Non-board member cannot be named to governing committee

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The Honorable Rene "Coach P" Plasencia
Representative, District 50
417 House Office Building
402 South Monroe Street
Tallahassee, Florida 32399

Dear Representative Plasencia:

You have requested an opinion regarding the correct interpretation of section 617.0825(1), Florida Statutes (2018), which is part of the "Florida Not For Profit Corporation Act ("Florida Act").[1] In pertinent part, that section provides:

"617.0825. Committees

(1) Unless the articles of incorporation or the bylaws otherwise provide, the board of directors, by resolution adopted by a majority of the full board of directors, may designate from among its members an executive committee and one or more other committees each of which, to the extent provided in such resolution or in the articles of incorporation or the bylaws of the corporation, shall have and may exercise all the authority of the board of directors[.]"

Specifically, you ask which of two interpretations is correct:

1. That—unless the bylaws and articles of incorporation do not allow the Board of Directors ("Board") to delegate authority to Board committees—a Board may designate committees composed of a number of its own members to exercise a part of its authority [to the extent allowed by section 617.0825(1)(a)-(c) and the not-for-profit corporation's bylaws and articles of incorporation]; or

2. That—unless the bylaws and articles of incorporation allow the Board to delegate authority to Board committees composed of individuals who are not required to be directors—a Board is authorized to designate committees whose membership is restricted to Board directors to exercise part of the Board's authority [to the extent allowed by section 617.0825(1)(a)-(c) and the not-for-profit corporation's bylaws and articles of incorporation].

Attorney General Ashley Moody has asked that I respond to your letter.

Our review of the Florida Act leads us to conclude that the first posited interpretation of section 617.0825(1) is correct. Section 617.0825 appears to codify the general rule "that the board of directors [has] the power to appoint and authorize a committee of their number to act for the corporation in a particular matter...although its authority to delegate powers involving the exercise of discretion and judgment is not unlimited."[2] The phrase "from among its members" modifies the sentence’s subject, the "board of directors," providing clear textual expression by

the Legislature that committees with oversight responsibilities be composed of board members. This view is consistent with the Model Non-Profit Corporation Act, after which chapter 617 was patterned, and with the interpretation reflected in a leading treatise on corporate law, Fletcher Cyclopedia of the Law of Corporations.[3]

This delegation of Board authority to a committee acting as a subset of the Board is a corollary to the general principle—set forth in section 617.0801, Florida Statutes—that "[a]II corporate powers must be exercised by, or under the authority of, and the affairs of the corporation managed under the direction of, its board of directors, subject to any limitation set forth in the articles of incorporation."4 The general principle incorporates important safeguards in governing a non-profit corporation, in that each director, by statute, is required to "discharge his or her duties as a director, including his or her duties as a member of a committee: (a) [i]n good faith; (b) [w]ith the care an ordinarily prudent person in a like position would exercise under similar circumstances; and (c) [i]n a manner he or she reasonably believes to be in the best interests of the corporation."[5] Additionally, directors may be removed by "[a] majority of all votes of the members, if the director was elected or appointed by the members[,]" and their actions may be challenged by members in derivative actions.[6]

Lastly, it appears that, where the Florida Act contemplates that an "alternative procedure" for Board or member action may be provided by the articles of incorporation, it expressly states this;[7] and where an absence of certain constraints is contemplated by the statute (unless such constraints are required by the articles of incorporation or bylaws), that is also expressly stated.[8] Thus, in section 617.0802, in defining the qualifications of directors, the Legislature provided that "[d]irectors must be natural persons who are 18 years of age or older but need not be residents of this state or members of the corporation unless the articles of incorporation or bylaws so require." (Emphasis added.) Notably, while this provision recognizes that the articles of incorporation and bylaws may impose the specific restrictions otherwise obviated by the statute, it does not contemplate that the corporate documents can provide wholly alternative qualifications for directors, or members of committees that exercise authority of the board, other than those stated in the statute.

Based on the foregoing, it appears that section 617.0825(1) allows a board of directors to designate from among its members an executive committee and one or more other committees, unless the articles of incorporation or the bylaws disallow this practice. But the statute does not permit the Board to appoint non-board members to an executive committee that is delegated Board governance functions. We trust that these informal comments will be helpful to you.

Sincerely,

Teresa L. Mussetto
Senior Assistant Attorney General

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[1] § 617.01011, Fla. Stat. (2018) ("Short title").

[2] *Yarnall Warehouse & Transfer, Inc. v. Three Ivory Bros. Moving Co.*, 226 So. 2d 887, 891 (Fla. 2d DCA 1969) (additional citations omitted).

[3] *See* 2A Fletcher Cyc. Corp. § 552.30 ("In all jurisdictions, the board of directors is given the power to fill strictly from its own membership vacancies arising on the executive committee or other committees validly delegated authority to exercise functions and powers only the board or a board committee can exercise. The Model Business Corporation Act and Model Nonprofit Corporation Act similarly so provide.") (footnotes omitted).

[4] *See also* § 617.0803, Fla. Stat. (2018) (requiring a board of directors "to consist of three or more individuals, with the number specified in or fixed in accordance with the articles of incorporation or the bylaws"); § 617.0824, Fla. Stat. (2018) (addressing quorums and voting requirements relating to corporate action undertaken by the board of directors).

[5] § 617.0830, Fla. Stat. (2018).

[6] *See* § 617.07401, Fla. Stat. (2018) ("Members' derivative actions"); *see also Larsen v. Island Developers, Ltd.*, 769 So. 2d 1071, 1072 (Fla. 3d DCA 2000).

[7] *See* § 617.0822 (2) ("Notice of meetings") (providing that, "[u]nless the articles of incorporation or the bylaws *provide for a longer or shorter period*, a special meeting of the board of directors must be preceded by at least 2 days' notice of the date, time, and place of the meeting") (emphasis added); § 617.1002 ("Procedure for amending articles of incorporation") (reflecting the manner in which amendments to the articles of incorporation must be made, "[u]nless the articles of incorporation *provide an alternative procedure*") (emphasis added).

[8] *See* § 617.0802 (defining qualifications of directors); § 617.0822(2) ("Notice of meetings") (providing that a notice of a special meeting of the board "need not describe the purpose of the special meeting *unless required by the articles of incorporation or the bylaws*") (emphasis added).