



Beyond the Nonprofit Revitalization Act Top 5 Tips for Committee Restructuring

For many nonprofits, *the Nonprofit Revitalization Act* has shaken up board culture, as well as established clear committee structures. With respect to committees, nonprofits have been challenged in their decision-making that goes beyond the definitions/restrictions applicable to Committees of the Board and Corporation (NPCL §712).

To date, the focus of the Office of the Attorney General, lawyers and other professional advisors has been on *compliance* matters - what you can and can't do with respect to committees. What has been neglected, however, is the *context* - how to think through customizing the law into your organizational culture and needs so that your committee structure works for you and your constituency, not just for the regulators.

So, without directly repeating provisions of the Revitalization Act, NYCON offers a top 5 tips for committee restructuring.

1. **Be as clear as possible as to what decisions your board and your Executive Director/CEO currently can and should make.** Fundamental in good governance among nonprofits of all missions and sizes is knowing and effectively practicing the distinction between governance and management responsibilities, including being able to navigate the grey areas. In order to determine whether a committee is needed and what its charge is, you first need to know who it is acting on behalf of or advising – the board or the Executive Director/CEO? It is not uncommon for boards, for example, to have committees, such as special events, marketing, program outreach, etc., that are structured to be accountable to the board but really work on behalf of management. This practice invites “micro-management” on behalf of the board that blurs the governance-management boundaries and brings with it a host of unintentional consequences.
2. **If the “committee” serves to offer advice to or assists the functions of the Executive Director or staff and not the board, then it does not need to be appointed by the board.** Committees of the Board and of the Corporation, as defined by the Revitalization Act, are appointed by and held accountable to the board of directors. If a committee is really a support to management, then it should be appointed by and held accountable to management, not the board directly, and is thus is not subject to the provisions under the Revitalization Act. When boards have committees that really perform the duties of staff, micro-management issues arise. To help make the distinction clear, it is advisable to state in the by-laws that the Executive Director/CEO can appoint his or her own advisory or workgroups to serve at the pleasure of the Executive Director/CEO within his or her scope of responsibility.

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3. **Avoid using the term “board” in advisory, or other “junior,” groups.** Frequently, nonprofits have “advisory boards”, who often do little or nothing of substance. It is becoming somewhat popular to have “junior boards,” which essentially serve as auxiliary groups intended to test and groom potential directors for the future. There is no legal prohibition to using the term “board” for these groups. But let’s be frank, the term is used to provide an elevated status to the group and implies that there is some level of governance authority, adding confusion instead of clarity. Therefore, it is best to avoid the word – if such a group does report to the board, not management, then make them a Committee of the Corporation. There are alternative labels to “board” or “committee” such as ‘task force,’ ‘work group,’ ‘advisors,’ etc.
4. **All Committees of the Board do not necessarily need to have standing authority to make “binding decisions.”** Although you may not at this time be willing to give a committee clear permanent authority to make binding decisions in the by-laws, think about whether it could be given specific authority by the board in the future under certain scenarios. A board can create an ad hoc Committee of the Board at any time and give it the authority to bind the nonprofit in a specific situation – such as negotiating terms of a lease or corporate affiliation. It can also delegate additional authority to an existing Committee of the Board. The key here is that when you create a Committee of the Corporation, you rule out the potential for that committee to take actions that bind the board or corporation when a situation warrants. In designing your committee structure, think of various unanticipated scenarios that may arise so that you have the flexibility for action when needed.
5. **If a committee does not have or will not in the future have “binding” authority but it does substantially perform fiduciary duties of care on behalf of the board, then consider making it a Committee of the Board.** There is some thinking that the term “binding” is not necessarily limited to making a specific decision on behalf of the board but may very well include work that meaningfully or substantially carries out the board’s fiduciary obligation with respect to the Duty of Care. The deliberations and recommendations of finance, budgeting and investment committees (excluding mandatory audit functions) for example, could be seen as Committees of the Board in this regard.



Questions? Need Additional Guidance?

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