

Non-Profit Governance: The Importance Of By-Laws

By Lisa N. Thompson

The Bylaws of a nonprofit are the legally binding rules by which the organization is governed. They set forth the structure of the organization and guide the Board of Directors (“Board”) in the conduct of its business. In essence, Bylaws are the operating manual for a nonprofit. Like an operating manual, all too often they are only referred to when something goes wrong.

A nonprofit that is exempt from federal income tax, as defined under Internal Revenue Code 501(c)(3), is required to submit a copy of its Bylaws along with its application for tax exemption under IRS form 1023 (Application for Tax Exemption). Nonprofits are required to keep records of their Bylaws, but unlike amendments to the Articles of Incorporation, Bylaws can be changed without officially filing the amendments with the Secretary of State.

While all Bylaws may be similar in substance and structure, when carefully drafted Bylaws should be unique to each organization and tailored to the needs of the nonprofit. To remain relevant, Bylaws should be reviewed by the Board every year or two, and amended whenever there are significant changes in the nonprofits’ mission and/or operations. The Bylaws should accurately reflect how the organization operates, and if they do not, should be amended.

Board members have a duty to understand the Bylaws of the organization and ensure that the provisions are followed. A nonprofit that cannot show that its actions comport with the requirements of its Bylaws is vulnerable to lawsuits. A Board can protect itself from legal challenges by adhering to its Bylaws. While Bylaws are not necessarily public documents, nonprofits that make them available to the public increase the accountability and transparency of the organization.

In general, well-drafted Bylaws are simple, flexible and easy to understand. Under the provisions of RSA 292, New Hampshire law gives nonprofits relative flexibility in how an organization can draft its Bylaws to alter the standard, default provisions, and allow the addition of operating rules not mentioned in the statute. However, Bylaws should be in compliance with all applicable federal and state laws. As the operating manual for an organization, Bylaws serve multiple purposes and are an important reference for the Board, officers, and staff.

A good practice for nonprofits is to provide each new member of the Board with a copy of the Bylaws in their orientation materials, along with copies of the organizations’ Articles of Incorporation, and IRS determination letter. All Board members, old and new, should become familiar with the Bylaws of the organization.

Before a Board changes or amends its Bylaws it should first confirm that the changes to be made are not prohibited by state law. Additionally, the Board should verify that any proposed amendments are consistent with other regulatory documents such as the Articles of Incorporation and, if applicable, other relevant statutes.

Additionally, a nonprofit is required to report changes to its Bylaws and other governing documents annually to the IRS on its IRS Form 990. The IRS requires that an organization report substantial changes to its character, purpose, or methods of operation as soon as possible. Such changes, if inconsistent with the organization’s tax exemption, could affect its

tax-exempt status. Minor changes only need to be reported by the nonprofit in its next annual Form 990 filing.

When drafting or revising the Bylaws of a nonprofit, it is important that they contain basic elements and include, at a minimum, the following provisions:

Amendments. There should be a procedure for how the Bylaws can be changed or amended. Generally, a vote of two-thirds of the Board is required to amend the Bylaws. However, to ensure consensus, some Boards require a super-majority vote (e.g., 66%) to amend Bylaws.

Committees. A committee has no management authority except that which is delegated to it by the Board, or the Bylaws. It is important that the Bylaws address what authority may be delegated to committees and what actions must be taken by the full Board. For example, by law, a Board cannot delegate to a committee the power to elect officers, amend or repeal the Bylaws, fill vacancies on the Board or committees, etc. The Bylaws should also provide how a committee is created or dissolved.

Conflict of Interest Policy. The Bylaws should include a provision stating the procedure for how the nonprofit will manage conflicts of interest between the organization and an insider. Rather than include the full conflict of interest policy in the Bylaws, at a minimum, the Bylaws should require the nonprofit to adopt a separate conflict of interest policy.

Elections. The Bylaws should stipulate whether Directors and officers are appointed or elected. The Board must have regular elections as required by the Bylaws, and a Board member cannot stay on the Board past his/her term unless re-elected in accordance with the Bylaws.

Meetings. The Bylaws should include the frequency of Board meetings and how the meetings will be conducted. Typically, Bylaws will specify a minimum number of Board meetings per year. In addition, the Bylaws should address how a special or emergency Board meeting may be called.

Members. Some nonprofits may have voting members (similar to shareholders of a for-profit corporation) who have the right to elect Board members and vote on other important matters. The Bylaws should address whether the organization has members and the rights of those members.

Number of Directors. New Hampshire law dictates that a nonprofit Board must be comprised of a minimum of five independent Directors. The Bylaws can set a minimum and maximum number of Directors. In addition, it is preferable to have an odd number of Directors to avoid tied voting.

Officers. It is important that the Bylaws clarifies who the officers of the organization are (titles) and create a job description for each office, detailing the duties and responsibilities of each position.

Quorum. The Bylaws should include specific language pertaining to what constitutes a quorum. A quorum is the minimum number of Board members who must be present to have a meeting and for official decisions to be made (usually a majority of the Board).

Removal. The Bylaws should contain a procedure for removing a Director or officer.

Terms. The Bylaws should specify how long Directors serve on the Board. Typically, terms for Directors are successive or staggered. The benefit of staggered terms is maintaining Board continuity. The Bylaws may also address term limits for Directors.

Voting. If the organization has voting members the Bylaws should clarify how the voting rules apply to its members. With respect to Board voting, the Bylaws should address the number of votes required to be an act of the organization.

Bylaws are not enforceable unless they are signed. Once the Bylaws, or the Amended and Restated Bylaws, of the organization are approved they should be signed by the officers of the nonprofit. Additionally, changes or amendments to the Bylaws should be recorded in the Board minutes and should follow proper procedure as outlined in the Bylaws with respect to approval of such amendments.

Bylaws are meant to address the governance of the organization and should not include information pertaining to the day-to-day operation of the nonprofit. Policies and procedures relating to the organization's employees such as social media, whistleblower, employment and conflict of interest policies need not be addressed in the Bylaws and are more appropriately dealt with separately in an Employee Handbook or manual.

As a nonprofit evolves over time it is critical that the Board periodically reviews its Bylaws to ensure that they adequately reflect the organization and make necessary changes so that they remain an effective governance tool and are in compliance with all applicable laws.

For more information on starting a business, contact Lisa Thompson at lthompson@hagehodes.com or 603-668-2222.