Sample Bylaw Provisions for Overriding the Default Provisions of the 2008 Model Nonprofit Corporation Act, Part II

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This is the second in a two-part series of articles suggesting sample language to override defaults in the American Bar Association's (ABA) Model Nonprofit Corporation Act (3d ed. 2008) (MNPCA). The first part, published in the Second Quarter 2009 *National Parliamentarian*, contained a general introduction to the purposes of the series, as well as proposed language to override statutory defaults involving (a) the rights of individual members, (b) meetings of the members, and (c) the members as a "designated body" exercising management powers assigned by default by the MNPCA to the board. This second part contains a brief advisory on how to use the provisions proposed in these articles in states where the MNPCA is adopted in whole or in part, as well as proposed language to override statutory defaults involving (a) powers assigned by the MNPCA to the board, (b) officers and directors, and (c) fundamental changes to governance and governing documents.

Readers considering the sample bylaw provisions discussed in this article should keep in mind that the MNPCA has yet to be adopted in any state, although it is anticipated that a number of states will adopt the MNPCA, or some significant provisions derived from it, in the next few years. In the future, the ABA intends to keep the MNPCA updated regularly, so provisions in the current edition are likely to change more frequently than previously. It is therefore possible that an MNPCA default provision that is the basis for a sample bylaw provision included in this article might change between the initial adoption of the MNPCA in August 2008 and the

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adoption of the MNPCA by any particular state. In addition, when states adopt the MNPCA, many are likely to do so with some changes based on local circumstances, so that the default provisions addressed in this article may not be implemented identically in state nonprofit corporation laws. In short, these suggestions may be useful to many nonprofit corporations in states that adopt the MNPCA; nevertheless, parliamentarians working with nonprofits should look at the relevant statutory provision as applied in their state before considering including any of these suggestions in their bylaws, either directly or in modified form.

The MNPCA default is that the officers are chosen by the board; this

appears to have in mind principally corporate officers who serve at the pleasure of the board (MNPCA §8.40). In most membership organizations, the officers are elected directly by the members, and they serve on the board with all the powers and rights of the other directors.

Sample Override Language Involving the Board, Officers, and Governing Documents

Emergency meetings. *"In case of emergency, as defined in MNPC §3.03, (1) at least 24 hours' notice of a special meeting of the Board shall be required, and (2) officers who are not directors may not serve in place of directors unable to attend."*

MNPCA §3.03 provides a default emergency procedure. At general parliamentary law, there is no default emergency procedure.

Directors' and officers' terms of office. *"Directors and officers serving on the Board of Directors shall be elected for a term of ____ year(s) or until their successors are elected and qualified."*

Under MNPCA §§8.04, 8.05, the default is that directors are elected at each annual meeting for a term of one year, and continue to serve until successors are qualified. The default under MNPCA §8.40 is that officers are chosen by the board and serve at the pleasure of the board, which appears to be modeled primarily for business corporate officers who serve at the pleasure of the board, as opposed to volunteer officers who simultaneously serve as board members. As noted in the first article of the series, the provision in MNPCA regarding directors' service until a successor is elected is not the same as the normal "and until" clause of the bylaws, since the procedure for removing a director, regardless of term length, is specified by MNPCA §8.08 and can even be without cause in some cases. The removal of officers is discussed below. At general parliamentary law, the default is that directors and officers hold office at will if no term is specified (George Demeter, *Demeter's Manual of Parliamentary Law and Procedure*, Blue Book ed. 1969, p. 215).

Removal of directors and officers by the members. *"The members may remove a director elected by the members or an officer serving on the Board of Directors and elected by the members, or a director or officer serving on the Board of Directors and appointed by the Board to fill a vacancy in a director or officer position otherwise elected by the members, only for good cause."*

Under MNPCA §8.08 the default is that members may remove a director may be removed without cause. Under MNPCA §8.43, the default is that the board may remove an officer without cause. Because the norm in the business corporate world is that officers are employees and not typically directors, MNPCA provisions for member-elected officers who also serve on the board of directors can be confusing and potentially overlapping. At general parliamentary law, directors and officers elected by the members may be removed only for cause, although the procedure is easier with an "or until

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their successors are elected" clause than with an "and until their successors are elected" clause (*RONR*, p. 642, l. 29–32).

Removal of directors and officers by the board. *"Except as otherwise provided by law, the Board of Directors may not remove a director elected by the members or an officer serving on the Board of Directors and elected by the members."*

Under the MNPCA §8.08, the board may not remove a director elected by the members except as provided in the bylaws or articles of incorporation. For very limited reasons, however, such as conviction of felony or failure to attend a bylaws-mandated minimum number of meetings, the statute provides that the board has the right (not subject to variance by bylaw provision) to remove a member-elected director. Under MNPCA §8.43, the default is that the board may remove any officer, which would include officers elected by the members. At general parliamentary law, only the members may remove a director or officer (*RONR*, p. 642, l. 29–32).

Vacancies filled by the members. *"The members shall fill any vacancy in a director or officer position elected by the members."*

Under MNPCA §8.10, the default allows directors to fill director vacancies, except director positions (i) elected by a member group (the default allows the member group to fill such a vacancy within three months), (ii) appointed (the default allows the appointing authority to fill such a vacancy), or (iii) specifically mandated in the articles of incorporation or bylaws (in which case the vacancy is filled as indicated in the articles of incorporation or bylaws). At general parliamentary law, the default is that the members fill the vacancy in any member-elected position (*RONR*, p. 465, l. 26–p. 466, l. 14: members have all the rights of governance except to the extent specifically granted to the board). In common practice, the board is usually given the power to fill vacancies.

Compensation of officers and directors. *"The compensation of the officers and directors, if any, shall be set by the members."*

Under MNCPA §8.11, the default is that the board of directors may set the compensation of the directors. At general parliamentary law, the default is that the members have the right to determine the compensation of the board (*RONR*, p. 465, l. 26–p. 466, l. 14: members have all the rights of governance except to the extent specifically granted to the board).

Meeting by telephone. *"Directors and committee members may only participate in person at meetings of the Board and committees, respectively."*

Under MNPCA §§8.20, 8.25, the default permits telephonic participation in meetings of the board and committees. At general parliamentary law, the default is that telephonic participation in meetings is prohibited (*RONR*, p. 482, l. 28–33). It is common in practice for organizations to have a bylaw provision allowing telephonic participation in board meetings.

Action without a meeting. *"The Board of Directors and committees may only take action at a meeting."*

Under MNPCA §§8.21, 8.25, the default is that any action that could be taken at a board or committee meeting may be taken by unanimous written consent. At general parliamentary law, the default is that action can only take place at a meeting (*RONR*, p. 2n*; p. 469, l. 24–34). It is common in practice for organizations to have a bylaw provision allowing board action without a meeting by unanimous written consent.

Special meetings. *"Special meetings of the Board or a committee may be called by _____, and shall require at least ____ days' written notice, except in case of emergency, in which case 24 hours' oral notice shall be sufficient. No business shall be transacted at a special meeting of the Board or of a committee except that mentioned in the call of the meeting."*

Under MNPCA §§8.22, 8.25, the default is that special meetings of the board or committees require at least two days' written notice and may be called by chair of the board, the highest-ranking officer, or twenty percent of the board. The default is also that the call of board and committee meetings need not state any particular business and that business is not restricted to that stated in the call. At general parliamentary law, the default is that only business stated in the call may be transacted at a special meeting of the board (*RONR*, p. 558, l. 24–27). At general parliamentary law, there are no provisions for special meetings of committees. Special committees are treated as meeting in a single continuous session, so all their meetings are regular adjourned meetings at general parliamentary law (*RONR*, p. 482, l. 26–27). At common parliamentary law, there are no provisions on who can call a special meeting; special meetings are only permitted if specifically provided for in the bylaws (*RONR*, p. 558, l. 19–24). At general parliamentary law, notice of a special meeting must be given a reasonable number of days in advance (*RONR*, p. 89, l. 15–17).

Under MNCPA §8.11, the default is that the board of directors may set the compensation of the directors.

Creation and composition of committees. *"Except as otherwise provided in these bylaws, only the members may create committees, including committees to exercise some, but not all, of the powers otherwise vested by statute in the Board. Except as otherwise provided in these bylaws or by vote of the members, the members shall elect the members of committees, including committees to exercise some, but not all, of the powers otherwise vested by statute in the Board. The affirmative vote of a majority of the members present and voting shall be sufficient for the creation of committees and election*

of committee members. Except as otherwise provided in these bylaws or by vote of the members, no committee, including committees to exercise some, but not all, of the powers otherwise vested by statute in the Board, shall be required to include a member of the Board."

Under MNPCA §§8.24, 8.25, the default is that the board may create and fill committees with some of the powers of the board, with limited statutory exceptions, by vote of the majority of directors then in office and that committees with some of the powers of the board must consist of some members of the board. Under MNPCA §8.12, a designated body can have different procedures for its "manner of acting" than the board or a committee. If the members are a designated body with power to elect or appoint to committees, any member may then serve on any committee. At common parliamentary law, only the members have the right to create and elect to committees of the organization (as opposed to committees of the board) and to issue instructions to those committees (*RONR*, p. 561, l. 26–28; cf. p. 467, l. 30–p. 468, l. 6; p. 468, l. 29ff). The proposed override provision in this case allows a bylaw provision or the members by vote to use one of the other traditional methods of filling committee positions.

Election of officers by the members. *"All officers shall be elected by the members by a vote of a majority of those present and voting."*

Under MNPCA §8.40, the default is that the board elects officers. Under *RONR* (p. 431, l. 16–17), the default is that the members elect the officers.

Duties of officers. *"In addition to those duties prescribed for the officers by these bylaws and the parliamentary authority adopted by the corporation, the members may prescribe additional duties of the officers. No officer may prescribe the duties of any other officer."*

Under MNPCA §8.41, the default is that the board may prescribe duties of officers and may authorize one officer to prescribe duties of another officer. At general parliamentary law, the presiding officer and secretary are the only required officers (*RONR*, p. 431, l. 1–3). The duties at general parliamentary law of the presiding officer, vice presiding officer (if any), treasurer (if any), and secretary are detailed at *RONR*, p. 432, l. 28–p. 445, l. 20.

Notice for removal of officers. *"No officer may be removed from office without ____ days' previous notice and an opportunity to be heard."*

Under MNPCA §8.43, the default is that the board may remove an officer without notice and without cause. At general parliamentary law, officers elected for a fixed term or "and until their successors are elected" are entitled to notice and hearing before removal (*RONR*, p. 643, l. 6–14). Although the default at general parliamentary law is "reasonable notice," it is clearer to mention a specific amount of time.

Indemnification. *"The members may adopt, and from time to time amend, an indemnification policy for the directors and officers of the corporation. Unless previously authorized by the members, no director or officer may petition any court for indemnification."*

Under MNPCA, the default indemnifies officers and directors in certain circumstances and allows them to petition the court for indemnification in other circumstances (see MNPCA §§8.52, 8.54, 8.56, 8.58(c)). What the statute terms "mandatory indemnification" can be varied by bylaw and is permissive for directors, permitted only if specifically stated in the articles of incorporation or bylaws (see MNPCA §§2.02(b)(8), Official Comment 3(h); 2.06). At general parliamentary law, the members have the authority to adopt an indemnification policy (*RONR*, p. 465, l. 26–p. 466, l. 14: members have all the rights of governance except to the extent specifically granted to the board).

Conflicts of interest. *"The members may adopt, and from time to time amend, a conflict-of-interest policy for the corporation."*

MNPCA §8.60 provides a default conflict-of-interest provision. At general parliamentary law, the members have the authority to adopt a conflict–of-interest policy (*RONR*, p. 465, l. 26–p. 466, l. 14: members have all the rights of governance except to the extent specifically granted to the board). If a member is to be required to abstain at a board or membership meeting because of a conflict of interest, the bylaws must include a specific provision to that effect (*RONR*, p. 394, l. 16–25).

Amendment of bylaws. *"These bylaws may be amended only at a meeting of the members by a vote of two-thirds of the members present and voting, provided that the members have received ____ days' written notice of the proposed amendment."*

Under MNPCA §§10.20–22, the default is that members may amend the bylaws by majority vote without notice. The statutory default also provides that, in addition to and separate from member amendment of bylaws, the board may amend the bylaws, except certain bylaws relating to member rights and director quorum and vote requirements and director removal; in regard to those items, the default is that only members can amend those items. Under *RONR*, if the bylaws do not contain an amendment provision, they can be amended only by the members, upon (1) previous notice and a vote of two-thirds of the members present

and voting, or (2) a vote of a majority of the entire membership (p. 573, l. 31–36).

"Fundamental change." *"No fundamental change, except for bylaws amendments, shall be adopted unless (1) the vote of the members is at least as high as the highest vote requirement for a bylaw amendment under these bylaws, (2) the notice for the fundamental change that was provided to the members was at least as long as the longest notice period required for a bylaw amendment under these bylaws, and (3) the specificity of the notice of the fundamental change was at least as specific as the most specific requirement for a bylaw amendment under these bylaws. The process for approval of a fundamental change, except for a bylaw amendment, by the members [or delegates, or members and delegates] shall require at least a vote of approval in the manner and according to the process required for the most-difficult-to-amend form of bylaw amendment."*

The default vote requirement under MNPCA for internally generated fundamental changes, except amendment of articles of incorporation, is, at a minimum: board approval and approval by a majority vote by the members (§§9.21 [domestication], 9.31 [for-profit conversion], 9.52 [entity conversion to unincorporated entity, such as limited liability company or association recognized by Uniform Unincorporated Nonprofit Association Act or similar legislation], 11.04 [merger or membership exchange], 12.02 [sale of substantially all assets], 14.02 [voluntary dissolution]). The vote requirement for amendments to the articles of incorporation is, at a minimum: (1) board approval and approval by a majority vote by the members; or (2) upon petition by the number or percentage of members set in the articles of incorporation (10 percent of the members is the default if no number or percentage is set in the articles of incorporation or bylaws), approval by a majority vote by the members (see MNPCA §10.03). These issues are matters of statute. The statutory defaults are significantly lower than the typical bylaw amendment requirements. This would allow a slim majority to make a fundamental change, such as an amendment to the articles of incorporation, that could override the existing bylaws against the wishes of a significant minority of the membership protected by a specific bylaw provision. The proposed language increases the requirements for adoption of a fundamental change to be at least as protective of minorities as the bylaws are. For example, under the provision as drafted above, if approval of a bylaw amendment requires a vote at a meeting, an amendment to the articles of incorporation could not take place by mail ballot. ✯

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