



**The New D.C. Nonprofit Corporation Act  
Takes Effect on Jan. 1, 2012:  
Everything You Need to Know to Comply**

December 19, 2011

12:00 - 2:00 pm EST

Venable LLP

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Washington, DC 20004

**Moderator:**

George E. Constantine, Esq.

**Panelists:**

Kristalyn J. Loson, Esq.

Janice M. Ryan, Esq.

VENABLE<sup>®</sup><sub>LLP</sub>

## **Presentation**

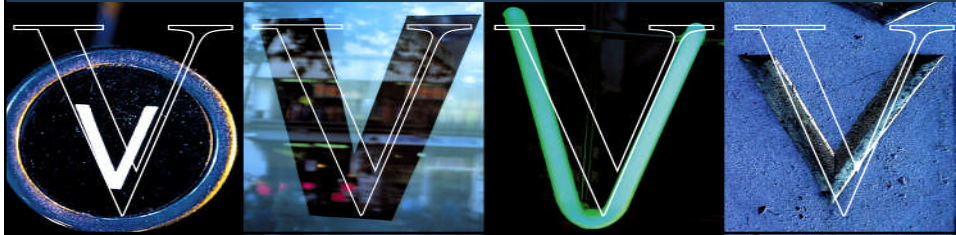


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Today's Discussion  
The New D.C. Nonprofit Corporation Act  
Takes Effect on Jan. 1, 2012:  
Everything You Need to Know to Comply

- Overview
- General Provisions
- Board and Officer Provisions
- Membership Provisions
- Fundamental Transaction Provisions
- Tax Provisions



## Overview

### The New D.C. Nonprofit Corporation Act

- Considerably more detailed than previous statute.
- Many default rules have changed, but the New Act generally provides flexibility to alter the default rules through the corporation's articles or bylaws.
- Acknowledges and accommodates 21<sup>st</sup> Century forms of communication and doing business.
- Authorizes new forms of governance.
- Applicable January 1, 2012.



## General Provisions

### Overview of Topics

- Basic Structure of the New Act
- Incorporation Provisions
- Registered Agent Provisions
- Biennial Reports
- Corporate Recordkeeping
- Application to "Old Act" Corporations



## General Provisions

### Basic Structure of the New Act

- Title 29 of the D.C. Code—Business Organizations Code
  - <http://www.dccouncil.washington.dc.us/legislation>
  - Click on the “View the DC Code” Link
- Hub and spoke structure
  - Generally Applicable (“hub”):
    - **Chapter 1—General Provisions**
    - Chapter 2—Entity Transactions
  - Specific Entities (“spokes”):
    - Chapter 3—Business Corporations
    - **Chapter 4—Nonprofit Corporations**
    - Chapter 5—Professional Corporations
    - Chapter 6—General Partnerships
    - Chapter 7—Limited Partnerships
    - Chapter 8—Limited Liability Companies
    - Chapter 9—General Cooperative Associations
    - Chapter 10—Limited Cooperative Associations
    - Chapter 11—Unincorporated Nonprofit Associations
    - Chapter 12—Statutory Trusts



## General Provisions

### Important General Definitions

- The New Business Organizations Code is designed to allow entities flexibility to communicate and conduct business using modern technology:
  - Record—“information that is inscribed on a tangible medium or that is stored in an electronic or other medium and is retrievable in perceivable form.” D.C. Code §29-101.02(39).
  - Sign—“means, with present intent to authenticate or adopt a record to: (A) Execute or adopt a tangible symbol; or (B) Attach to or logically associate the record with an electronic symbol, sound, or process.” D.C. Code §29-101.02(41).



## General Provisions

### Incorporation Provisions

- Incorporating is simpler:
  - Only one incorporator required;
  - Notary unnecessary.
- Articles of incorporation require less detail:
  - Must indicate whether the corporation will have members, but no longer necessary to specify whether members have voting rights;
  - May, but need not, list initial board of directors.
    - If initial board not listed, incorporator(s) may hold initial organizing meeting to elect directors and adopt bylaws.
- Restatement of articles of incorporation now permitted.



## General Provisions

### Registered Agent Provisions

- Registered office no longer required.
- Domestic entities and qualifying foreign entities must designate and maintain a registered agent.
  - Commercial registered agent:
    - Entity names the commercial RA in Articles of Incorporation or change of registered agent form;
    - RA maintains separate listing with the District re: address, etc.
  - Non-commercial registered agent:
    - Entity names the non-commercial RA in Articles of Incorporation or change of registered agent form and must also identify RA's address in the District;
    - RA need not be a District resident, but must have District street address;
    - RA must keep District apprised of any changes to name or address.
- Change of registered agent no longer requires certification of approval of change by board or authorized officer.



## General Provisions

### Biennial Reports

- New filing deadline: April 1.
- Two-year filing cycle remains the same:
  - Initial report is due by April 1 of the year following the calendar year in which the filing entity was first formed or registered to do business in the District.
  - Subsequent reports are due by April 1 of each second calendar year thereafter.



## General Provisions

### Corporate Recordkeeping

- Recordkeeping requirements expanded.
- Records may be kept in digital form.
- Directors and members have inspection rights.



## General Provisions

### Corporate Recordkeeping

- Permanent records:
  - **Minutes** of all meetings of the board, members, and any designated body;
  - Records of all **actions taken without a meeting** by the board, members, or members of a designated body;
  - Records of all **actions taken by a committee of the board** or a designated body on behalf of the corporation.
- Additional records:
  - Appropriate **accounting** records;
  - A record of the corporation's **members**, in a form that permits preparation of a list of the names and addresses of all members, in alphabetical order by class, showing the number of votes each member is entitled to cast.



## General Provisions

### Corporate Recordkeeping

- The following records must be maintained **at the corporation's principal office**:
  - Articles of incorporation;
  - Bylaws;
  - Minutes and records required to be kept permanently from the past 3 years;
  - All communications in the form of a record to members generally within the past 3 years, including the financial statements furnished to members for the past 3 years;
  - A list of all the names and business addresses of the current directors and officers;
  - The most recent biennial report filed with the District.





## General Provisions

### Application to “Old Act” Corporations

- “Old Act” corporations:
  - Entities incorporated in the District prior to 1962 enactment of the District of Columbia Nonprofit Corporation Act.
- Phase-out provisions:
  - Old Act corporations must file a notice with the District within 2 years of the New Act’s applicability date, or be forever barred from asserting the corporation is not subject to the New Act.
  - BUT, if an Old Act corporation desires to do business in the District, it must file articles of incorporation and otherwise comply with the New Act.
  - Legislative history of the New Act expresses intent to phase out Old Act corporations. See D.C. Council Committee on Public Services and Consumer Affairs, Committee Report on Bill 18-500, at 18.



## Board and Officer Provisions

### Overview of Topics

- Meetings
- Director Terms
- Committees
- Designated Body
- Required Officers
- Standards of Conduct
- Liability
- Indemnification
- Emergency Powers



## Board and Officer Provisions

### Meetings

#### ■ Quorum

- Default quorum is now a **majority of directors in office before a meeting begins.**
  - Previously was a majority of the number of directors fixed in the articles or bylaws.
- Different quorum may be established by the articles or bylaws provided it is not lower than the minimum quorum requirement.
- **Minimum quorum** is now one-third of the directors in office or two directors, whichever is greater.
  - Previously was one-third of the number of directors fixed in the articles or bylaws.



## Board and Officer Provisions

### Meetings

#### ■ Notice

- Previously, meetings of the board held upon such notice as prescribed in the bylaws or by resolution of the board.
- New defaults:
  - Regular meetings:
    - Must be held with notice of the date, time, place, or purpose of the meeting, unless otherwise provided in the articles or bylaws.
    - May provide a single notice of all regularly scheduled meetings for the year at the beginning of the year (or for a lesser period) without having to give notice of each meeting individually.
  - Special meetings:
    - Must be preceded by at least 2 days' notice of the date, time, and place of the meeting, unless the articles or bylaws provide for a longer or shorter period.
    - Notice need not describe the purpose of the special meeting, unless required by the articles or bylaws.
- Articles or bylaws may authorize oral notice of board meetings.



## Board and Officer Provisions

### Director Terms

- Basic rule maintained:
  - Director terms may be specified in the articles or bylaws.
  - If not specified in the articles or bylaws, the term of a director is 1 year.
- New maximum term:
  - The term of a director may not exceed 5 years, except for:
    - Directors appointed by persons that are not members;
    - Directors who are designated in a manner other than by election or appointment.



## Board and Officer Provisions

### Committees

- Two types:
  - Board committees;
  - Advisory committees.
- Board Committees.
  - May consist of one or more directors (previously at least two directors required).
  - Board approval is required for:
    - Creation of board committees;
    - Appointment of directors to board committees.
  - Required approval threshold is the **greater** of:
    - A majority of all the directors in office; or
    - The number of directors required by the articles or bylaws to take action.



## Board and Officer Provisions

### Committees

- Board Committees.
  - Board committees may exercise the power of the board, to the extent specified by the board or in the articles or bylaws.
  - Board committees may not, however:
    - Authorize distributions;
    - Approve or propose to members actions required to be approved by the members;
    - Fill vacancies on the board or any of its committees;
    - Adopt, amend, or repeal bylaws.
- Advisory Committees.
  - The corporation may create or authorize the creation of one or more advisory committees;
  - Advisory committee members need not be directors;
  - Advisory committees are not board committees and may not exercise any powers of the board.



## Board and Officer Provisions

### Designated Body

- Some, but less than all, of the powers, authority, or functions of the board may be vested by the articles in a **designated body**.
- Members of a designated body shall have the rights, duties, and obligations of directors; to the extent board powers, authority, or functions are vested in a designated body, the directors are relieved from their liabilities with respect to those powers, authority, and functions.
- Purposes:
  - House of delegates-type governance model;
  - Committees authorized to exercise board powers that may include non-directors.



## Board and Officer Provisions

### Officers

- New Act:
  - Two separate officers required, at minimum:
    - Officer responsible for management (e.g., a “president”);
    - Officer responsible for finances (e.g., a “treasurer”).
    - Cannot be the same individual.
  - One officer must be assigned the duties of a secretary.
- Previously a president, secretary, and treasurer were required, and the president and secretary positions could not be held by the same person.



## Board and Officer Provisions

### Standards of Conduct

- Codifies common law fiduciary duties of care and loyalty.
- Directors—when discharging duty as a director, director must act:
  - In good faith;
  - In a manner the director reasonably believes to be in the best interest of the corporation;
  - With the care that a person in a like position would reasonably believe appropriate under similar circumstances.
- Officers—when discharging duty as an officer, officer must act:
  - In good faith;
  - In a manner the officer reasonably believes to be in the best interest of the corporation;
  - With the care that an ordinarily prudent person in a like position would exercise under similar circumstances.



## Board and Officer Provisions

### Standards of Conduct

- Disclosure of material information:
  - A director must disclose to other board or committee members information not already known by them but known by the director to be material to the discharge of his or her decision-making or oversight functions, except to the extent disclosure would violate a duty imposed by law, a legally enforceable obligation of confidentiality, or a professional ethics rule.
  - An officer has a duty to:
    - Inform superior officer, board, or committee thereof to whom the officer reports information about the affairs of the corporation known to the officer, within the scope of the officer's functions, and known by the officer to be material to the superior officer, board, or committee thereof;
    - Inform superior officer, another appropriate person within the corporation, the board, or a committee thereof, of any actual or probable material violation of law involving the corporation, or material breach of duty to the corporation by an officer, employee, or agent of the corporation, that the officer believes has occurred or is likely to occur.



## Board and Officer Provisions

### Standards of Conduct

- Conflicted Interest Transactions
  - A transaction between the corporation and any director, officer, or member having an interest in the transaction shall not be void or voidable solely for that reason, provided:
    - The transaction is **fair to the corporation** at the time it is authorized; or
    - The material facts as to the relationship or interest are **disclosed** and the transaction is then **approved in good faith** by vote of the **disinterested directors or the members**.
- Business Opportunities
  - A director may avoid liability for taking for himself, directly or indirectly, a business opportunity in which the corporation may be interested, provided:
    - The director first **brings the opportunity to the corporation's attention**, and
    - The **corporation disclaims its interest** pursuant to the procedures for a conflicted interest transaction.



## Board and Officer Provisions

### Standards of Conduct

- Loans to directors and officers
  - Continue to be prohibited.
  - New carve-outs:
    - Advances to pay reimbursable expenses reasonably expected to be incurred by a director or officer;
    - Advances to pay premiums on life insurance if advance is secured by the cash value of the policy;
    - Advances for expenses related to indemnification;
    - Loans or advances pursuant to employee benefit plans;
    - A loan secured by the principal residence of an officer;
    - A loan to pay relocation expenses of an officer.



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## Board and Officer Provisions

### Liability

- Director Liability to the Corporation or its Members
  - **General Rule**
    - A director will not be liable to the corporation or its members unless the party asserting liability establishes that the director failed to meet the required standards of conduct for directors in discharging his or her duties.
  - **Limited Liability for Money Damages**
    - Notwithstanding the general rule, a director is not liable to the corporation or its members for any action taken or any failure to take any action, as a director, except for liability for:
      - Amount of financial benefit received to which the director is not entitled;
      - Intentional infliction of harm;
      - Approval of or assent to unlawful distribution;
      - Intentional violation of criminal law.
    - **Automatically applies** to directors of **charitable corporations** (i.e., organizations eligible for exempt status under Section 501(c)(3) of the Internal Revenue Code).
    - Directors of **non-charitable corporations** may **only qualify** if the limitation is **specified in the corporation's articles**.



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## Board and Officer Provisions

### Liability

- Volunteer Immunity
  - New Act retains provisions of current law providing volunteers of nonprofit corporations with limited immunity from civil liability to third parties in connection with their volunteer service.
  - **Liability Insurance Required**
    - The volunteer immunity protections apply only if the corporation maintains a minimum level of liability insurance:
      - Not less than \$200,000 per individual claim;
      - Not less than \$500,000 per total claims arising from the same occurrence.
    - Exception from the insurance requirement is retained for 501(c)(3)s having annual total functional expenses, exclusive of grants and allocations, of less than \$100,000.
  - Volunteers include directors, officers, and others who perform services for the corporation without compensation other than reimbursement of expenses.
  - Does not relieve the corporation from liability, but the corporation is liable only to the extent of the applicable limit of insurance coverage it maintains.



## Board and Officer Provisions

### Indemnification

- New detailed provisions governing when a corporation must, may, and may not indemnify a director or officer.
- Previously, the Act permitted indemnification against expenses actually and necessarily incurred in connection with the defense of any proceeding in which a director or officer was made a party by reason of having been a director or officer, except where the individual is adjudged liable for negligence or misconduct in performance of a duty.





## Board and Officer Provisions

### Indemnification

- Mandatory
  - The corporation **must indemnify** a director or officer to the **extent he or she was successful, on the merits or otherwise**, in the defense of any proceeding to which he or she was made a party because of his or her position with the corporation **against reasonable expenses** incurred in connection with the proceeding.
- Prohibited
  - The corporation **may not**, unless ordered by a court, **indemnify** a director or officer:
    - In connection with **a proceeding by or in the right of the corporation**, except for reasonable expenses incurred in connection with the proceeding if it is determined that he or she has met the relevant standard of conduct;
    - In connection with **any proceeding** for which the director or officer was **adjudged liable** on the basis of **receipt of a financial benefit to which he or she was not entitled**, whether or not involving action in an official capacity.



## Board and Officer Provisions

### Indemnification

- Permissible
  - The corporation **may** indemnify an individual who is a party to a proceeding because he or she was a director or officer against **liability** incurred in the proceeding only if specific procedures are followed:
    - Authorization:
      - Generally must be authorized in each specific instance;
      - But may be authorized in advance through an obligatory provision of the articles or bylaws, or by resolution of the board.
    - Determination:
      - Determination required by vote of the disinterested directors, the members, or by special legal counsel that indemnification is permissible because the director or officer has met the applicable standard of conduct;
      - Must be made in each specific instance.



## Board and Officer Provisions

### Indemnification

- Advance for expenses
  - The corporation may advance funds to pay for or reimburse expenses incurred before final disposition of a proceeding, if:
    - Affirmation from the individual that he or she qualifies;
    - Agreement by the individual to repay any funds advanced if the individual is ultimately not entitled to indemnification; and,
    - Authorization by the board (or may be authorized in advance through an obligatory provision of the articles or bylaws, by resolution of the board, or by contract approved by the board or members).



## Board and Officer Provisions

### Indemnification

- Altering the default:
  - Broader indemnification may be authorized in the articles of incorporation:
    - May permit or make obligatory indemnification of a director for liability to any person for any action taken, or any failure to take any action, as a director, except for liability for:
      - Receipt of financial benefit to which the director is not entitled;
      - Intentional infliction of harm;
      - Approval of or assent to unlawful distribution;
      - Intentional violation of criminal law.
  - Indemnification rights set forth in the statute may be narrowed by a provision in the corporation's articles or bylaws.
- Indemnification of employees, agents, or other volunteers is permitted.



## Board and Officer Provisions

### Emergency Powers

- If emergency powers are authorized in the articles or bylaws, in the event of an emergency, the board may:
  - Modify lines of succession to accommodate incapacity of any director, officer, employee, or agent;
  - Relocate the principal office or designate alternative principal offices, or authorize the officers to do so.
- Emergencies exist if a quorum of directors cannot be readily assembled because of some catastrophic event.
- During an emergency:
  - Notice need only be given to those directors it is practicable to reach, and in any practicable manner;
  - One or more officers of the corporation present at a board meeting may be deemed directors for the meeting.



## Membership Provisions

### Overview of Topics

- “Member” Definition
- Voting
  - Voting Entitlement
  - Voting for Directors
- Meetings
  - Notice
  - Quorum
- Action by Ballot
- Delegates
- Designated Body
- Amendments to Articles and Bylaws
- Inspection of Membership List
- Inspection of Records
- Financial Statements



## Membership Provisions

### “Member” definition

- Previously – “one having membership rights in a corporation in accordance with provisions of its articles of incorporation or bylaws.”
- New law – “any person that has the right to select or vote for election of directors or delegates or vote on any fundamental transaction.”
  - Can have individuals/entities called “members” that do not have membership rights.



## Membership Provisions

### Delegates

- Person elected or appointed to vote in a representative assembly for the election of directors or other matters.
- Created by articles of incorporation or bylaws (note conflict with 29-406.12(a)).
- Purpose:
  - House of Delegates-type governance for making policy decisions.
  - Committee consisting of individuals who are not directors.



## Membership Provisions

### Designated Body

- A person or group that has been vested with some, “but less than all” powers of the board of directors or members (or both). See D.C. Code § 406.12.
  - No illumination on what some but less than all means.
  - Member of a designated body does not have to be: (1) an individual; (2) a director; or (3) a resident of the District of Columbia.
  - If vested with board power, must be created in articles of incorporation.



## Membership Provisions

### Voting

- New Default—each member is entitled to one vote on each matter voted on by the members, except as otherwise provided in articles or bylaws.
- Previously, members were only entitled to vote as provided by articles or bylaws.
  - Organizations with members should review matters on which statute grants right to vote (such as fundamental transactions listed in 29-401.02(20)).
- Voting for directors—plurality of votes cast (unless otherwise provided in articles/bylaws).
- No cumulative voting unless permitted by articles / bylaws (unless “grandfathered in”).



## Membership Provisions

### Meetings

- New default quorum—majority of votes entitled to be cast; can be greater or lesser in articles or bylaws (previously was 1/10 of votes).
- Authorizes Electronic Meetings
  - via the Internet or *“other electronic communications technology that permits members to read or hear the proceedings substantially concurrently with their occurrence, to vote on matters submitted, to pose questions, and to make comments.”*
- Higher default for special meetings with cap at 25%.
  - 10%; previously was 5% (organizations that rely on default would have to amend articles/bylaws).



## Membership Provisions

### Actions by Ballot

- New default is that action can be taken without a meeting by a membership corporation if corporation delivers a ballot to every member entitled to vote.
- Ballot shall follow guidelines for form:
  - Be in form of record (can be electronic).
  - Set forth proposed action.
  - Provide opportunity to vote for or against candidate for election or director.
- Number of votes cast must equal quorum for meeting and number of votes authorizing action must be same as required to take action at meeting.
- Solicitation to vote by ballot must also state (1) number of responses needed for quorum; (2) percentage of approvals needed; and (3) time in which ballot must be received.



## Membership Provisions

### Amendments to Articles and Bylaws

- Articles – Membership Corporation
  - Amendments must be approved by board and submitted to members entitled to vote.
    - Except – administrative amendments.
    - Except – members can propose and adopt amendments without approval by board if proposed by 10% or more of members entitled to vote (or greater or lesser number as specified in articles).
    - Additionally, if required by articles or bylaws, must also submit to a designated body.
- Articles – Nonmembership Corporation
  - Board may adopt amendments (unless otherwise provided in articles of incorporation).
    - Must also be approved by (1) designated body if required by articles or bylaws, (2) persons who appoint directors if other than board\*, and (3) individual who is a designated director\*.



## Membership Provisions

### Amendments to Articles and Bylaws

- Bylaws
  - Members may amend or repeal corporation's bylaws (unless otherwise provided in articles or bylaws).
  - Board, of membership or nonmembership corporation, may amend or repeal bylaws (unless otherwise provided in articles or bylaws; or power reserved to members or designated body in whole or in part).
    - However, in a membership corporation, certain amendments require member approval (unless otherwise provided in articles/bylaws and not to be amended by board or designated body).
      - Changing rights of certain members—voting, dissolution, etc.;
      - Levying dues;
      - Relating to termination/suspension of members.



## Membership Provisions

### Inspection of Membership List

- Corporation must prepare list of members entitled to notice of meeting including (i) address of each member and (ii) number of votes member is entitled to cast at meeting.
- Available for inspection by members two days after notice of meeting given until meeting.
- Member must be allowed to copy upon written demand showing “proper and relevant purposes.”
- Also, different procedure under s. 29-405.20(f)—permits corporation to offer alternative method for achieving purpose.
- Failure to make list available does not affect validity of action.



## Membership Provisions

### Inspection of Records

- Members granted right to inspect corporate records required to be maintained by new law upon written demand and 5 days' notice (articles, bylaws, minutes and records of action; all communications with members for last three years; list of directors and officers and business addresses; most recent biennial report).
  - Proper purpose required for: meeting minutes older than three years, accounting records, membership list.
- Right can be abolished by articles or bylaws (except right to see membership list and matters in litigation).





## Membership Provisions

### Financial Statements

- In separate section, requires corporation to provide members with latest annual financial statements upon written demand.
  - Must be accompanied by accountant's report (if applicable) or president's statement that prepared according to generally accepted accounting principles or describing preparation.
  - Nonprofit may impose reasonable charge.
  - Right of inspection cannot be abolished.



## Fundamental Transactions

### Overview of Topics

- Overview
- Amendments by Third Parties
- Domestication
- Notice of Charitable Dissolution
- Other Transactions



## Fundamental Transactions

### Definition

- New Act defines “fundamental transactions” as follows:
  - Amendment to the articles or bylaws;
  - Merger;
  - Membership exchange;
  - Sale of all or substantially all of the assets;
  - Domestication;
  - Conversion;
  - Dissolution.



## Fundamental Transactions

### Amendments

- Articles may require that an amendment to the articles be approved by a specified person or group of persons in addition to the board of directors and members.
- Same for bylaws (only provision allowing third-party approval can be in either the articles or the bylaws).
- Helpful for national-chapter relationships, parent-affiliate relationships.



## Fundamental Transactions

### Domestication

- Domestication permits a nonprofit corporation to transfer its jurisdiction of incorporation without having to create or merge into a different legal entity.
- Domestication must be an authorized transaction under the laws of both the new and old jurisdictions.
- Potential benefits:
  - May be possible to maintain existing recognition of tax-exempt status by the IRS, though no word yet from IRS;
  - Avoid need to assign contracts.



## Fundamental Transactions

### Charitable Dissolution

- Notice to Attorney General:
  - A charitable corporation must now provide a notice to the Attorney General of the District of Columbia that it intends to dissolve prior to delivering articles of dissolution to the District.
  - No timeframe specified.
  - Statute provides that the notice “does not delay or otherwise affect the dissolution process.”



## Fundamental Transactions

### Other Transactions

- Provisions for additional fundamental transactions (other than amendments to the articles of incorporation or bylaws of a membership corporation) not significantly different, although membership approval thresholds and/or requirements have changed for transactions such as mergers and sales of all or substantially all assets.
- Restrictions on disposition of charitable assets:
  - Property held in trust or otherwise dedicated to a charitable purpose may not be diverted from its purpose in a sale of assets unless the corporation obtains an appropriate court order to the extent required by and pursuant to the laws of the District on cy pres or otherwise dealing with the nondiversion of charitable assets.



## Tax Provisions

### Effective Date of Local Income Tax Exemption

- Exemption from local income and franchise tax shall be effective on the effective date of the exemption determination letter issued for the organization by the Internal Revenue Service.
- Previously, local exemption was effective as of the date of application to the District for recognition.
- Application to the District for recognition of local tax exemption still required.



## Questions and Discussion

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Tax and Wealth Planning  
 Antitrust  
 Political Law  
 Business Transactions Tax  
 Tax Controversies  
 Tax Policy  
 Tax-Exempt Organizations  
 Wealth Planning  
 Regulatory

### INDUSTRIES

Nonprofit Organizations and Associations  
 Credit Counseling and Debt Services  
 Financial Services  
 Consumer Financial Protection Bureau Task Force

### GOVERNMENT EXPERIENCE

Legislative Assistant, United States House of Representatives

### BAR ADMISSIONS

District of Columbia

Jeffrey Tenenbaum chairs Venable's Nonprofit Organizations Practice Group. He is one of the nation's leading nonprofit attorneys, and also is an accomplished author, lecturer and commentator on nonprofit legal matters. Based in the firm's Washington, D.C. office, Mr. Tenenbaum counsels his clients on the broad array of legal issues affecting trade and professional associations, charities, foundations, think tanks, credit and housing counseling agencies, advocacy groups, and other nonprofit organizations, and regularly represents clients before Congress, federal and state regulatory agencies, and in connection with governmental investigations, enforcement actions, litigation, and in dealing with the media.

Mr. Tenenbaum was the 2006 recipient of the American Bar Association's Outstanding Nonprofit Lawyer of the Year Award, the inaugural (2004) recipient of the *Washington Business Journal's* Top Washington Lawyers Award, the 2004 recipient of The Center for Association Leadership's Chairman's Award, and the 1997 recipient of the Greater Washington Society of Association Executives' Chairman's Award. He also was a 2008-09 Fellow of the Bar Association of the District of Columbia and is AV Peer-Review Rated by *Martindale-Hubbell*. He started his career in the nonprofit community by serving as Legal Section manager at the American Society of Association Executives, following several years working on Capitol Hill.

### HONORS

Listed in *The Best Lawyers in America 2012* for Non-Profit/Charities Law, Washington, DC (Woodward/White, Inc.)

Washington DC's Legal Elite, *SmartCEO Magazine*, 2011

Fellow, Bar Association of the District of Columbia, 2008-09

Recipient, American Bar Association Outstanding Nonprofit Lawyer of the Year Award, 2006

Recipient, *Washington Business Journal* Top Washington Lawyers Award, 2004

Recipient, The Center for Association Leadership Chairman's Award, 2004

Recipient, Greater Washington Society of Association Executives Chairman's Award, 1997

Legal Section Manager / Government Affairs Issues Analyst, American Society of Association Executives, 1993-95

AV® Peer-Review Rated by *Martindale-Hubbell*

Listed in *Who's Who in American Law* and *Who's Who in America*, 2005-present editions

## EDUCATION

J.D., Catholic University of America, Columbus School of Law, 1996

B.A., Political Science, University of Pennsylvania, 1990

## MEMBERSHIPS

American Society of Association Executives

California Society of Association Executives

New York Society of Association Executives

## ACTIVITIES

Mr. Tenenbaum is an active participant in the nonprofit community who currently serves on the Editorial Advisory Board of the American Society of Association Executives' *Association Law & Policy* legal journal, the Advisory Panel of Wiley/Jossey-Bass' *Nonprofit Business Advisor* newsletter, and the ASAE Public Policy Committee. He previously served as Chairman of the *AL&P* Editorial Advisory Board and has served on the ASAE Legal Section Council, the ASAE Association Management Company Accreditation Commission, the GWSAE Foundation Board of Trustees, the GWSAE Government and Public Affairs Advisory Council, the Federal City Club Foundation Board of Directors, and the Editorial Advisory Board of Aspen's *Nonprofit Tax & Financial Strategies* newsletter.

## PUBLICATIONS

Mr. Tenenbaum is the author of the book, *Association Tax Compliance Guide*, published by the American Society of Association Executives, and is a contributor to numerous ASAE books, including *Professional Practices in Association Management*, *Association Law Compendium*, *The Power of Partnership*, *Essentials of the Profession Learning System*, *Generating and Managing Nondues Revenue in Associations*, and several Information Background Kits. He also is a contributor to *Exposed: A Legal Field Guide for Nonprofit Executives*, published by the Nonprofit Risk Management Center. In addition, he is a frequent author for ASAE and many of the other principal nonprofit industry organizations and publications, having written more than 400 articles on nonprofit legal topics.

## SPEAKING ENGAGEMENTS

Mr. Tenenbaum is a frequent lecturer for ASAE and many of the major nonprofit industry organizations, conducting over 40 speaking presentations each year, including many with top Internal Revenue Service, Federal Trade Commission, U.S. Department of Justice, Federal Communications Commission, and other federal and government officials. He served on the faculty of the ASAE Virtual Law School, and is a regular commentator on nonprofit legal issues for *The New York Times*, *The Washington Post*, *Los Angeles Times*, *The Washington Times*, *The Baltimore Sun*, *Washington Business Journal*, *Legal Times*, *Association Trends*, *CEO Update*, *Forbes Magazine*, *The Chronicle of Philanthropy*, *The NonProfit Times* and other periodicals. He also has been interviewed on nonprofit legal issues on Voice of America Business Radio and Nonprofit Spark Radio.





## George E. Constantine

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### AREAS OF PRACTICE

Antitrust  
 Antitrust Investigations  
 Political Law  
 Tax-Exempt Organizations  
 Tax Controversies  
 Tax and Wealth Planning  
 Regulatory

### INDUSTRIES

Nonprofit Organizations and Associations  
 Credit Counseling and Debt Services

### BAR ADMISSIONS

Maryland  
 District of Columbia

### EDUCATION

J.D., University of Maryland School of Law, 1998

Recipient, Order of the Coif law school honors society

Recipient, Judge R. Dorsey Watkins Award for excellence in torts

B.A., Loyola College In Maryland,

George Constantine concentrates his practice exclusively on providing legal counseling to and advocacy for trade and professional associations and other nonprofit organizations. He has extensive experience with many of the major legal issues affecting associations, including contracts, tax, antitrust, governance, and political activity matters.

Mr. Constantine has represented exempt organization clients undergoing Internal Revenue Service examinations; he has assisted associations and other nonprofit organizations going through mergers, consolidations, joint ventures, and dissolutions; and he has provided ongoing counseling on numerous transactional and governance matters that are unique to nonprofit organizations.

Mr. Constantine has been appointed to the 2009-10 Legal Section Council of the American Society of Association Executives. In addition, Mr. Constantine is the former Staff Counsel of the American Society of Association Executives (ASAE), the 25,000-member national society for trade and professional association executives. As ASAE's sole staff attorney, he gained in-depth experience with the many legal issues facing associations. He also represented ASAE's interests before Congress and federal agencies.

### PUBLICATIONS

Mr. Constantine is the author of numerous articles regarding legal issues affecting associations and other nonprofit organizations published by ASAE, the Greater Washington Society of Association Executives, the American Chamber of Commerce Executives, the New York Society of Association Executives, and the Texas Society of Association Executives.

- November 18, 2011, The New D.C. Nonprofit Corporation Act Takes Effect on Jan. 1, 2012: Everything You Need to Know to Comply
- November 4, 2011, Top Ten Things a New Nonprofit General Counsel Should Investigate
- September 27, 2011, Protecting and Licensing Nonprofit Trademarks: Key Trademark and Tax Law Issues
- August 3, 2011, Could Your Nonprofit's Chapters Be Considered "Franchises" under State Law?
- Summer 2011, Grassroots Lobbying: A Legal Primer
- July 20, 2011, Related Foundations of Associations: Top Five Legal and Tax Pitfalls to Avoid
- February 2011, Recent IRS Determination Highlights Importance of Separation Among Affiliates
- December 16, 2010, So You Want To Be On The Internet<sup>®</sup>

- November 3, 2010, Cyberspace Risk: What You Don't Know Could Hurt You
- July 22, 2010, Lobbying for Your Agency: Avoiding the Tax and Legal Pitfalls
- May-June 2010, The IRS Tax-Exempt Examination Process
- April 27, 2010, IRS Provides Guidance to Nonprofits Assisting Homeowners
- April 9, 2010, Legal Traps of Internet Activities for Nonprofits
- March 30, 2010, D.C. Circuit Paves Way for Unlimited Contributions for Independent Expenditures
- March 2010, D.C. Circuit Paves Way for Unlimited Contributions for Independent Expenditures, Political Law Alert
- February 18, 2010, *Citizens United*: How the Supreme Court's Decision Will Impact Associations and Their Members
- January 2010, Supreme Court Strikes Down Laws Banning Corporate Expenditures, Political Law Alert
- October 6, 2009, Legal Traps of Internet Activities for Nonprofits
- July 16, 2009, Steering Clear of the Most Common Legal Hazards in Hotel, Convention Center, and Meeting Contracts
- March 3, 2009, Steering Clear of the Most Common Legal Hazards in Hotel, Convention Center, and Meeting Contracts
- September 22, 2008, The New IRS Form 990: What Does It Mean for Your Organization?
- May 19, 2008, The New IRS Form 990: What Does It Mean for Your Nonprofit Organization?
- March 4, 2008, The New IRS Form 990: What Does It Mean for Your Nonprofit Organization?
- February 15, 2008, Political Activity, Lobbying Law and Gift Rules Guide
- January 10, 2008, The Honest Leadership and Open Lobbying Act: New Lobbying and Ethics Rules
- June 13, 2007, Contracts - 10 Steps to a Better Contract
- November 2006, Pension Protection Act of 2006: Provisions of Interest to Exempt Organizations
- October 1, 2006, New Tax Law Establishes Additional Standards and Requirements for Credit Counseling Agencies
- September 7, 2006, Legal and Tax Issues for Nonprofit Associations
- January 2005, IRS Issues 'Virtual' Trade Show Guidance
- January 4, 2005, Characteristics of a Tax-Exempt Credit Counseling Agency
- October 27, 2004, New IRS Ruling Could Have Taxing Impact on 501(c)(3) Associations with Certification Programs
- August 10, 2004, Association Codes of Ethics: Identifying Legal Issues and Minimizing Risk
- April 16, 2004, Antitrust Concerns with Association Information Exchanges
- March 25, 2004, Untangling the Web - Internet Legal Issues for Associations
- November 4, 2003, Avoiding Association Tax Pitfalls in Cyberspace
- May 6, 2003, Summary of Provisions in S. 476 — The Charity Aid, Recovery, and Empowerment Act of 2003
- December 16, 2002, Good Governance — Ensuring That Your Association's Governing Documents Pass Legal Muster
- September 1, 2002, Association Activities Targeted in Recent Antitrust Enforcement Actions
- May 1, 2002, Corporate Sponsorship: The Final Regulations
- April 1, 2002, Associations and Campaign Finance Reform
- January 1, 2002, Recent Antitrust Decision on Salary Surveys Highlights Risks to Associations
- November 1, 2001, Legal and Tax Considerations for Capital Campaigns

- January - February 2001, New Campaign Finance Disclosure Law Hits the Wrong Target, *Journal of Taxation of Exempt Organizations*

## SPEAKING ENGAGEMENTS

Mr. Constantine is a frequent lecturer on association and tax-exemption organization legal topics, including corporate and tax issues.

- December 19, 2011, The New D.C. Nonprofit Corporation Act Takes Effect on Jan. 1, 2012: Everything You Need to Know
- October 21, 2011, "IRS Group Exemption Procedures" for ABA
- September 27, 2011, Webcast: "Protecting and Licensing Nonprofit Trademarks: Key Trademark and Tax Law Issues" for the Association of Corporate Counsel's Nonprofit Organizations Committee
- July 20, 2011, "Related Foundations of Associations: The Top Five Legal and Tax Pitfalls to Avoid" for the Association Foundation Group
- June 22, 2011, "Play on Natural Turf: Authentic and Transparent Grassroots Lobbying" for the American Society of Association Executives
- May 12, 2011, "Starting and Sustaining the Growth of a Nonprofit Organization" for the Washington, DC Economic Partnership Program
- November 12, 2010, Protecting Your Association from Cyber Attacks and Financial Fraud
- November 3, 2010, "Cyberspace Risk: What You Don't Know Could Hurt You," Nonprofit Risk Management Center
- September 13, 2010, "Board Leadership: Legal Issues" at Greater DC Cares Nonprofit Board Leadership Program
- July 22, 2010, "Lobbying for Your Agency: Avoiding the Tax and Legal Pitfalls" at the Association of Independent Consumer Credit Counseling Agencies Summer 2010 Conference
- June 8, 2010, Legal Quick Hit: "Lessons in Tax Compliance: The Broad Impact of the IRS' Interim Report on the Colleges and Universities Compliance Project" for the Association of Corporate Counsel's Nonprofit Organizations Committee
- April 9, 2010, "Legal Traps of Internet Activities for Nonprofits" a Lorman Teleconference
- March 16, 2010, The Form 990: Dealing with the Fall Out (Audioconference)
- February 18, 2010, *Citizens United*: How the Supreme Court's Decision Will Impact Associations and Their Members
- February 18, 2010, "Legal Issues 2010: Keeping Your Association Out of Trouble" for the American Association of Medical Society Executives
- October 13, 2009, "Risk Management for Events and Meetings" course at the George Washington University's School of Business
- October 13, 2009, Presentation on meeting contracts to George Washington University students
- October 6, 2009, Legal Traps of Internet Activities for Nonprofits
- July 16, 2009, Steering Clear of the Most Common Legal Hazards in Hotel, Convention Center, and Meeting Contracts
- July 16, 2009, Steering Clear of the Most Common Legal Hazards in Hotel, Convention Center and Meeting Contracts: A Roadmap for Nonprofits
- March 3, 2009, Steering Clear of the Most Common Legal Hazards in Hotel, Convention Center and Meeting Contracts
- February 24, 2009, Legal Issues for Nonprofit Associations
- October 1, 2008, The New IRS Form 990: What Does it Mean for Your Organization?
- September 22, 2008, The New IRS Form 990: What Does It Mean for Your Nonprofit Organization?
- May 19, 2008, New IRS Form 990 Audio conference
- January 10, 2008, The Honest Leadership and Open Lobbying Act: New Lobbying

and Ethics Rules

- November 5, 2007, American Public Health Association Annual Meeting
- September 28, 2007, Annual Association Law Symposium
- June 13, 2007, Contracts - 10 Steps to a Better Contract
- September 7, 2006, Legal and Tax Issues for Nonprofit Associations
- February 10, 2004, American Society of Association Executives Winter Conference
- November 4, 2003, Avoiding Association Tax Pitfalls in Cyberspace
- October 3, 2003, American Society of Association Executives 2003 DC Legal Symposium
- August 25, 2003, American Society of Association Executives' Annual Meeting
- April 17, 2003, Board Fiduciary Duties
- March 13, 2003, Protecting Your Chamber's Intellectual Property
- March 7, 2003, The Ins and Outs of Nonprofit Liability
- February 7, 2003, Legal and Tax Aspects of Raising Non-Dues Revenue
- December 10, 2002, ASAE 2002 Winter Conference



## Kristalyn J. Loson

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### AREAS OF PRACTICE

Regulatory

### INDUSTRIES

Nonprofit Organizations and Associations

Credit Counseling and Debt Services

### BAR ADMISSIONS

District of Columbia

Florida

### EDUCATION

J.D., *with honors*, The George Washington University Law School, 2009

The Public Contract Law Journal, *member*

George Washington University Domestic Violence Project Clinic

B.A., *cum laude*, University of Miami, 2005

*Department of Political Science Honoree*

Kristalyn J. Loson is an Associate in Venable's Regulatory Practice Group. She focuses her practice primarily on nonprofit organizations and associations, assisting charities, trade and professional associations, and other nonprofit organizations on a wide array of legal issues, including incorporation and tax-exemption applications, tax-exemption compliance and IRS audits, corporate governance, membership issues, contracts, and charitable solicitation regulation, among others.

Prior to joining Venable, Ms. Loson served as a *pro bono* staff attorney for the Guardian ad Litem Program, 20th Judicial Circuit of Florida. While earning her law degree, she also completed internships with the U.S. Department of Justice's Civil Division, and the U.S. Attorney's Office. She also served for a year as a judicial intern in the chambers of the Honorable Fern Flanagan Saddler of the Superior Court of the District of Columbia.

Prior to entering law school, Ms. Loson worked as a fundraiser for a large multi-national nonprofit organization. Through her experience in the nonprofit sector, she has gained perspective on the unique needs of these organizations, both legal and otherwise.

### PUBLICATIONS

- December 2, 2011, Advertising News & Analysis - December 2, 2011, Advertising Alert
- November 22, 2011, Cause-Related Marketing in the Crosshairs: What the New York Attorney General's Breast Cancer Investigation Means for Nonprofits and Their Corporate Supporters
- November 18, 2011, The New D.C. Nonprofit Corporation Act Takes Effect on Jan. 1, 2012: Everything You Need to Know to Comply
- October 17, 2011, Lobbying: What Does It Mean for 501(c)(3) Organizations?
- October 17, 2011, Lobbying: What Does It Mean for Nonprofits?
- October 13, 2011, Advertising News & Analysis - October 13, 2011, Advertising Alert
- October 2011, Avoid Legal Pitfalls in Cause Related Marketing, *Electronic Retailer Magazine*
- September 26, 2011, Preventative Planning: Avoiding Common Legal Pitfalls in Hotel, Convention Center and Meetings Contracts
- September 15, 2011, Lobbying: What Does It Mean for Nonprofits?
- August 2011, Contracting for Housing Services
- August 11, 2011, Avoiding Legal Pitfalls in Cause-Related Marketing
- June 20, 2011, IRS Announces First Round of Revocations for Nonprofits that Failed to File Form 990

- April 29, 2011, Raising Funds, Not Eyebrows: Legal Considerations in Fundraising
- April 29, 2011, Developing and Managing a Successful Fundraising Campaign
- April 13, 2011, Considerations in Mergers and Asset Transfers of Credit Counseling Agencies
- October 18, 2010, Avoiding UBIT Pitfalls
- October 2010, Key Steps to Forming and Operating a Nonprofit, Tax-Exempt Charity
- June 3, 2010, A Lesson in Compliance: IRS Releases Interim Report on Nonprofit Colleges and Universities Compliance Project (Long Version)
- June 3, 2010, A Lesson in Compliance: IRS Releases Interim Report on Nonprofit Colleges and Universities Compliance Project (Short Version)
- May 7, 2010, Massive Loss of Tax Exemptions Looming
- February 5, 2010, Mortgage Assistance Relief Services Targeted in Federal Trade Commission Rulemaking, Credit Counseling Alert
- 2009, *Improving Privatization: How Federal Procurement Concepts Can Solve Lingering Problems in State Contracts for Child Welfare*, 38 Pub. Cont. L.J. 956

### SPEAKING ENGAGEMENTS

- December 19, 2011, The New D.C. Nonprofit Corporation Act Takes Effect on Jan. 1, 2012: Everything You Need to Know
- September 26, 2011, "Preventative Planning: Avoiding Common Legal Pitfalls in Hotel, Convention Center and Meetings Contracts" at the Small Market Meetings Conference
- June 14, 2011, Legal Quick Hit: "Raising Funds without Raising Eyebrows: Legal Considerations for Nonprofits" for the Association of Corporate Counsel's Nonprofit Organizations Committee
- April 29, 2011, Developing and Managing a Successful Fundraising Campaign
- October 18, 2010, "Confusing Stuff You Need to Know to Keep You and Your Chamber Out of Trouble" for the Western Association of Chamber Executives (WACE)
- September 21, 2010, "Nonprofit 101" at Howard University Business School, hosted by Delta Sigma Phi





## Janice M. Ryan

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### AREAS OF PRACTICE

Political Law  
Tax-Exempt Organizations  
Tax and Wealth Planning  
Legislative and Government Affairs  
Advertising and Marketing  
Litigation  
Antitrust  
Regulatory

### INDUSTRIES

Nonprofit Organizations and  
Associations

### GOVERNMENT EXPERIENCE

Legislative Assistant, United States  
Senate, Office of Senator Patrick  
Leahy (D-VT)

### BAR ADMISSIONS

District of Columbia  
Maryland

### COURT ADMISSIONS

U.S. Tax Court

### EDUCATION

Janice Ryan is an associate in the firm's Regulatory Affairs Practice Group, where she assists a broad range of clients in state and federal regulatory compliance, enforcement, and policy matters.

Ms. Ryan focuses her practice on counseling trade and professional associations, public charities, private foundations, and other nonprofits on a wide variety of legal topics, including tax exemption, corporate governance, antitrust, transactional, and political activities matters. Ms. Ryan also advises for-profit and nonprofit clients on all aspects of state and federal political law, including campaign finance, lobbying disclosure, gift and ethics rules, pay-to-play laws, and tax implications of political activities. Ms. Ryan develops comprehensive political compliance programs tailored to clients' needs, and assists clients to implement those programs on an ongoing basis.

Previously, Ms. Ryan served as a Legislative Assistant to U.S. Senator Patrick Leahy (D-VT), where she handled health care, education, human services, and food and nutrition policy matters. During her five years on Capitol Hill she gained significant experience in the appropriations and legislative authorization processes, developing strong skills in negotiation, advocacy, and statutory analysis.

### PUBLICATIONS

- November 18, 2011, The New D.C. Nonprofit Corporation Act Takes Effect on Jan. 1, 2012: Everything You Need to Know to Comply
- February 2011, Understanding Force Majeure Clauses
- January 2010, Supreme Court Strikes Down Laws Banning Corporate Expenditures, Political Law Alert

### SPEAKING ENGAGEMENTS

- December 19, 2011, The New D.C. Nonprofit Corporation Act Takes Effect on Jan. 1, 2012: Everything You Need to Know

J.D., *summa cum laude*, Catholic  
University of America, Columbus  
School of Law, 2008

Associate Editor, *The Catholic  
University Law Review*

Recipient, The John L. Garvey  
Faculty Award

A.B., Dartmouth College, 2000

## MEMBERSHIPS

American Bar Association

Maryland State Bar Association



VENABLE<sup>®</sup><sub>LLP</sub>

**Additional Information**

## Articles

November 18, 2011

### The New D.C. Nonprofit Corporation Act Takes Effect on Jan. 1, 2012: Everything You Need to Know to Comply

Related Topic Area(s): Corporate Governance

The coming New Year will soon usher in a new legal landscape for District of Columbia nonprofit corporations. On January 1, 2012, the new District of Columbia Nonprofit Corporation Act of 2010 goes into effect. To ensure that your organization is ready to comply, now is the time to review your organization's articles of incorporation, bylaws, and governance policies and practices for any necessary changes.

As a general rule, the 2010 Act provides D.C. nonprofit corporations with considerable flexibility to structure their corporate governance, and for the most part will not require changes to day-to-day operations. However, numerous default rules have changed under the 2010 Act and new, more detailed provisions governing matters like director standards of conduct and liability, indemnification, member voting rights and ballot voting procedures, and numerous other topics require D.C. nonprofit corporations to familiarize themselves with the new law, and determine whether changes to their governing documents or practices will be necessary to comply. The following highlights many of the significant changes that are in store.

#### GENERAL PROVISIONS AND APPLICABILITY

##### Location of General Provisions (D.C. Code, Title 29, Chapters 1 and 4)

- The new Business Organizations Code—Title 29 of the D.C. Code—is a hub-and-spoke structure. Chapter 1 of the Code contains one set of general provisions and definitions that govern all business organizations in the District on matters such as filing of corporate reports and requirements for registered agents. Separate chapters then govern matters unique to each type of business entity. Nonprofit corporations must look to Chapter 1 of Title 29 for important general provisions and definitions and to Chapter 4 for the rules specifically applicable to nonprofit corporations.

##### Biennial Reports Filing Deadline (D.C. Code § 29-102.11)

- Biennial reports will now be due every two years on or before April 1 instead of January 15. According to unofficial agency guidance, organizations should continue to follow their existing two-year cycle for filing the biennial report, and should simply begin using the new April 1 filing deadline in the year their report is due (i.e., organizations that last filed in January 2010 have until April 1, 2012 to file their next-due biennial report).

##### Corporate Records (D.C. Code §§ 29-413.01 to .05)

- The new law specifies expanded record-keeping requirements for D.C. nonprofit corporations and permits such records to be kept in digital form. Minutes of all meetings of and records of all actions taken by the board, members, and any designated body must be maintained permanently. Appropriate accounting records and membership lists must be maintained. Additionally, numerous records must be maintained at the corporation's principal office, including the articles, bylaws, minute books for the most recent three years, all formal notices or other communications to members for the most recent three years, a current list of the names and business addresses of the corporation's directors and officers, and a copy of the corporation's most recent biennial report.

##### "Old Act" Corporations (D.C. Code §§ 29-107.01(b); 414.01)

- The new law appears to be intended to phase out so-called old act corporations—those incorporated in the District prior to the 1962 enactment of the District of Columbia Nonprofit Corporation Act. See D.C. Council Committee on Public Services and Consumer Affairs, Committee Report on Bill 18-500, at 18 (explaining that § 29-107.01 "includes a provision designed to phase out 'old-Code' corporations"). Technically, old act corporations have two years from the new law's applicability date in which to file a notice with the District that includes the corporation's articles of incorporation or other public organic record and the names and street addresses of its current directors and officers. Any old act corporation that fails to provide the required notice within the required time period shall be thereafter barred from asserting that it is not subject to the requirements of the new law. However, despite this provision, any old act corporation that desires to do business in the District must file articles of incorporation and comply with the provisions of the new law.

#### BOARD AND OFFICER PROVISIONS

#### AUTHORS

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Jeffrey S. Tenenbaum

#### RELATED INDUSTRIES

Nonprofit Organizations and Associations

#### ARCHIVES

2011 2007 2003  
2010 2006 2002  
2009 2005 2001  
2008 2004

**Board Quorum** (D.C. Code § 29-406.24)

- Default quorum is now a majority of directors in office before a meeting begins. A different quorum may be established by the articles or bylaws, provided it is not lower than the minimum quorum requirement.
- Minimum quorum is now 1/3 of the directors in office or two directors, whichever is greater.
- *Previous default quorum was a majority of the number of directors fixed in the articles or bylaws. Previous minimum quorum was 1/3 of the number of directors fixed in the articles or bylaws.*

**Board Committees** (D.C. Code § 29-406.25)

- A board committee may now consist of one or more directors (previously at least two directors were required).

**Minimum Officers** (D.C. Code § 29-406.40)

- Two separate officers are required at minimum—one officer responsible for management (e.g., a “president”), and one officer for finances (e.g., a “treasurer”). The president and treasurer positions cannot be held by the same individual. One of the officers must be assigned the duties of a secretary.
- *Previously a president, secretary, and treasurer were required, and the president and secretary positions could not be held by the same person.*

**Standards of Conduct** (D.C. Code §§ 29-406.30, 406.32, 406.42, 406.70, 406.80)

- The new law codifies traditional common law concepts of director and officer fiduciary duties (e.g., the duties of care and loyalty). An individual director or officer must discharge his or her duties in good faith, in a manner that he or she reasonably believes is in the best interests of the corporation, and with either the care that a person in a like position would reasonably believe appropriate under similar circumstances (directors) or with the care an ordinarily prudent person in a like position would exercise under similar circumstances (officers).
- The new law provides procedures by which potential conflict of interest transactions can be processed.
  - *Conflicted Interest Transactions.* Transactions between the corporation and any director, officer, or member having an interest in the transaction shall not be void or voidable solely for that reason, provided the transaction is fair to the corporation at the time it is authorized or provided the material facts as to the relationship or interest are disclosed and the transaction is then approved in good faith by vote of the disinterested directors or the members.
  - *Business Opportunities.* A director may avoid liability for taking for himself, directly or indirectly, a business opportunity in which the nonprofit corporation may be interested, provided the director first brings the opportunity to the corporation’s attention and the corporation disclaims its interest in the opportunity pursuant to the procedures for a conflicted interest transaction (i.e., the material facts as to the relationship or interest are disclosed and the opportunity is disclaimed in good faith by vote of the disinterested directors or the members).
- Loans to directors and officers continue to be prohibited; however, the new law carves out exceptions for particular permissible advances (e.g., for reimbursable expenses or pursuant to employee benefit plans) and loans (e.g., those secured by the principal residence of an officer or to pay relocation expenses of an officer).

**Liability** (D.C. Code §§ 29-402.02(c), 406.31, 406.90 to .91)

- The new law codifies specific standards for director liability to the corporation or its members.
  - *General Standard.* As a general rule, a director will not be liable to the corporation or its members unless the party asserting liability establishes that the director failed to meet the required standards of conduct for directors (i.e., the prescribed standards of good faith, loyalty, and care) in discharging his or her duties.
  - *Limited Liability for Money Damages.* The new law automatically limits the liability of a director of a charitable corporation for money damages in connection with certain actions or inactions of the director. Directors of non-charitable corporations may only qualify for similar limited liability protections if the limitation is specified in the corporation’s articles. For purposes of the new law, a charitable corporation is one that is eligible for exempt status under Section 501(c)(3) of the Internal Revenue Code. A trade association or other non-501(c)(3) corporation should consider amending its articles if providing these protections to the corporation’s directors is desired.
- The new law retains provisions of existing law that provide volunteers of nonprofit corporations (e.g., directors, officers, and others who perform services for the corporation without compensation) with limited immunity from civil liability to third-parties in connection with their volunteer service, provided that the corporation maintains a minimum level of liability insurance (i.e., not less than \$200,000 per individual claim and \$500,000 per total claims arising from the same occurrence). The exception from the minimum insurance requirement is retained for 501(c)(3)s having annual total functional expenses, exclusive of grants and allocations, of less than \$100,000.

**Indemnification** (D.C. Code §§ 29-406.50 to .58)

- The new law includes detailed provisions governing when a corporation must, may, and may not indemnify a director or officer. Specific procedures are now required to be followed before indemnification may be made under non-mandatory circumstances. Under the new law, a corporation may not indemnify a director or officer unless indemnification is authorized for a specific proceeding after a determination is made by the disinterested members of the board, by the members, or by special legal counsel that indemnification is permissible because the director or officer has met the applicable standard of conduct. The corporation may authorize permissible indemnification in advance through an obligatory provision of the articles or bylaws or by resolution of the board. However, the determination of permissibility must be made in each specific instance. Similarly, detailed procedures are required before a corporation may advance expenses to a director or officer in connection with a proceeding. Finally, the corporation may provide for broader indemnification under a provision of its articles (within specific limits), or may limit any indemnification rights provided by statute under a provision of its articles or bylaws.

## MEMBERSHIP PROVISIONS

### “Member” Definition (D.C. Code § 29-401.02)

- A member is any person that has the right to select or vote for the election of directors or delegates, or to vote on any type of fundamental transaction. Other persons may be referred to by the corporation as “members” but those who do not have voting rights are not members for purposes of the statute.

### Membership Meetings (D.C. Code §§ 29-405.01 to .09)

- If authorized by the articles or bylaws, meetings of members may now be held by means of the Internet or other electronic communications technology that permits members to read or hear the proceedings substantially concurrently with their occurrence, to vote on matters submitted, to pose questions, and to make comments.
- Special meetings may be called by at least 10 percent of the voting members or such other amount up to 25 percent as the articles or bylaws may specify.
- *Previously, special meetings could be called by at least five percent of the voting members, unless otherwise provided in the articles or bylaws, with no cap on the minimum percentage required to call the meeting.*

### Notice (D.C. Code §§ 29-101.02(39); 401.03; 405.05)

- Notice may be communicated in person or by delivery, including by electronic transmission, no fewer than 10 nor more than 60 days before each meeting of the members, unless otherwise provided in the articles or bylaws.
- *Previously, the default notice period was no fewer than 10 nor more than 50 days before each meeting and no particular provision was made for oral or electronic notice.*

### Action by Ballot (D.C. Code § 29-405.09)

- A new provision governing ballot voting permits members to act without a meeting provided the corporation follows specific procedures pertaining to ballots. The corporation must deliver a ballot to every member entitled to vote on the matter; the ballot must be in the form of a record (which could include an electronic ballot or email), set forth each proposed action, provide an opportunity to vote for or withhold a vote for each candidate in the case of a director election, and provide an opportunity to vote for or against each other proposed action. All solicitations for votes by ballots must indicate the number of responses needed to meet the quorum, state the percentage of approvals necessary to approve each matter other than the election of directors, and specify the time by which a ballot must be received by the corporation to be counted. Approval by ballot shall be valid only when the number of votes cast equals or exceeds the quorum required to be present at a meeting authorizing the action, and the number of approvals equals or exceeds the number of votes that would be required to approve the matter at a meeting at which the total number of votes cast was the same as the number of votes cast by ballot.

### Voting Entitlement (D.C. Code § 29-405.21)

- Each member is entitled to one vote on each matter voted on by the members, except as otherwise provided in the articles or bylaws.
- *Previously, members were not entitled to vote except as the right to vote was granted in the articles. The new default is the opposite—members are entitled to vote unless otherwise limited by the articles or bylaws.*

### Member Quorum (D.C. Code § 29-405.24)

- Default quorum is now a majority of votes entitled to be cast on a matter. A different quorum (greater or lesser) may be established by the articles or bylaws.
- *Previous default quorum was 1/10 of the votes entitled to be cast on a matter.*

### Voting for Directors (D.C. Code §§ 29-405.27; 414.03)

- Directors shall be elected by a plurality of the votes cast by the members entitled to vote in the election at a meeting at which a quorum is present, unless otherwise provided in the articles or bylaws.
- Members shall not have the right to cumulate their votes, unless permitted by the articles or bylaws. However, members that were entitled to cumulate their votes for election of directors prior to the effective date of the 2010 Act may continue to do so until otherwise provided in the organization’s articles or bylaws.
- *Previously, by default, directors were elected by majority vote and members were entitled to cumulate votes in director elections.*

### Delegates; Designated Body (D.C. Code §§ 29-404.30; 406.12)

- Under the new law, a nonprofit membership corporation may provide in its articles or bylaws for delegates, which may exercise some or all of the rights of members in governing the corporation. Additionally, a group of delegates may be a “designated body” authorized to exercise some, but less than all, powers of the board, to the extent provided in the articles or bylaws.

### Amendments to Articles and Bylaws (D.C. Code §§ 29-408.01 to .09)

- Amendments to the articles proposed by the board must be approved by the board and submitted for approval to any members entitled to vote on the amendments. The board need not obtain approval of the members, however, to adopt certain administrative amendments or to restate the articles without revision. Members entitled to vote on amendments to the articles may also propose and adopt amendments without approval of the board—such amendments may be proposed by 10 percent or more of the members entitled to vote on articles amendments, or by such greater or lesser number as specified in the articles.
- Members may amend or repeal the corporation’s bylaws, except as otherwise provided in the articles or bylaws. The board of directors may also amend or repeal the corporation’s bylaws, unless the articles or bylaws reserve that power exclusively to the members or a designated body, in whole or in part. However, unless otherwise provided by the articles or bylaws, certain amendments affecting the rights of members may only be adopted by the members

(e.g. members' respective rights and obligations with respect to voting; levying dues, assessments or fees on some or all members; requiring cause to remove a director). Only the members may amend the articles or bylaws to alter the members' exclusive statutory right to adopt such amendments.

- *Previously, the members did not have an independent right to amend the articles without approval of the board, and the power to amend the bylaws was vested solely in the board, unless otherwise provided in the articles or bylaws. Also, the new law permits a nonprofit corporation to restate its articles, which was not previously an option.*

#### **Inspection of Membership List** (D.C. Code § 29-405.20)

- The corporation must prepare a list of members entitled to notice of a particular meeting of members, showing the address of each member and the number of votes that each member is entitled to cast at the meeting. The list must be made available to members for inspection beginning two business days after notice of the meeting is given and continuing through the meeting. Upon written demand and a showing of proper and relevant purpose, the member must also be allowed to copy the list. Instead of making the list available for inspection, the corporation may state in the meeting notice that the corporation has elected to proceed under D.C. Code § 29-405.20(f), which requires a member's demand for inspection to state a proper purpose for inspection, and which permits the corporation to offer, within 10 business days of receiving the demand, a reasonable alternative method for achieving the purpose. Refusal or failure to prepare or make the list available shall not affect the validity of action taken at the meeting; however, a member is entitled to seek enforcement of his or her right to inspect or copy the list by court order.

#### **Inspection of Records; Financial Statements** (D.C. Code §§ 29-413.02; 413.20)

- Members are granted the right to inspect and copy any of the corporate records required to be maintained by the corporation under the new law upon written demand, and in some circumstances, upon a showing of proper and relevant purpose. Members may not use the member list, however, for any commercial purpose, or to solicit money or property (unless the money or property will be used to solicit votes of the members in connection with an election to be held by the nonprofit corporation). The new law currently states that the members' right to inspect corporate records may be abolished or limited in the articles or bylaws. However, indications have been made that this was a drafting error which may soon be corrected in a package of technical amendments to the new law.
- Separately, the corporation's latest annual financial statements, which shall include a balance sheet and a statement of operations for the most recent fiscal year, must be furnished to members upon written request.

### **FUNDAMENTAL TRANSACTIONS**

#### **Domestication** (D.C. Code § 29-407.01 to .06)

- The new law provides for a domestication process, which permits a nonprofit corporation to transfer its jurisdiction of incorporation without having to create or merge into a different legal entity, provided that domestication is authorized by the laws of both the new and old jurisdictions.

#### **Notice of Charitable Dissolution** (D.C. Code § 29-412.02)

- A charitable corporation must now provide notice to the Attorney General of the District of Columbia that it intends to dissolve prior to delivering articles of dissolution to the D.C. Department of Consumer and Regulatory Affairs. This notice requirement shall not, however, delay or otherwise affect the dissolution process.