

NEW REPORTING REQUIREMENTS

I. Reporting Requirements

A. New Law

1. In 2024, Pennsylvania will implement new annual reporting requirements as part of Act 122 signed into law by Governor Wolf on November 3, 2022.

2. This replaces the previous decennial reporting with an annual reporting process for both domestic and foreign filing associations.

3. This shift to annual reporting brings increased transparency and accountability to businesses operating within the state.

B. Who Must File Reports?

1. Any entity registered with the Commonwealth and/or required to report other information must now report this information too.

2. To be more specific non- profit entities.

C. What Must Be Reported?

1. The annual report is a comprehensive document that provides essential information about your association.

2. You are required to provide details such as:

- The business name,
- Jurisdiction of formation,
- Registered office address,
- Names of governors or directors, names and titles of principal officers (if any),
- Address of the principal office, and
- The entity number issued by the Pennsylvania Department of State.

D. By When Must Entities File Reports

1. Reports must be filed annually beginning with the calendar year *after* which an entity or association becomes subject to this Section.

2. The Section will take full effect on January 3, 2024, however, according to the Department's website, the actual reporting requirement begins in the 2025 calendar year.¹

3. Section 146(c) labeled specific annual deadlines for filing based on entity form:

a. Prior to July 1: domestic or foreign corporation, for profit and not-for-profit

b. Prior to October 1: domestic or foreign limited liability company

c. On or prior to December 31: any other form of domestic or foreign association

E. Reminders from the Department

1. Subsection 146(g) provides that the Department will annually deliver notice to each entity required to file an annual report at least two months prior to the annual report due date.

2. However, the failure of the Department to deliver notice or an entity to receive notice does not constitute a waiver of the requirement to file an annual report. Entities must be aware of their deadline and filing requirements.

F. Filing Fees

1. In conjunction with Section 146, Section 153 of the BCL was amended to reflect the fees that come with filing these annual reports.

2. Corporation, limited partnerships, or limited liability companies organized not-for-profit will not have any filing fees for these annual reports.

¹ <https://www.dos.pa.gov/BusinessCharities/Business/Resources/Pages/Annual-Reports.aspx>

(153(a)(18)(i)). All other entities required to report must pay \$7.00 with each annual report.

G. What Happens if an Annual Report is not filed?

1. This topic relates not only to this form of annual reporting, but all annual reporting.

2. First, under §381, if an entity does not deliver an annual report to the Department within six (6) months after its due date, the Department may commence a proceeding to administratively dissolve a domestic filing entity or cancel the statement of registration of a domestic limited liability partnership or the statement of election of an electing partnership that is not also a limited partnership.

3. Importantly, this section 381 applies to annual reports due on or after January 4, 2027. Therefore, as of right now and for the next couple of years, there will be no such penalty as this for missing an annual report. There is a transition period until January 4, 2027.

4. Section 382 lists the procedure by which the Department can affect this administrative dissolution or cancellation.

a. First, the Department must deliver notice to the entity of the Department's determination. This notice would be sent to the entity's registered office and the address of the entity's principal office.

b. Second, if within 60 days after the Department delivers notice, the entity does not file the required report, then the Department must administratively dissolve or cancel the entity.

c. Third, after dissolution/cancellation, the Department must deliver a copy of the statement of dissolution or cancellation to the entity at its registered office and its principal office.

d. Last, as a result of a dissolution, the entity can only carry on wind up activities. As a result of cancellation, a limited liability partnership or electing partnership continues its existence as a general partnership.

5. There is a reinstatement process for entities that were subject to 382 administrative dissolution or cancellation.

6. If the Department finds that the application meets the requirements for reinstatement, it would cancel the prior action by filing a statement of reinstatement and deliver a copy to the entity.

II. FinCEN Reporting

1. Beginning on January 1, 2024, many companies in the United States will have to report information about their beneficial owners, i.e., the individuals who ultimately own or control the company.

2. They will have to report the information to the Financial Crimes Enforcement Network (FinCEN). FinCEN is a bureau of the U.S. Department of the Treasury.

3. Non-profit entities are exempt from this reporting requirement.

BY-LAWS

A. Do you recommend any new additions to older By-laws?

1. Overview

a. Bylaws help your nonprofit by providing clear guidance on how the non-profit should be operated, whether you are a new organization just getting started or a group that has been in existence for many years. I

b. While you are not required to file your bylaws with the state when incorporating your nonprofit organization in Pennsylvania, the IRS requires a filing of bylaws with applications for 501(c)(3) tax-exempt status (Form 1023).

c. Some of the key issues to be addressed, including certain requirements under Pennsylvania law are the following:

- (1) Name and Purpose
- (2) Location and Address of Offices
- (3) General Provisions Relating to the Board of Directors, including
 - The powers of the Board;
 - Any qualifications required to become a director;
 - The number of directors, or a minimum and maximum number,
 - Depending on the structure of your organization (Pennsylvania law requires that nonprofits have at least one director, and if neither the bylaws nor the articles of incorporation specifies a number, then the default is three directors. 15 Pa. C.S.A. § 5723.);
 - The processes by which directors are nominated, elected, and removed; and
 - Any term limits.

(4) Meetings and Voting Practices

(5) Officers

(6) Members - If you choose to have members your bylaws should address:

- The number and type classes of members,
- Qualifications of membership,
- The number and time of meetings of members, dues, rights of membership, rules relating to voting by members,
- Transferability of membership voting rights, and termination of membership.
- Additionally, if you will have special classes of membership, such as honorary members, then you should create the processes by which these individuals join the organization.

(7) Amendments

2. Required Bylaws -Overview - The organizing document of a charitable organization exempt under Section 501(c)(3) must include:

- a. An acceptable purpose clause under Treas. Reg. 1.501(c)(3)-1(b)(1)(i)(a),
- b. A powers clause which is not too broad as expressed in Treas. Reg.1.501(c)(3)-1(b)(1)(i)(b), and
- c. A limitation on lobbying and prohibition on political activity under Treas. Reg. 1.501(c)(3)-1(b)(3),
- d. An acceptable dissolution clause under Treas. Reg. 1.501(c)(3)-1(b)(4).

Note: Referencing these clauses only in the bylaws is generally not acceptable, although a dissolution provision contained in the by-laws may satisfy the organizational test if state law would give effect to such a provision.

3. Purpose Clause

The organization will be considered organized exclusively for one or more exempt purposes only if the organizing document limits the purposes of such organization to one or more exempt purposes.

4. Powers Clause

The organizing document does not expressly empower the organization to engage, otherwise than as an insubstantial part of its activities, in activities which in themselves are not in furtherance of one or more exempt purposes.

5. Prohibition Against Lobbying and Political Activity

An organization is not organized exclusively for one or more exempt purposes if its articles expressly empower it:

a. To devote more than an insubstantial part of its activities to attempting to influence legislation by propaganda or otherwise; or

b. Directly or indirectly to participate in, or intervene in (including the publishing or distributing of statements), any political campaign on behalf of or in opposition to any candidate for public office; or

c. To have objectives and to engage in activities that characterize it as an "action organization". An organization is an action organization if a substantial part of its activities is attempting to influence legislation by propaganda or otherwise.

6. Dissolution Provisions

a. An organization is not organized exclusively for one or more exempt purposes unless its assets are dedicated to an exempt purpose.

b. An organization's assets will be considered dedicated to an exempt purpose, for example, if, upon dissolution, such assets would, by reason of a provision in the organization's articles or by operation of law, be distributed:

- (1) For one or more exempt purposes, or
- (2) To the Federal Government, or to a State or local government, for a public purpose, or
- (3) Would be distributed by a court to another organization to be used in such manner as in the judgment of the court will best accomplish the general purposes for which the dissolved organization was organized.

c. However, an organization does not meet the organizational test if its articles or the law of the State in which it was created provide that its assets would, upon dissolution, be distributed to its members or shareholders.

B. Mandatory and Optional Provisions Under the Pennsylvania BCL.

1. The articles of incorporation of a nonprofit corporation must be written in English and signed by each of the incorporators [15 Pa. Cons. Stat. § 5306].

2. Certain provisions are required by statute to be included in the articles of incorporation; in general, the mandatory provisions are those that identify the corporation and set forth its purposes and financial structure.

3. Thus, the articles must:

a. Name and Address - Set forth the corporation's name and the address of its initial registered office or the name of its commercial registered office provider [15 Pa. Cons. Stat. §§ 5306(a)(1), (2); see 15 Pa. Cons. Stat. § 109].

b. Purpose Clause - Give a brief statement of the corporation's purpose [15 Pa. Cons. Stat. § 5306(a)(3)].

c. No Pecuniary Gain or Profit - State that the corporation does not contemplate any pecuniary gain or profit, incidental or otherwise [15 Pa. Cons. Stat. § 5306(a)(4)].

d. Incorporated Under the NCL- State that the corporation is incorporated under the provisions of the Nonprofit Corporation Law of 1988 [15 Pa. Cons. Stat. § 5306(a)(5)].

e. Membership or Stock - If the corporation is a corporation, state whether the corporation is organized on a nonstock (membership) or a stock share basis, and set forth in detail the terms of the stock share structure, if applicable [15 Pa. Cons. Stat. § 5306(a)(6); 19 Pa. Admin. Code § 41.6; see § 41.37[1]].

f. No Members - State that the corporation is to have no members, if applicable [15 Pa. Cons. Stat. § 5306(a)(7); 19 Pa. Admin. Code § 41.7].

g. Incorporators - Give the names and addresses of incorporators [15 Pa. Cons. Stat. § 5306(a)(8)].

h. Term - State the term for which the corporation is to exist if it is not perpetual [15 Pa. Cons. Stat. § 5306(a)(9); 19 Pa. Admin. Code § 41.5].

i. Effective Date - State the hour, if any, and the month, day, and year when the articles are to be effective if they are to be effective on a specified date [15 Pa. Cons. Stat. § 5306(10)].

4. Unincorporated organization - In addition, if the organization being incorporated is currently an unincorporated association, the articles of incorporation must contain a statement that the incorporators constitute a majority of the members of the committee authorized to incorporate the association by the vote required by the organic law of the association for the amendment of that law [15 Pa. Cons. Stat. § 5331; 19 Pa. Admin. Code § 41.10].

5. Other Provisions –

a. The articles of incorporation may also contain any other provisions that the incorporators may choose to insert if the subject matter of these provisions is authorized or required by the Nonprofit Corporation Law to be set forth in the articles or in the bylaws of a nonprofit corporation, or in an agreement or other instrument [15 Pa. Cons. Stat. § 5306(a)(11)(i); 19 Pa. Admin. Code § 41.9].

b. Other provisions may also be included if they relate to the regulation of the internal affairs or business of the corporation, or to the rights, powers, or duties of its members, security holders, directors, or officers, and they are not inconsistent

with the Nonprofit Corporation Law [15 Pa. Cons. Stat. § 5306(a)(11)(ii); 19 Pa. Admin. Code § 41.9].

- 1) Adding or removing board members
- 2) Giving notice and holding board meetings
- 3) Taking a vote and meeting quorum requirements
- 4) Handling conflicts of interest
- 5) Compensating directors
- 6) Keeping records
- 7) Amending the bylaws
- 8) Operating during emergencies
- 9) Dissolving the nonprofit

C. BCL Update

1. Overview –

a. There were updates to the Pennsylvania Business Corporations Law that went into effect in 2023 that may influence certain articles added to a corporation's bylaws.

b. The updates include the following:

- (1) Form Selection
- (2) Reduction in personal Liability of Officers
- (3) Renunciation of Business Opportunities
- (4) Emergency Powers

2. Forum Selection for Internal Corporate Claims

Summary:

- Corporations can provide that internal corporate claims must be brought before specified court or courts in the Commonwealth.

- Internal corporate claims are fiduciary duty actions, derivative suits, and actions related to Title 15, the articles or bylaws, or any agreement regarding corporate governance.
- The court must still hold jurisdiction (§1513).
- This is an option, not a statutory default.

Application:

- If corporations wish to provide for forum selection of this type, it must create a bylaw.
- Without a bylaw, the default is that there is no forum selection for internal corporate claims.

3. Reduction of Personal Liability of Officers

Summary:

- Corporations may provide that officers will not be held personally liable for monetary damages for any action taken in the scope of their duties unless the officer breached or failed to perform the duties of an officer and the breach or failure to perform was self-dealing, willful misconduct, or recklessness (§1735).
- This liability limitation does not in fact limit liability arising from a criminal statute or from the payment of taxes under Federal or State or local law. This limitation of liability is an option, not a statutory default.

Application: The shareholders may adopt a bylaw that provides officers with this limitation of liability. Without a bylaw, the default is that liability is not limited for officers.

4. Emergency Powers

Summary: The BCL updated its definition for emergencies to be more broadly applicable to current times (§1509). In response to these updates, the BCL provided that corporate actions taken to further ordinary business affairs of the corporation

that were taken *in accordance with emergency bylaws* are valid and binding (§1509(f)).

Application: The applicability of this change is not a suggestion by the BCL, but rather an opportunity for corporations to update their bylaws with provisions for how business will run during emergencies. If a corporation's bylaws do not contain emergency provisions, it may be advisable to draft them.

D. Should by-laws include code of conduct, sexual harassment, diversity equity and inclusion wording?

1. Bylaws are a contract between the board of directors and the company about how the board of directors will run the company.
2. Therefore, provisions like code of conduct, sexual harassment, or DEI may be better included in a handbook to guide employees.
3. However, if any of those are particularly important and foundational to the organization, they could be included in the bylaws or articles.
4. Including such wording in the bylaws is not required but shows a commitment to a standard from the top-level down, if that is the type of image you are going for.

E. Is it recommended that non-profits get Board of Director's Liability Insurance?

1. As you see above in regard to personal liability for directors and officers, especially through the new BCL reporting requirements, directors and officers are now under higher scrutiny and they are still personally liable for the actions of the organization.
2. Insurance might not be a bad idea especially for smaller and mid-sized non-profits who might not have many assets.

D. Should Board members have their own personal liability insurance?

1. Again, it is a judgment call. Board members can be subject to personal liability for their decisions and actions. Indemnification provisions may become null and void if a board member acted in bad faith or even if the organization lacks funds to indemnify the members.

2. Therefore, it certainly could be recommended for Board Members to get their own personal liability insurance.

85% of the claims are employee related - Non-profit claims are twice those of private companies – not only indemnification provisions but also a provisions that limits the liability of the directors – members when acting as a BoD may have liability

E. Fiduciary Responsibility of Board Members and Senior Management

1. Duty of Care

a. Board Members, senior management and members of committees must perform their duties in a manner they reasonably believe to be in the best interests of the corporation using the same degree of care, skill, caution and diligence that a person of ordinary prudence would use under similar circumstances.

b. Decision-makers are required to make reasonable inquiries when analyzing contracts, investments, business dealings, and other matters.

c. An individual who is acting in conformance with this standard will:

- attend and participate in board meetings on a regular basis;
- attend and participate in committee meetings when the individual is a member of the committee;
- diligently read, review, and inquire about material that affects the corporation;
- • keep abreast of the affairs and finances of the corporation; and
- use independent judgment when analyzing matters that affect the corporation

d. Decision-makers may rely on information provided by their employees, committees, attorneys, public accountants and qualified professionals as long as the decision-maker reasonably believes that the information provided is reliable.

e. Decision-makers must use their own independent judgment when evaluating information. Individuals who fail to meet the prescribed standard may be personally liable to the corporation if their actions cause financial harm.

f. Board members, trustees and senior management have a fiduciary responsibility when handling finances and investments.

(1) That simply means, they must exercise the degree of care, caution and diligence that prudent persons would exercise in handling their own personal investments and finances.

(2) Individuals who have or claim to have special knowledge or skills in the area of investment will be held to a higher standard.

(3) Fiduciaries who carelessly or negligently invest funds may be personally liable for any losses sustained.

2. DUTY OF LOYALTY

a. Board members and senior management must always perform their duties in good faith with the best interests of the organization in mind.

b. This means that they must not seek to derive private gain from business transactions that involve the nonprofit corporation or advance their own interests at the expense of the corporation.

c. Acts of self-dealing constitute a breach of fiduciary duty which may result in personal liability to the nonprofit organization.

d. Board members, trustees, and senior management should avoid conflicts of interest and even the appearance of impropriety.

e. Individuals who take advantage of corporate opportunities to make profits for themselves at the expense of the corporation may be liable for the profits they received at the organization's expense.

3. CONFLICT OF INTEREST

a. Board members and senior management have a duty to avoid potential or apparent conflicts of interest. To avoid the appearance of impropriety, it

is important for individuals to be open and honest with their fellow managers and board members at all times.

b. It is particularly important for board members to disclose the following facts:

- whether they have a potential conflict of interest with respect to any transaction, business decision or other matter in which the organization is involved;
- whether they have a financial, business or personal interest in an entity with which the nonprofit organization is or will be doing business;
- whether individuals related to them have a financial, business or personal interest in an entity with which the nonprofit organization is or will be doing business; or
- whether they serve as a director, member or employee of either a competitor of the corporation or a corporation with which the nonprofit organization is or will be doing business.

c. The board should proceed with caution when any of the above facts are present because there may be a conflict of interest.

d. An individual who has a potential conflict with respect to a particular transaction should disclose it to fellow managers and board members and abstain from participating in the negotiations and decisions surrounding that transaction.

e. To avoid the appearance of impropriety, the individual who has the conflict of interest should not be present in the room during any discussions that relate to the transaction.

Dissolution

I. Introduction

- A. For many reasons, a nonprofit may decide to dissolve and cease operations.
- B. This guide focuses on the key steps to take to follow the voluntary legal dissolution under Subchapter F under Pennsylvania law.
- C. While this guide mentions tax issues, it does not serve as a replacement for an in-depth analysis of your nonprofit corporation executed by a tax professional.
- D. Additionally, this guide is not intended to serve as legal advice, as the process for dissolving a nonprofit is complex and involves complex legal and tax issues. If you are considering dissolving a nonprofit, you should seek legal advice independent of this guide.

II. Key Issues

A. Adoption of a Plan of Liquidation and Dissolution (Mandatory)

1. Active Entity - Under Section 5972, a non-profit corporation that has already commenced business may dissolve voluntarily.

a. The begin, there must be a proposal for dissolution in one of three ways:

(1) Adoption by the board of directors or other governing body of a resolution recommending the dissolution;

(2) Petition of members entitled to cast at least 10% of the votes that all members are entitled to cast setting forth a resolution recommending dissolution, which is then directed to the board of directors; OR

(3). Any other method for proposing or adopting a resolution recommending dissolution as provided for in the organization's bylaws.

b. After a resolution has been created, it must be submitted to a vote of the members of the corporation entitled to vote.

(1) Under Section 5974, the resolution is adopted by receiving an affirmative vote of the majority of votes of members entitled to vote.

(2) If the organization has no members entitled to vote, then the resolution is adopted whenever it is adopted by the board.

c. The corporation should immediately notify each known creditor and claimant of its winding up proceedings, which is accomplished by official publication and mailing.

2. Dormant Entity

a. How to start? If dormant with no board of directors, what do you do?

(1) Depending on the term dormant dissolution starts in one of two ways. If dormant refers to never commencing business in the first place, then the members or incorporators of the non-profit (not Board) just have to file the articles of dissolution.

(2) Otherwise, for non-profits that have been active at least at some point, dissolution is started by a proposal in one of three main ways.

(a) First, the board of directors or other governing body can adopt a resolution recommending that the corporation be dissolved voluntarily.

(b) Second, 10% of the voting members can create a petition recommending dissolution.

(c) Third, there may be a provision in the bylaws allowing for another method of proposing or adopting a resolution for dissolution.

(d) Therefore, a board of directors is not necessarily needed.

b. If an organization has been dormant for a while, there may still be a governing body of some sort that runs the corporation.

c. On the other hand, there is a process for involuntary dissolution.

(1) For example, if a non-profit has been dormant but there is no means to effect a voluntary dissolution because the methods listed above are not possible, an involuntary dissolution, which is facilitated by the Orphan's Court, can be proposed by a member or director of a non-profit filing an application with the court.

(2) After a resolution has been created, it must be submitted to a vote of the members of the corporation entitled to vote. Under Section 5974, the resolution is adopted by receiving an affirmative vote of the majority of votes of members entitled to vote. If the organization has no members entitled to vote, then the resolution is adopted whenever it is adopted by the board.

B. Winding-Up (Mandatory)

1. Once the boards of directors or members approve the dissolution process, then the nonprofit must wind-up operations. Regarding the winding up process, under Section 5975, the power to wind up the organization is vested in the board or other body that elected to proceed with the dissolution in the first place.

2. Common activities involved in winding -up operations include collecting on all accounts, converting assets to cash and paying all liabilities.

3. Additionally, there are several activities required by PA law:

a. Creditor Notice - A nonprofit must mail a notice of dissolution by certified or registered mail to each creditor or claimant.

b. City of Philadelphia - A nonprofit in Philadelphia must mail a notice of dissolution by certified or registered mail to City of Philadelphia, Municipal Services Building, 1401 J.F.K. Boulevard, Public Services Concourse, Philadelphia, PA 19102.

c. Other Municipality - If the nonprofit has a place of business in another municipality, then it must send notice there as well.

d. Advertise - The nonprofit must also advertise the dissolution in a local county law reporter and in a general circulation newspaper to provide notice to creditors.

4. Distribution of Assets (Mandatory)

a. After creditors and claimants are paid, and the nonprofit has fulfilled its obligations, it must distribute the remaining assets. Distributions cannot be diverted from the intended charitable purpose without court approval.

b. In charitable organizations, all assets are classified as charitable assets (501(c)(3) assets).

(1) These assets may only be distributed to organizations that closely align with the charitable non-profit's mission and purpose.

(2) If the nonprofit is a 501(c)3, then the assets must be distributed to another 501(c)3.

(3) The nonprofit should provide notice, including the plan of dissolution, to the Attorney General of any distribution to another charitable organization.

(4) If the charitable organization wishes to distribute their assets in any other manner, then it must seek Orphan's Court approval.

c. If a nonprofit has over \$100,000 in remaining assets, then Orphans' Court must also approve distributions.

NOTE: A dissolution of assets can be written in the by-laws if the Board has a specific idea of how the assets might be distributed upon organizational distribution (i.e., to a specific other charity).

Also, for general non-charitable non-profits, a dissolution of assets aside from going to the shareholders or members may be specified in a bylaw adopted by the members. A non-profit may distribute surplus assets converted to cash among the shareholders, or if none, the members per capita.

ALSO NOTE: Property owned by non-profit – should it be sold or can it be transferred to another non-profit?

1. It depends on the type of organization. If the property was donated to the organization for a charitable purpose, it might be wisest to seek an opinion from the Orphan's Court. The asset would need to go to another 501(c)(3) organization, but there is no clarification on whether the property should be sold.

2. The general rule is that assets should be converted to cash only to the extent to cover the remaining liabilities of the organization.

3. Beyond that, it is not mandatory. Therefore, selling the property might be against the charitable purpose of the asset. It can be transferred to another charitable non-profit.

C. Tax Clearance (Mandatory)

1. A dissolved nonprofit seeking to dissolve must submit all tax forms due and pay all taxes and charges.

2. The nonprofit must then apply for tax clearance certificates from both the PA Department of Revenue and the PA Department of Labor and Industry.

D. Articles of Dissolution (Mandatory)

1. After the nonprofit discharges all liabilities, the remaining assets are distributed, and the nonprofit has received tax clearance then the nonprofit must file Articles of Dissolution with the Pennsylvania Department of State.⁷

2. The Articles of Dissolution must include:

- Name of the nonprofit and the address of its registered office;
- Names and addresses of its directors and officers;

- The manner in which the proposal to dissolve voluntarily was adopted by the nonprofit;
- A statement that all liabilities have been discharged and the assets of the nonprofit are sufficient to discharge its liabilities;
- A statement that all the remaining assets of the nonprofit have been distributed;
- A statement that no actions or proceedings are pending against the Nonprofit in any court, or
- Adequate provision has been made for the satisfaction of any judgment or decree that may be obtained against the nonprofit in each pending or proceeding action; and
- A statement that the required notice was sent to each known creditor and claimant and to each municipality in which the nonprofit has a place of business in the Commonwealth.

E. IRS Notification

1. If the nonprofit is tax exempt, then it must inform the IRS of the dissolution in the appropriate Form 990.

2. The final tax filings should include certified copies of the articles of dissolution, the plan of dissolution and the formal authorization of dissolution.

3. Additionally, the nonprofit should disclose any of the following items in Schedule N of Form 990:

- a. A description of any transferred assets and transaction fees;
- b. The asset distribution date ;
- c. The assets' fair market value; and if applicable
- d. Disclosures if an officer, director, trustee, or key employee of the entity is, or is expected to be, involved in the successor or transferee organization.

F. Dissolution Complete - Once this has been filed, dissolution is complete and the corporation ceases.