The term “nonprofit corporation” is not limited to a charitable institution. While charitable corporations are likely to be nonprofit corporations, educational institutions, religious organizations, social clubs, cultural groups, paramedic services, trade associations, and others, all may be formed as nonprofit corporations. Although nonprofit corporations may be organized for any lawful purpose “other than for pecuniary profit,” make no mistake about it—nonprofit corporations are businesses, in some cases big businesses. They purchase and sell services and sometimes goods; they are employers; and their employees are subject to compliance with tax and labor laws. When a nonprofit organization incorporates, it must comply with basic corporate formalities and make its necessary state and federal tax filings.

New Jersey nonprofit corporations are governed by Title 15A of the New Jersey Statutes. This distinguishes them from business corporations, which are governed by the New Jersey Business Corporation Act, codified as the first 16 chapters of Title 14A, and from professional corporations that are governed by the Professional Service Corporation Act, codified as Chapter 17 of Title 14A. The committee of the New Jersey State Bar Association that drafted Title 15A sought to align it, as much as possible, to the New Jersey Business Corporation Act. The thought was that unless distinguishable due to the inherent difference in their natures, ‘corporation case law’ as it develops could be applied to, and provide guidance for, practitioners of both business law and nonprofit law.

Similarities
Both business and nonprofit corporations are governed by a board. In a business corporation, board members are usually called directors. In a nonprofit corporation, board members are traditionally referred to as trustees, but they may be called directors, governors, or some other designation provided in the certificate of incorporation or bylaws.

Both business and nonprofit corporations must have officers: a president, a secretary, and a treasurer; each may have other officers as well. The officer designations in a nonprofit are usually the same as in a business corporation, but need not be. If identified as such in the corporation’s governing documents, the president could be called the grand raccoon; the secretary, the scribe; and the treasurer, the bursar.

While their titles may be the same, the officers in a nonprofit corporation are often less ‘hands on’ than in a business corporation. They usually serve without compensation. In a charitable institution the day-to-day activities are often under the supervision of an executive director; in an educational institution, a headmaster or dean; in a religious corporation, a pastor or other clergy person. These individuals are likely to be salaried employees.

Before accepting the title of trustee or officer of a nonprofit corporation (which some may do simply to embellish a resume), it is wise to think twice. The law is clear that there is no such thing as a “dummy” or “figurehead” director. Anyone assuming the title should be prepared to fulfill the duties and perform the job. The trustees and officers of a nonprofit corporation owe it—and its members if there are members—the same fiduciary duty that directors and officers of a business corporation owe to it and its shareholders.

Distinguishing Features
Notwithstanding the similarities, there are fundamental differences between business and nonprofit corporations.

While both have a board as a governing body and must pro-
vide for officers to carry out the directives of the board, a business corporation must have at least one shareholder, that is, a person or entity that is an ‘owner’ for whom or for which the corporation makes or loses money. A nonprofit corporation does not require an equivalent to a shareholder or owner. It may have a member or members, and it may grant the member or members certain rights, including those possessed by business corporation shareholders; but a nonprofit corporation may be without members.5

A hospital or a charity might be a nonprofit corporation without members. The corporate documents will authorize the trustees to choose their successors from time to time, or provide that the trustees are to be chosen periodically by persons ex-officio; for example, one each by the mayor of London, the archbishop of Canterbury, and the ambassador to the Court of St. James.

The certificate of incorporation of a New Jersey nonprofit corporation must specify whether it is with or without members, and if it is to have members, their rights are to be set forth either in the certificate of incorporation or the bylaws.

Examples of nonprofit corporations with members who have voting rights to elect the governing body are a private school where the parents elect the board of trustees, a religious institution where the congregants elect the parish council, a trade association where the participating business organizations elect the board of directors, a country club where the members elect the board of governors, or a social club where the members elect the board of raccoons.

Whereas an annual meeting of shareholders is required for a business corporation,7 provision may be made in the corporate documents of a New Jersey nonprofit corporation for the selection of trustees to be made only once every two years.8

Some nonprofits desire to apply the term “member” to recipients of their good works or donors who provide their funding. If those persons are not to have voting or other rights, the absence of those rights should be spelled out in the certificate of incorporation or the bylaws. Otherwise, counsel will discover, to his or her dismay, when some action is required to be taken by the ‘members,’ that no one knows who the members are, where they are, and what rights they may possess.

A second distinguishing feature is that whereas New Jersey and other modern business corporation statutes permit governance by a sole director,9 New Jersey nonprofit corporations must have no less than three trustees.10 This is because in a charitable, religious, educational, or even social institution, there is an inherent degree of public or quasi-public interest calling for governance by a collegial body.

A third distinguishing feature is that the certificate of incorporation for a nonprofit corporation must contain a specific purpose clause stating the reason for the nonprofit corporation’s existence.11 A business corporation’s form of general purpose clause12 will not do.

The importance of a specific purpose clause was shown in a Wisconsin decision where a nonprofit entity had been formed under that state’s business corporation act (as permitted), but by virtue of its specific purpose clause, was afforded immunity from liability under Wisconsin’s recreational immunity statute.13

Mergers

Nonprofit corporations may merge with other nonprofit corporations, but are not authorized to merge with business corporations.14 Whereas business corporations generally require mergers to be approved by a majority vote of the shareholders,15 Title 15A requires a two-thirds vote of the trustees in a nonprofit corporation without members.17

The corporate documents may vary this percentage.

In a membership nonprofit corporation, the members do not have dissenters’ rights18 enjoyed by shareholders in a business corporation.19

The Corporate Documents

In setting up a nonprofit corporation, one must be conscious of both state law and federal tax law requirements. It is not required that a nonprofit corporation seek favorable tax status from the Internal Revenue Service, but the nonprofit must do so if it desires to enjoy one of the several tax-exempt categories afforded by the Internal Revenue Code. N.J.S. 15A:2-7 specifies the basic requirements to be included in a certificate of incorporation. If the nonprofit corporation desires to obtain favorable tax treatment under the Internal Revenue Code, its certificate of incorporation and bylaws should contain certain additional provisions.

Annual Reports

As with business corporations, the New Jersey Division of Commercial Recording wants to keep in touch with, and derive some revenue from, each nonprofit corporation. To remain in good standing, an annual report form is required to be filed each year,20 together with a modest fee.21

Dot Every ‘I’; Cross Every ‘T’

Like a business corporation, the filing of a certificate of incorporation for a nonprofit corporation brings it to life. The corporation should then be organized, usually through a unanimous written ‘consent’ (in lieu of meeting) of the trustees named in the certificate of incorporation. The written consent (or the minutes of an actual meeting of the trustees) evidences such things as adoption of bylaws and election of officers,
and authorizes the opening of a bank account.

Like a business or professional corporation, it is advisable for the nonprofit corporation to record and keep minutes of its board meetings and any member meetings. Just as there are disputes between and among the principals in a business or professional corporation, ‘factions’ develop in nonprofit corporations that sometimes lead to bitter litigation.  

Some Other Things to Consider

Does the nonprofit corporation own real property? Does it own a motor vehicle or other personal property? If so, it will need insurance. In that connection, be cognizant of the terms and limitations of the Charitable Immunity Act. Consider whether the corporation’s governing body should have directors and officers liability insurance.

Determine whether the corporation is one that is subject to the Charitable Registration and Investigation Act. Additionally, it is always wise for the corporation to engage an accountant knowledgeable in accounting for nonprofit corporations.

Also keep in mind that Title 15A, enacted in 1983, replaced and substantially repealed old Title 15. Several chapters of old Title 15, involving special types of nonprofit corporations such as fire companies, were, however, saved from repeal to protect existing entities covered by those chapters. In addition, the Uniform Management of Institutional Funds Act and Chapter 19 of Title 15, pertaining to private foundations, were also saved from repeal.

Endnotes

2. Religious corporations may be formed under Title 15A, but certain religious corporations may be and have been formed under Title 16 and are governed by that title subject to N.J.S. 15A:1-3(3), N.J.S. 15A:1-4; and N.J.S. 15A:1-5.
5. N.J.S. 15A:2-8a(3)(4) and (5).
11. N.J.S. 15A:2-8a(2).
15. N.J.S. 14A:10-3(2).

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