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Mr. William H. Clark, Esq.
Reporter for the Revised Model Nonprofit Corporation Task Force
Drinker Biddle
One Logan Square
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Philadelphia, PA 19103-6996
VIA FACSIMILE (215-988-2757) AND U.S. MAIL

Re: Comments on the January 2008 Exposure Draft of the Proposed Model Nonprofit Corporation Act (3d ed.)

Dear Mr. Clark:

Thank you and the Task Force for your work to revise the Model Nonprofit Corporation Act. Your efforts to resolve some of the confusion surrounding nonprofit issues are to be applauded.

As President of the American College of Parliamentary Lawyers (and Certified Professional Parliamentarian and Professional Registered Parliamentarian), I have several suggestions on the Exposure Draft. Our members are attorneys with a strong practice emphasis on meetings procedures for nonprofit associations and corporations. For instance, I have served many of the largest associations in the country, including the National School Boards Association. My clients represent over 20 million members. In contrast, some ACPL members regularly represent small nonprofits. As a result, our members are very familiar with and will have worthwhile input regarding changes to nonprofit practice.

We recognize the volume of work before your task force. As a result, I will focus mainly on the several specific issues that most concern ACPL members. As a general comment, I must note that some aspects of the revision appear focused solely towards board-driven nonprofits, rather than member-driven nonprofits. Many of our members' clients are smaller nonprofits controlled by members, rather than by a board. We encourage the Task Force to consider drafting which would allow these organizations to maintain their present structure.

The following comments are on specific provisions of the Exposure Draft. You likely have received similar recommendations (perhaps even from other ACPL members). However, these suggestions are officially on behalf of the ACPL.

COMMENTS

§ 1.40 [ACT] DEFINITIONS

"Board" or "Board of Directors" is defined in § 1.40(2) as the "group of individuals responsible for the management of the activities and affairs of the nonprofit corporation, regardless of the name used to refer to the group." As mentioned above, the practice in many states for smaller nonprofits is that the members are "responsible for the management of the activities and affairs" of the nonprofit. This is regularly the situation in certain denomination religious nonprofit corporations.

In contrast, the Exposure Draft establishes a default of board-governed membership organizations. While we recognize that the Task Force has provided for member-governed member nonprofits through the designated body concept, many nonprofits—particularly at the beginning—are small, unsophisticated, and member-driven. The attorneys who assist these organizations (often for free) will have a difficult time navigating the Code to draft a member-governed membership body through the designated body concept. Also, since the designated body model is not from the Revised Model Business Corporation Act, such language is likely to lead to confusion by the many corporate attorneys who regularly assist in the creation of nonprofits.

The ACPL encourages amending the Model Act to allow for such flexibility by having a member-governed option. Then, lay or pro bono drafters could select such a governance structure by including such language in their bylaws. A member-governed nonprofit would (1) have ultimate governing authority rest in the members and allow members supervision of board activities, except as provided otherwise in the bylaws (e.g., "The Board shall be subject to the orders of the members, and none of its acts shall conflict with action taken by the members."), and (2) require that the members, when performing functions the Model Act defines as functions of the board, act pursuant to the procedural requirements of Article VII.

§ 7.01 MEMBER MEETINGS: ANNUAL AND REGULAR MEETINGS

§ 7.01(a) requires an annual meeting of members. While such a provision may make sense for a well-organized, financially-flush nonprofit, it does not for the many loosely organized nonprofits that currently exist in the United States. I can think of numerous nonprofit clients that exist on a national or regional basis that currently meet (and are permitted to) every two or three years. Some of these are educational associations that cannot financially or logistically gather each year. Only by meeting less frequently can the nonprofits hope to obtain a representative group, rather than solely those members who live in the area of the annual meeting/convention. As a comparison, I will note that federal law only requires national unions to meet once every five years. I'm not certain why the burden on smaller, less financially sound nonprofits would be so much more onerous.

The ACPL recommends amending the Model Act to include an alternative to an annual meeting of members, such as: "Provided that the Board submits to the members an annual report, which may be electronic form, of actions taken by the board and a financial statement, a corporation with members located in two or more states (considering the District of Columbia, territories and commonwealths of the United States, and foreign nations as states for this purpose) may hold general meetings no less frequently than once every five years."

§ 7.08 MEMBER MEETINGS: CONDUCT OF MEETING

§ 7.08 provides that the chair of a meeting "shall determine the order of business and shall have the authority to establish rules for the conduct of the meeting." I have advised many thousands of meetings, ranging from several people to 10,000. Without sounding too apocalyptic, this provision is contrary to standard practice in meetings of membership associations in the United States, violates democratic principles of meetings, and may be a disaster in the making. Many of ACPL's members are hired, either by a group of members or by other leaders, because an autocratic president has alienated a significant percentage of members. In fact, "out of control" chairs and boards is the reason that states have begun amending the statutes governing homeowner and condominium associations to provide for a specific parliamentary authority, and not to leave it to the whim of an officer or board that wish to rule the association with an iron hand. Based on my experience, I suspect the current proposed language would meet significant opposition from legislators as well as by many influential organizations, such as the American Association of Retired Persons (which has been lobbying states individually to make nonprofit community association meetings more open and democratic). Because of differences in the nature of nonprofit and for-profit meetings (and leaders), the ACPL recommends that the default language be changed so that members at the meeting have the authority to determine the order of business and to establish rules for the conduct of the meeting. This could be accomplished simply by adding language to the end of § 7.08(b) and § 7.08(d) to the effect of, "subject to appeal to the members."

Similarly, § 7.23 (Acceptance of Vote) appears to allow "the secretary or other officer or agent authorized to tabulate votes" to be the final arbiter on the validity of ballots. Such power should ultimately rest with the membership. I regularly work with nonprofits where the membership seeks to remove poor leadership. To provide that the individual appointed by the leadership has unfettered authority to determine which ballots count would turn democratic principles on their head and, in many circumstances, make it virtually impossible to remove a director without judicial involvement. The ACPL again recommends that language to the effect of "subject to appeal to the members" be added at the end of § 7.23(c).

§ 7.24 MEMBER MEETINGS: QUORUM AND VOTING REQUIREMENTS FOR VOTING GROUPS

Proposed § 7.24(b) provides as follows:

> Once a member is present for any purpose at a meeting, the member is deemed present for quorum purposes for the remainder of the meeting and for any adjournment of that meeting unless a new record date is or must be set for that adjourned meeting.

While this language follows the for-profit shareholder meeting model, it is not appropriate for the smaller nonprofit association. More importantly, I believe that you will find that it is not representative of the current practice for nonprofits in the United States. (See Howard L. Oleck & Cami Green, *Parliamentary Law and Practice for Nonprofit Organizations* § 10, at 17 (2d ed. 1991), "The rule is that a quorum must be present for a meeting to begin and that it should continue in order for business to be transacted at the meeting.")

Once again, the nature of nonprofit associations is different than that of for-profit corporations. Shareholder meetings are often attended by professionals or those with a financial interest and meet during the day; smaller nonprofit membership associations tend to be attended by volunteers and often meet at night. Unlike shareholder meetings, it is very common in smaller associations for members to leave lengthy meetings. Decisions should not be left to a small minority or to a single person because they simply outlasted everyone else. In addition, I have many nonprofit political associations, PTO (Parent-Teacher Organizations) associations, unions (some are incorporated as nonprofits), and small associations where the requirement of a quorum is an important democratic safeguard for members. Significant and important business is placed early on the agenda so that members can leave, if necessary. If all but one member leaves the meeting at that point, they should not be concerned that significant business will be transacted in their absence. Instead, the ACPL again recommends wording that would provide a default, but that could be altered by language in the bylaws.

§ 8.24 DIRECTORS AND OFFICERS: QUORUM AND VOTING

Under § 8.24, decisions of the board of directors are determined by "the affirmative vote of a majority of directors present" (rather than a "majority of directors present and voting"). While we recognize that some states follow this model, such language has the effect of changing an abstention to a "no" vote (in that every director present at the meeting who does not vote "yes" keeps the vote from achieving a "majority of directors present"). Elected officials are sometimes required by statute to vote, but nonprofit directors should be able to choose not to participate in a decision for a variety of reasons. For instance, in a corporate setting with finances at stake and professional directors, board members should be expected to take a position on most issues. In contrast, in smaller nonprofits, volunteer directors cannot all be expected to fully educate themselves on every issue in advance of meetings. In the event such a director chooses to abstain from participating, it should not be automatically counted as a "no" vote. On a practical level, board members in nonprofits have generally risen through the ranks in a variety of leadership positions. My experience suggests that these leaders will be much more familiar with the concept of votes being determined by those "present and voting," as at membership meetings. Shifting the basis for the vote at director meetings is more likely to be more confusing, and may be overlooked altogether.

Interestingly, the very next subsection provides that a director can "dissent or abstain from the action." By changing the standard denominator of a vote to a "majority of directors present," the end result is that all abstentions will be a vote against the action. Once again, if such language is recommended, there should be a provision for bylaws language to alter the default.

PARLIAMENTARY AUTHORITY PROVISION

I wish to close by again touching on § 7.08(b):

> Except as provided in the articles of incorporation or bylaws, the chair shall determine the order of business and shall have the authority to establish rules for the conduct of the meeting.

For purposes of fairness and transparency, meeting rules should be clearly established in advance. However, most member-governed organizations, particularly smaller ones, cannot be expected to draft lengthy procedural meeting rules. At the same time, the statute will be cumbersome and confusing if it provides for numerous procedural defaults. The usual method by which organizations establish rules of order for meetings is to include in the bylaws a provision prescribing a specified and generally accepted manual of parliamentary procedure (and then to adopt such special rules as may be necessary). Regularly adopted parliamentary authorities include *Robert's Rules of Order Newly Revised (10th Ed.), The Standard Code of Parliamentary Procedure (4th Ed.)("Sturgis"), Demeter's Manual of Parliamentary Law and Procedure, Modern Parliamentary Procedure* (Keesey), and many others.

As evidence of how a parliamentary authority can help statutorily, I will note various states have recently adopted parliamentary authorities for different types of meetings, including community associations (homeowner and condominium associations) and governmental bodies. Likely the clearest model is that adopted by North Carolina in 2005 as an amendment to the Planned Community Act and the Condominium Act (based on language from other states):

> N.C.G.S. § 47F-3-108 and § 47C-3-108. **Meetings**.
> (c) Except as otherwise provided in the bylaws, meetings of the association and the executive board shall be conducted in accordance with the most recent edition of *Robert's Rules of Order Newly Revised.*

While this language permits the association to choose another parliamentary authority or to write meeting rules, it provides a default of *Robert's*. Both Hawaii (Haw. Rev. Stat. § 421J-6) and Oregon (Or. Rev. Stat. § 94.657) have almost identical language governing community associations. For comparison, Cal. Civil Code § 1363(d) provides that "Meetings of the membership of the [community] association shall be conducted in accordance with a recognized system of parliamentary procedure or any parliamentary procedures the association may adopt."

The North Carolina language has benefited nonprofit community association meetings, and is not at all difficult to comply with. Attorneys who were originally suspicious of the provision seem to be generally happy with outcome. For homeowners, it was good to get standard rules for meetings, and not leave it to the whim of the chair or board. Lawmakers and homeowner advocates were pleased to gain transparency in meetings.

Because *Robert's* explicitly provides for very relaxed procedures in small boards, any concerns that board meetings would get more complicated didn't happen. Also, *Robert's* provides that most meeting disputes have to be resolved at the time they occur, or they are waived. By incorporating *Robert's*, the statute makes clearer that it's too late to fight about whether or not a motion was seconded or if debate was properly closed after the meeting moves on or at a later meeting. It was nice to get that finality.

The ACPL recommends amending the Model Act to provide language which would permit the nonprofit through its bylaws to select a parliamentary authority for association meetings. While in concept the Model Draft allows the adoption of such rules, it would require a sophisticated drafter who knows which default provisions to override. In contrast, inclusion of language that clearly allows a parliamentary authority would provide a roadmap for membership organizations seeking to verify that meeting procedures are fair.

Please consider these suggestions from the ACPL. Obviously, I would be happy to speak with you or Task Force members about any questions or concerns.

With kind regards, I am

Very truly yours,

James H. Slaughter, President
American College of Parliamentary Lawyers

/cbs

cc: Dean Emeritus Lizabeth A. Moody
Chair of the Revised Model Nonprofit Corporation Act Task Force

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