

# New Legal Requirements for New York Nonprofit Membership Corporations

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## Client Advisory

February 5, 2019 by Pamela A. Mann, Ahsaki E. Benion and Jeremy S. Steckel

### Overview

On December 21, 2018, the New York Not-for-Profit Corporation Law (N-PCL) was amended to require that, effective July 1, 2019, any existing or new nonprofit membership corporation incorporated in New York must have a membership comprised of no fewer than three persons.[1] A corporation may have a corporation, joint-stock association, unincorporated association or partnership as its sole member only if such corporation, association or partnership is owned or controlled by no fewer than three persons. The amendment has no impact on nonprofits formed in a state other than New York but doing business or soliciting contributions in New York.

### Background

Every New York not-for-profit corporation must have a Board of Directors consisting of no fewer than three persons and, except as otherwise provided in its certificate of incorporation, the corporation must be managed by its Board. In addition to having a Board, non-charitable corporations[2] must have members, and charitable corporations may, but are not required to, have members. Those members generally retain certain rights related to the governance of the corporation, such as the right to elect the members of the Board or to approve certain fundamental corporate changes such as a merger, sale of substantially all of the corporation's assets, or dissolution.[3]

Prior to the passage of this amendment, a nonprofit could have a membership consisting of one person, or a business entity as its sole member regardless of how many individuals owned or controlled that entity. For example, a parent could make a gift to his or her adult child to start a new foundation to be operated by the child, with the parent as the sole member. This fairly common organizational structure would no longer be permissible in New York.[4]

### How To Comply

Nonprofit membership corporations should review the composition of their membership to ensure compliance with the new law. This may require corporations to first amend their certificate of incorporation and/or bylaws, to the extent these documents contain provisions that contradict or are inconsistent with the new law. Consult with legal counsel if you have any doubt about whether your governance documents or current practices need to be modified. Certificate amendments require additional lead time because they must be filed with, and accepted by, the New York State Department of State. Charitable corporations that currently have non-compliant membership structures could choose to no longer have members, rather than amend their membership structures to comply with this new law. This option is not available for non-charitable corporations, which are required to have members.

Those forming new nonprofit membership corporations should consider this new law, among other things, in choosing whether to incorporate in New York or in another state (e.g., Delaware) that permits a membership comprised of one person.

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[1] See bill number A10336A, which amended N-PCL § 601, and is available [here](#).

[2] Non-charitable corporations include civic, patriotic, political, social, fraternal, athletic, agricultural, horticultural, or animal husbandry organizations, and professional, commercial, industrial, trade or service associations. N-PCL § 102(a)(10).

[3] Membership rights are generally set forth in the corporation's bylaws and/or certificate of incorporation. Some of these rights are granted to members by law, regardless of what the corporation's governance documents say. Certain other rights can be allocated to the Board of Directors or the Members, if specified in the corporation's governance documents.

[4] The justification for this amendment appears to be preventing abuse. The New York State Assembly Memorandum in Support of Legislation explains that a single individual member of a charitable nonprofit may elect the Board, and describes this as a "significant loophole." It further explains that "Amending the NPCL to preclude the possibility that a charitable nonprofit be controlled by any one member will prevent abuse by individuals who may try to use a charitable nonprofit for his or her own private interest." This seems to overlook the control vested in the Board of Directors, each of whom is bound by a fiduciary duty to act in the corporation's best interest, regardless of who elected him or her. Moreover, we question how effective this new law will be at achieving its stated objective, given that it permits corporations to have three persons as members who are in the same family or business.

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