

Avoiding Association Bylaw and Governance Pitfalls

Nisha Thakker

Partner

Tenenbaum Law Group PLLC

2022 WSAE Summit

November 30, 2022

Governance Hierarchy

- State Nonprofit Corporation Law
- Articles of Incorporation
- Bylaws
- Policies and Procedures

Inconsistent with the Applicable State Nonprofit Corporation Law

- Out-of-date language that is not enforceable
- Recent revisions to many state nonprofit corporation laws allow for greater flexibility – but generally only if your Bylaws expressly allow for it
- Getting stuck with statutory default language

Too Much Detail

- Bylaws should allow an association to remain flexible
- Overly detailed Bylaws restrict the association from being nimble
- Reserve the detail for policies and procedures, which are generally easier to amend

Unwieldy Governance Structure

- Large board of directors
- Overinvolvement of previous leaders (e.g., past Presidents)
- Too many layers of governance and approval processes
- High voting thresholds for members and directors/boards

Out-of-Date

- No longer reflective of the practices of the association
- Includes practices that are not followed
- Inconsistently applied to the management of the association

Bylaws Amendment Process

- Create a Bylaws task force (not a standing committee)
- Review your purposes clause
- Work with experienced association legal counsel
- Be flexible

Bylaws Task Force

- Representative of the current membership of the association
- Individuals who have diverse backgrounds
- Individuals who are well respected in the association
- Previous committee or leadership experience

Purposes Clause

- Consistent with your Articles of Incorporation and IRS tax-exemption application and IRS Forms 990
- Reflective of the current purposes of the association; things change over time; be sure it is broad enough (can affect the application of UBIT)

Working with Legal Counsel

- Keep legal counsel involved from the beginning, working hand-in-hand with the Bylaws task force
- Advise on current best practices and common pitfalls
- Familiarity with state nonprofit corporation laws and tax-exempt associations

Be Flexible

- Range for board size
- Give the board flexibility to add officers, committees, etc.
- Include options for meetings and voting actions
- Do not include unrealistic quorum or voting requirements and processes
- Don't make it too difficult to amend the Bylaws (or the Articles of Incorporation)

Voting Actions

- High quorum and voting thresholds can hinder your ability to act
- Differences between board action and membership action
- Allow the board to act quickly in emergencies (“emergency powers”)
- Consider unanimous written consent and ballot voting, including by electronic means

Quorum and Voting Thresholds

- Failure to include quorum requirements then defaults to the state nonprofit corporation statute
- State default requirements tend to be much higher than necessary
- Set realistic quorum and voting thresholds (for both board and membership meetings and voting outside of a meeting)

Policies Outside of Bylaws

- Bylaws should not include the policies of the association
- Membership criteria
- Membership dues amounts
- Elections
- Other policies

Policies and Procedures

- The board sets policies and procedures; a membership vote should not be required for amendments
- A change in election processes, membership dues, or membership criteria should not require membership vote
- Separate policies and procedures (outside of Bylaws) allow the association to remain nimble

Questions?

T E N E N B A U M

L A W G R O U P P L L C



Nisha G. Thakker, Esq.
Partner

Tenenbaum Law Group PLLC
1101 K Street, NW, Suite 700
Washington, DC 20005
202-221-8004
nthakker@TenenbaumLegal.com
www.TenenbaumLegal.com