaws. MNCA § 8.08 (a); D.C. Code § 29-406.08 (a). D.C. Code § 29-406.08 (c) (5) only allows the board to remove a director for a limited number of specifically enumerated technical grounds.

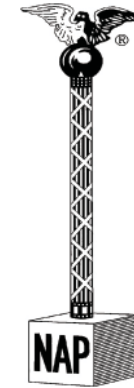
<sup>4</sup> Note that the prohibition on cumulative voting is a mandate under MNCA § 7.27 (b). The District of Columbia legislators disagreed with this strict prohibition, so § 29-401.50 (d) (4) is not strictly necessary, although a similar provision would be necessary in a state that adopted verbatim the MNCA language in regard to cumulative voting.

<sup>5</sup> Note that the bylaws cannot condition the acceptance of a resignation on board, officer, or committee approval, except possibly if they are specifically granted that authority in the articles of incorporation as a “designated body.”

<sup>6</sup> Note that resignation of individual members would continue to be effective immediately, consistent with RONR. D.C. Code § 29-404.20; RONR p. 279, l. 34–p. 280, l. 5.

<sup>7</sup> Even under the member-governed corporation provisions, committees with power to act must be composed entirely of board members, unless the power to act has been vested with the delegates or members, in which case, the committee must consist of delegates or members, respectively. § 29-406.25 (a). Statutory procedural requirements for board meetings must be complied with by committees with power to act. § 29.406.25 (c). Member-governed corporations also may not restrict the statutory right of the board, or other body appointing the committee, from appointing temporary alternates for absent committee members. § 29.406.25 (g).

<sup>8</sup> Note that the bylaws cannot condition the acceptance of a resignation on board, officer, or committee approval, except possibly if the respective individual or body is specifically granted that authority in the articles of incorporation as a “designated body.”



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