



Board of Directors: Stu Silberman, Chair    Marian Guinn, Vice Chair    Eileen O'Brien, Secretary  
Steve Jennings, Treasurer    Russell Harper, Public Policy Chair    Danielle Clore, CEO (ex officio)

Public Policy Committee: Russell Harper, Chair    Bart Baldwin    Kevin Connelly    Marian Guinn  
Regan Hunt    Jay Jackman    Kim Menke    Mason Rummel    Stu Silberman

## **Kentucky Revised Statute Work Group Recommendations**

Kentucky Nonprofit Network, Kentucky's state association of nonprofit organizations, convened a Work Group to explore specific recommendations that could be made to improve Kentucky Revised Statutes concerning nonprofit incorporation and governance. A majority of the existing laws were written in the 1960s and do not reflect a number of current realities, including advances in technology.

These recommendations are intended to clarify areas of confusion and provide guidance to Kentucky's existing nonprofit organizations, as well as those seeking to form a nonprofit corporation in Kentucky. The work group members included Jen Algire, The Greater Clark Foundation; Bart Baldwin, Nonprofit Consultant/Lobbyist; Brian Brezosky, Kentucky Hospital Association; Danielle Clore, Kentucky Nonprofit Network; Ed Cortas, Center for Nonprofit Excellence; Gary Cox, Association of Independent Colleges and Universities in Kentucky; Tad Myre, Wyatt, Tarrant & Combs; Mason Rummel, James Graham Brown Foundation.

### **Membership, Meetings & Voting:**

- Because Kentucky law on nonprofit meetings was written before email and conference calling, there is a bit of confusion regarding what is permissible. These revisions would provide clarity and guidance.

#### .161 Definitions

Although an email vote would probably have this effect under Chapter 273 even without such an amendment, in light of the Kentucky Electronic Signature Act, an express amendment would provide clearer guidance for nonprofits that a signature includes an email vote.

Recommendation: Add the definition of "signature," similar to the provisions of KRS 271.B-400(2).

#### .377 Action by members or directors without a meeting

Recommendation: Adding the definition of "signature," similar to the provisions of KRS 271.B-400(2) in .161 will address this issue.

- A number of boards of nonprofit organizations are unclear about proxy voting. These revisions would clarify that proxy voting could apply only to membership organizations and is not permitted for the governing board of directors.

.201 Voting

.203 Quorum

Recommendation: Modify this language to clarify this applies only to membership organizations. This could be misunderstood to mean that proxy voting is permitted for the board of directors.

.217 Quorum of directors

KRS 271B.8-200(2) provides that “the board of directors may permit any or all directors to participate in a regular or special meeting by, or conduct the meeting through the use of, any means or communicate by which all directors participating may simultaneously hear each other during the meeting. A director participating in a meeting by this means shall be deemed to be present in person at the meeting.” The Legislative History would make it clear that this is not necessarily a change in the law, but rather a clarification to it. Similar changes should be made to permit telephonic member meetings, similar to what is contained in KRS 271B.7-080 for shareholders.

Recommendation: Clarify that proxy voting by the board of directors is not permitted (not to be confused with members permitted to vote by proxy). Amend to add the existing provision contained in KRS 271.8-200(2).

**Board Members:**

.211 Number and election of directors

KRS 273.211(4) provides that “A director may be removed from office pursuant to any procedure therefor provided in the articles of incorporation.” Many nonprofits are unaware of this and include director removal provisions only in their bylaws. The removal provisions of the Model Nonprofit Corporation Act, Third Edition, are preferable to existing law as they automatically incorporate reasonable removal provisions, distinguishing between membership and nonmembership organizations, unless the articles of incorporation or the bylaws provide otherwise. Thus, the statutory “default” provisions can generally be overridden by the corporate governance documents if that is the desire.

Recommendation: Modify language to say “articles of incorporation or bylaws.” Generally adopt the director removal provisions of Section 8.08 of the ABA Model Act.

.171 General powers

KRS Chapter 273 is relatively silent on indemnification and provides no guidance as to the proper scope of such indemnification and also could lead to the inference that only officers and directors can be indemnified. Language should be added that offers detailed guidance on the appropriate scope of indemnification (when it should and should not be available), and also provide for mandatory indemnification in certain instances.

Recommendation: Add language to mirror KRS 271B.8-500 through KRS 271B.8-580. Include language: “unless limited in an organization’s articles of incorporation or bylaws.”

## **Board Committees:**

### .221 Committees

Recommendation: Amend to distinguish between “Committees of the Board” that must be appointed or elected by the board and typically include exclusively governing board members and “Committees of the Corporation” that are not intended to govern, may include non-board members and serve in an advisory capacity.

## **Dissolving a Nonprofit:**

### .313 Articles of dissolution

KRS 273.313 can be read to require that all debts have to be paid prior to the filing of the articles of dissolution. That is not always easy to do. The business corporation statutes, on the other hand, allow a dissolved corporation “to continue its corporation existence” in order to “wind up and liquidate its business and affairs.”

Recommendation: Amend to mirror KRS 271B.14-050.

## **Membership Organizations:**

- Kentucky’s current laws are not entirely as clear as they could be on the differences that distinguish a nonprofit from a membership organization.

### .187 Members

This is confusing and if literally construed, this provision could lead to a conclusion that, if the articles and bylaws are silent about whether there are members, then the corporation has members (even though none were ever intended).

Recommendation: Modify language such that a corporation has such members as are provided for in its articles of incorporation or bylaws. Thus, if the articles or bylaws are silent, then it is clear that the corporation has no members.

### .197 Notice of members’ meetings

As currently drafted, KRS 273.197 states that notices for member meetings must be delivered “personally or by mail.” KRS 273.223 states that notices for board meetings are “as the bylaws may prescribe.” This change would clarify that email notices for member meetings are permitted.

Recommendation: Modify language regarding member meetings to reflect similar language included for board of director meetings. Align the two notice standards so that it is clear that notice can be given by email for member meetings.

### .233 Books and records

KRS 273.233 provides that “All books and records of corporation may be inspected and copied by any member, or the member’s agent or attorney, for any proper purpose at any reasonable time. The member’s right of inspection shall not be abolished or limited by the corporation’s articles of incorporation or bylaws.” These member inspection rights have been construed to afford overly broad rights of inspection to members, including the right to inspect HR records, confidential records and even documents otherwise protected by the attorney-client privilege.

Recommendation: Amend to prohibit inspection rights of nonvoting members.

Amend to create specific guidance on member’s access to inspection, to include membership lists, certain financial information, governance documents, minutes, etc., similar to KRS 271B.16-010-220. Include language similar to “as the bylaws may prescribe” (types of members, examples of documents, address issues such as confidentiality, urgency, reasonableness).

## **Regulation:**

### .237 Shares of stock and dividends prohibited

This provision was drafted prior to the time that nonprofit corporations, including many health care organizations, began using membership interests and rights to approximate an ownership interests. While there is legitimacy in limiting or prohibiting distributions of nonprofit corporations to individuals (including directors and officers), the statute should permit distributions or similar types of payments from one Section 501(c)(3) to one or more other Section 501(c)(3) organizations.

Recommendation: Amend to permit for distribution of assets or confer benefits consistent with the organization’s purposes, and specify that the prohibition against member distributions would not preclude distributions by one Section 501(c)(3) organization to another so long as the distribution is consistent with the corporation’s purposes and doesn’t violate federal tax law. This could also include distributions by one Section 501(c)(4) to another Section 501(c)(4) (or to a Section 501(c)(3)), and the same could be included for Section 501(c)(6).

\*This also may require a modification of the definition of a “Nonprofit corporation” as contained in KRS 273.161(3), which states that such a corporation is “a corporation no part of the net income or profit of which is distributable to its members, directors or officers.”

\*Include language for foundations.

### .167 Purposes

Across the country, nonprofit health care organizations are providing products that may be subject to insurance regulation. There is no good reason for this limitation.

Recommendation: Delete the following language: “organizations subject to any of the provisions of the insurance laws or banking laws of this state may not be organized under KRS 273.161 to 273.390.”