

Updating Nonprofit Corporate Policies

03.16.21 | Linda J. Rosenthal, JD



It's been a year since the World Health Organization declared COVID-19 a pandemic and the world as we knew it was turned upside down.

For this nation's nonprofits, the past twelve months have been an unsettling journey through repeated phases of crisis planning *and* crisis management. Finally, though, we can see probable light at the end of the tunnel sooner rather than later. With three separate vaccines approved for emergency use, a ramped-up production and distribution schedule, and a historic \$1.9 trillion relief package now on the books, it may be time for America's tax-exempt organizations to collectively exhale and begin to envision a *non*-crisis path forward.

With the start of any ordinary new year, there are certain planning and housekeeping tasks that nonprofit organizations routinely undertake. One of the usual January activities is the review of the organization's written policies and handbooks. Depending on the size and scope of a particular organization, there may be just a handful or so of key governance policies or the group may have in place dozens of them on a broad range of topics.

Although New Year's Day was a few months back, now – on the cusp of spring – seems to be the right time to *begin thinking* about a comprehensive policies review. Because of the upheaval we have all experienced, this round of review may be much more than the simple tweaks and updates. Will the mission, scope, operations, and organizational structure of each organization be the same as before the coronavirus tsunami slammed onto our shores? Probably not. And who knew – for instance, back in early March 2020 – that much of the work of the nonprofit sector could be shifted offsite and done electronically? Perhaps most workers will clamor to get back to the office and the comfort and camaraderie of doughnuts in the break room? Or perhaps not.

"Creating nonprofit policies begins with knowing what they are," according to Board Effect's Lena Eisenstein, writing in *Nonprofit Policy Review Checklist* (August 12, 2020).

“Policies are the operational guidelines for an organization,” Ms. Eisenstein explains. Their purpose is “... to protect and steer the staff and the board as they fulfill the mission of the organization.” They are *distinct* from the other key corporate documents comprising the governance package of an organization; that is: (1) the articles of incorporation and (2) the bylaws.

Articles and Bylaws Distinguished

The founders of most nonprofit organizations choose to proceed with the corporate format instead of defaulting to the status of unincorporated association. A corporation is a fictional legal entity established under state law. It is separate and apart from the individuals; a key benefit to this choice organizational structure is the shielding of the individuals from legal liability.

The first required step is the drafting and filing with the state of a public document titled “articles of incorporation;” it includes certain required information that functions as a corporate charter. See, for example, *California Nonprofit Articles of Incorporation* (September 1, 2019) Gene Takagi, Esq., *NEO Law Blog*. This document is generally brief and includes only the few basic points listed as mandatory under state law; for example: name, purposes statement, principal office street address, and initial agent for service of process. Nonprofits around the nation also include several brief recitations needed to qualify for federal tax exemption. This document can be amended but is done only sparingly; for instance, if the organization wants to change its name or its statement of purposes.

Under state law, a corporation is also generally required to adopt a document titled “bylaws.” It *must* include certain specified points and *may* include any number of optional provisions. “Bylaws may contain any provision, not in conflict with law or the corporation’s articles of incorporation, for the management of the activities and for the conduct of the affairs of the corporation.” The purpose of bylaws is to provide guidance to the corporation’s board of directors. A secondary function is to provide reassurance to government authorities, funders, and other interested stakeholders.

The bylaws document comprises the “primary policies for an organization.” That includes defining “... the role of the board members, how they are elected, how they function during board meetings, and how their work is structured.” Similarly, the bylaws also describe and define the officers of the corporation, how they are elected, and their powers and duties. If there are members, the bylaws will include those details as well including voting rights.

While there are many optional provisions that can be included in the bylaws, this document “should not be cluttered by every conceivable rule and recommendation.” It should create only the “very basic structure for” operation. Bylaws can and should be amended from time to time. It’s properly viewed as an “evolving document” that needs to “be reviewed by the board on a regular basis.”

Corporate Policies

“The purpose of policies is to protect and steer the staff and the board as they fulfill the mission of the organization. They are a reference tool for appropriate action, ethical decision making, and for dealing with potential or actual conflicts.”

It's a bit too facile to suggest that policies are what's leftover after the articles of incorporation and the bylaws are drafted and adopted. But, in certain respects, that's accurate. The corporate policies and handbooks can and should perform different functions than the articles and bylaws. For instance, policies "can paraphrase a law, explain a procedure, clarify a principle, or express a desired goal."

The size, scope, and purposes of a particular nonprofit organization will determine *how many* policies are needed or at least recommended. For most organizations, including small groups, there are six basic policies recommended by the Internal Revenue Service. See *When The Revenue Agent Comes Calling* (March 15, 2016).

For larger groups and major institutions, there may be a far greater number – spanning categories ranging from human resources, financial management, fundraising, communications, investments, and data management and security. See *Nonprofit Policy Review Checklist*, cited above.

See also *Top Ten Policies and Practices for Nonprofit Organizations* (December 17, 2013) Virginia Sikes, Esq., Montgomery, McCracken Walker & Rhoades, LLP and *What Governance Policies Should Your Nonprofit Have?* (May 2013), Stephen Fishman, J.D., *Nolo Press*.

Conclusion

"New policies are regularly needed to deal with situations that arise in the life of an organization." As each organization regains its footing in this newest – and hopefully concluding – phase of the COVID-19 pandemic, the board and senior staff should begin the process of evaluating the current and future needs in terms of policy documents.

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