



READY REFERENCE PAGE

NO. 126
FOR YOUR FILE

Revised Uniform Unincorporated Nonprofit Association Act Provides Clarification for Rules of Conduct

Members are protected from individual liability for obligations of the association

For years we have counseled groups of unincorporated individuals carrying on nonprofit activities to incorporate in order to obtain a level of protection from individual liability for the association's obligations. The law was unclear in many states and individual members of unincorporated associations could often end up with personal liability for the obligations of the association as if it were a general partnership.

Those rules are slowly changing as more states adopt the Uniform Unincorporated Nonprofit Association Law, first promulgated by the National Conference of Commissioners on Uniform State Laws in 1996, and now the Revised Uniform Unincorporated Nonprofit Association Law issued in 2008. The Uniform Act was adopted in about eight states, and the Revised Act has now been adopted in five jurisdictions, including most recently in Pennsylvania (part of [Act 67 of 2013](#)). (The other jurisdictions adopting the Revised Act are Arkansas, Iowa, Nevada and the District of Columbia.) Under the Act, a member of an unincorporated association is not liable for such obligations solely by virtue of being a member.

The Uniform Act made clear that an unincorporated nonprofit association should be treated as a separate legal entity that can own and hold property, often a question under state law, and can sue and be sued as an association. The Revised Act adds provisions that allow the Association to function more like a nonprofit corporation.

The Pennsylvania Act (the "Act"), which closely follows but is not identical to the Revised Act, is very flexible, permitting the members of the nonprofit association to structure their operations as

they wish. Many of the rules are written as permissions (i.e., "a nonprofit association may"). Many others are caveated by reference to the nonprofit association's own governing rules (i.e., "unless otherwise provided in the governing principles").

Under the Act, a "nonprofit association" is an unincorporated organization consisting of two or more members joined together under an agreement that is oral, in record form or implied from conduct for one or more common, nonprofit purposes. The term "nonprofit association" does not include: a trust, a marriage, domestic partnership, common law domestic relationship, civil union or other domestic living arrangement; an organization formed under any other statute that governs the organization and operation of unincorporated associations; a joint tenancy, tenancy in common or tenancy by the entireties, even if the co-owners share use of the property for a nonprofit purpose.

A "member" is a person that, under the governing principles, may participate in the selection of persons authorized to manage the affairs of the nonprofit association or in the development of policies and activities of the nonprofit association.

The "governing principles" are the agreements, whether oral, in record form or implied from its established practices, that govern the purpose or operation of a nonprofit association and the rights and obligations of its members and managers.

A "manager" is a person that is responsible, alone or in concert with others, for the manage-

ment of a nonprofit association. “Established practices” are the practices used by a nonprofit association without material change during: (1) the most recent five years of its existence; or (2) if it has existed for less than five years, its entire existence.

A. When Does Pennsylvania Law Apply to a Nonprofit Association?

The law of Pennsylvania, including the Act, governs the operation in Pennsylvania of a nonprofit association formed or operating in Pennsylvania, unless its main place of activities is in another jurisdiction. Unless the governing principles specify a different jurisdiction, the law of the jurisdiction in which a nonprofit association has its main place of activities governs its internal affairs.

B. What Provisions of the Act Provide Protections to Members of a Nonprofit Association?

1. Separate legal entity. The Act establishes that a nonprofit association is a legal entity distinct from its members and managers. It affords the nonprofit association the same powers as an individual to do all things necessary or convenient to carry on its purposes.

2. No personal liability. As mentioned above, a member or manager is not personally liable, directly or indirectly, for a debt, obligation or other liability of a nonprofit association solely by reason of being a member or manager. The Act states that status as a member or manager does not prevent or restrict other law from imposing liability on the person or the nonprofit association because of the person’s conduct.

3. Formalities not required. The Act states that the nonprofit association’s failure to observe formalities relating to the exercise of its powers or the management of its activities and affairs is not a ground for imposing liability on a member or manager for a debt, obligation or other liability of the nonprofit association.

4. Judgments do not reach members or managers. The Act states that a judgment or order against a nonprofit association is not by itself a judgment or order against a member or manager.

C. Indemnification

The Act provides that a nonprofit association is subject to the provisions of the state Nonprofit Corporation Law of 1988 relating to indemnification. The Act states that for purposes of applying those provisions, references to the “articles,” “bylaws,” “directors” and “members” mean the “governing principles,” “managers” and “members”.

D. Ability to Earn Profits

A nonprofit association may engage in profit-making activities, but profits from any activities must be used or set aside for its nonprofit purposes.

E. Nondistribution constraint

Except for “permitted payments,” a nonprofit association may not pay dividends or make distributions to a member or manager. Under the provision defining “permitted payments,” a nonprofit association may: (1) pay reasonable compensation or reimburse reasonable expenses to a member or manager for services rendered; (2) confer benefits on or make contributions to a member or manager in conformity with its nonprofit purposes; (3) repurchase a membership and repay a capital contribution made by a member to the extent authorized by its governing principles; (4) repay indebtedness to a member or manager; and (5) make distributions of property to members upon winding up and termination to the extent permitted by the Act.

F. Selection of Manager(s); Scope of Manager’s Authority

Except as provided in the governing principles, the following rules apply under the Act. Only the

members may select a manager, who may be a member or a nonmember. If there is no manager selected and serving, all members are managers. All matters relating to the activities of the nonprofit association are decided by its managers except for matters reserved for approval by the members in the Act. Each manager has equal rights in the management and conduct of the nonprofit association's activities, and a difference among managers is decided by a majority of the managers.

G. Admission, Suspension, Dismissal and Expulsion of Members

Except as provided in the governing principles, a person becomes a member and may be suspended, dismissed or expelled, in accordance with the governing principles. Also except as provided in the governing principles, the suspension, dismissal or expulsion of a member does not relieve the member from any unpaid capital contribution, dues, assessments, fees or other obligation incurred or commitment made by the member before the suspension, dismissal or expulsion.

If there are no applicable governing principles, a person may become a member or be suspended, dismissed or expelled only with the approval of the members.

H. Resignation of Members

A member may resign in accordance with the governing principles. In the absence of applicable governing principles, a member may resign at any time. Except as provided in the governing principles, resignation does not relieve the member from any unpaid capital contribution, dues, assessments, fees or other obligation incurred or commitment made before resignation.

I. Matters Requiring Approval by Members

Except as provided in the governing principles, a nonprofit association must have the approval of its members to: (1) admit, suspend, dismiss, or

expel a member; (2) select or dismiss a manager; (3) adopt, amend or repeal the governing principles; (4) transfer all, or substantially all, of its property, with or without its goodwill, outside the ordinary course of its activities; (5) dissolve; (6) undertake any other act outside the ordinary course of its activities; (7) determine its policy and purposes; or (8) do any other act or exercise a right that the governing principles require to be approved by members.

J. Action by Members

Except as provided in the governing principles, approval of a matter by the members requires the affirmative vote of a least a majority of the votes cast at a meeting, and each member is entitled to one vote on each matter submitted for approval.

The governing principles may provide for the: (1) calling, location and timing of member meetings; (2) notice and quorum requirements for member meetings; (3) conduct of member meetings; (4) taking of action by the members by consent without a meeting or by ballot; and (6) taking of action by members by proxy. If the governing principles do not provide for one of these matters, customary usages and principles of parliamentary law and procedure apply.

K. Duties of Members

A member does not have a fiduciary duty to the nonprofit association or to another member solely by being a member. The member must discharge duties under the governing principles to the nonprofit association and the other members and exercise any rights under the governing principles and the Act, in a manner consistent with the governing principles and the contractual obligation of good faith and fair dealing.

L. Action by Managers

Except as otherwise provided in the governing principles, approval of a matter by the managers requires the affirmative vote of at least a majority of the votes cast at a meeting of managers, and

each manager is entitled to one vote on each matter submitted for approval by the managers.

The governing principles may provide for the: (1) delegation to a manager of authority to act without a meeting of the managers; (2) creation and authority of committees of the managers; (3) calling, location and timing of meeting of the managers or a committee of the managers; (4) notice and quorum requirements for meetings of the managers or a committee of the managers; (5) conduct of meetings of the managers or a committee of the managers; (7) participation by managers in a meeting of the managers or a committee of the managers by telephone or other means of electronic communication; and (8) taking of action by a manager by proxy.

M. Duties of Managers; Limitation of Liability

1. Duty of care. A manager's duty of care to the nonprofit association is the same as that of a nonprofit director to the nonprofit corporation. The manager shall manage the nonprofit association: in good faith; in a manner the manager reasonably believes to be in the best interests of the nonprofit association; and with such care, including reasonable inquiry, as a prudent person would reasonably exercise in a similar position and under similar circumstances. A manager may rely in good faith on any opinion, report, statement or other information provided by another person that the manager reasonably believes is a competent and reliable source for the information.

2. Duty of loyalty. A manager owes a fiduciary duty of loyalty to the nonprofit association with respect to the responsibilities of the manager. After full disclosure of all material facts, a specific act or transaction that would otherwise violate the duty of loyalty may be authorized or ratified by a majority of the members that are not interested directly or indirectly in the act or transaction.

3. Presumption. A manager that makes a judgment in good faith satisfies the du-

ties of care and loyalty if the manager: (1) is not interested, directly or indirectly, in the subject of the judgment and is otherwise able to exercise independent judgment; (2) is informed with respect to the subject of the judgment to the extent the manager reasonably believes to be appropriate under the circumstances; and (3) believes that the judgment is in, or not opposed to, the best interests of the nonprofit association.

4. Limitation of liability. The governing principles in record form may provide that a manager shall not be personally liable, as a manager, for monetary damages for any action taken unless: (1) the manager has breached or failed to perform the manager's duties under the Act; and (2) the breach or failure to perform constitutes self-dealing, willful misconduct or recklessness. The limitation of liability does not apply to: (1) the responsibility or liability of a manager under a criminal statute; or (2) the liability of the manager for the payment of taxes under federal, state or local law.

The Act also addresses: (1) conditions under which a member's interest or any right under the governing principles may be transferable; (2) the right of a member or manager, or former member or manager, to information; (3) the ability of a nonprofit association to deliver to the Department of State a statement appointing an agent to receive service of process; and (4) procedures for the transfer of real property held in the name of a nonprofit association.

—Virginia P. Sikes
Montgomery, McCracken, Walker & Rhoads, LLP
Philadelphia, PA