

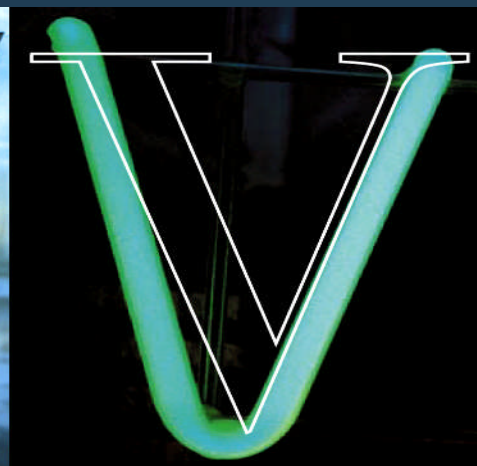
# VENABLE<sup>®</sup><sub>LLP</sub>

## The New D.C. Nonprofit Corporation Act Takes Effect on Jan. 1, 2012: Everything You Need to Know to Comply

December 19, 2011  
12:30 - 2:00 pm EST

Moderator:  
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Panelists:  
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# Today's Discussion

## The New D.C. Nonprofit Corporation Act Takes Effect on Jan. 1, 2012: Everything You Need to Know to Comply

- Overview
- General Provisions
- Board and Officer Provisions
- Membership Provisions
- Fundamental Transaction Provisions
- Tax Provisions



# Overview

## The New D.C. Nonprofit Corporation Act

- Considerably more detailed than previous statute.
- Many default rules have changed, but the New Act generally provides flexibility to alter the default rules through the corporation's articles or bylaws.
- Acknowledges and accommodates 21<sup>st</sup> Century forms of communication and doing business.
- Authorizes new forms of governance.
- Applicable January 1, 2012.



# General Provisions

## Overview of Topics

- Basic Structure of the New Act
- Incorporation Provisions
- Registered Agent Provisions
- Biennial Reports
- Corporate Recordkeeping
- Application to “Old Act” Corporations



# General Provisions

## Basic Structure of the New Act

- Title 29 of the D.C. Code—Business Organizations Code
  - <http://www.dccouncil.washington.dc.us/legislation>
  - Click on the “View the DC Code” Link
- Hub and spoke structure
  - Generally Applicable (“hub”):
    - **Chapter 1—General Provisions**
    - Chapter 2—Entity Transactions
  - Specific Entities (“spokes”):
    - Chapter 3—Business Corporations
    - **Chapter 4—Nonprofit Corporations**
    - Chapter 5—Professional Corporations
    - Chapter 6—General Partnerships
    - Chapter 7—Limited Partnerships
    - Chapter 8—Limited Liability Companies
    - Chapter 9—General Cooperative Associations
    - Chapter 10—Limited Cooperative Associations
    - Chapter 11—Unincorporated Nonprofit Associations
    - Chapter 12—Statutory Trusts



# General Provisions

## Important General Definitions

- The New Business Organizations Code is designed to allow entities flexibility to communicate and conduct business using modern technology:
  - Record—“information that is inscribed on a tangible medium or that is stored in an electronic or other medium and is retrievable in perceivable form.” D.C. Code § 29-101.02(39).
  - Sign—“means, with present intent to authenticate or adopt a record to: (A) Execute or adopt a tangible symbol; or (B) Attach to or logically associate the record with an electronic symbol, sound, or process.” D.C. Code § 29-101.02(41).



# General Provisions

## Incorporation Provisions

- Incorporating is simpler:
  - Only one incorporator required;
  - Notary unnecessary.
- Articles of incorporation require less detail:
  - Must indicate whether the corporation will have members, but no longer necessary to specify whether members have voting rights;
  - May, but need not, list initial board of directors.
    - If initial board not listed, incorporator(s) may hold initial organizing meeting to elect directors and adopt bylaws.
- Restatement of articles of incorporation now permitted.





# General Provisions

## Registered Agent Provisions

- Registered office no longer required.
- Domestic entities and qualifying foreign entities must designate and maintain a registered agent.
  - Commercial registered agent:
    - Entity names the commercial RA in Articles of Incorporation or change of registered agent form;
    - RA maintains separate listing with the District re: address, etc.
  - Non-commercial registered agent:
    - Entity names the non-commercial RA in Articles of Incorporation or change of registered agent form and must also identify RA's address in the District;
    - RA need not be a District resident, but must have District street address;
    - RA must keep District apprised of any changes to name or address.
- Change of registered agent no longer requires certification of approval of change by board or authorized officer.





# General Provisions

## Biennial Reports

- New filing deadline: April 1.
- Two-year filing cycle remains the same:
  - Initial report is due by April 1 of the year following the calendar year in which the filing entity was first formed or registered to do business in the District.
  - Subsequent reports are due by April 1 of each second calendar year thereafter.



# General Provisions

## Corporate Recordkeeping

- Recordkeeping requirements expanded.
- Records may be kept in digital form.
- Directors and members have inspection rights.



# General Provisions

## Corporate Recordkeeping

- Permanent records:
  - **Minutes** of all meetings of the board, members, and any designated body;
  - Records of all **actions taken without a meeting** by the board, members, or members of a designated body;
  - Records of all **actions taken by a committee of the board** or a designated body on behalf of the corporation.
- Additional records:
  - Appropriate **accounting** records;
  - A record of the corporation's **members**, in a form that permits preparation of a list of the names and addresses of all members, in alphabetical order by class, showing the number of votes each member is entitled to cast.



# General Provisions

## Corporate Recordkeeping

- The following records must be maintained *at the corporation's principal office*:
  - Articles of incorporation;
  - Bylaws;
  - Minutes and records required to be kept permanently from the past 3 years;
  - All communications in the form of a record to members generally within the past 3 years, including the financial statements furnished to members for the past 3 years;
  - A list of all the names and business addresses of the current directors and officers;
  - The most recent biennial report filed with the District.



# General Provisions

## Application to “Old Act” Corporations

- “Old Act” corporations:
  - Entities incorporated in the District prior to 1962 enactment of the District of Columbia Nonprofit Corporation Act.
- Phase-out provisions:
  - Old Act corporations must file a notice with the District within 2 years of the New Act’s applicability date, or be forever barred from asserting the corporation is not subject to the New Act.
  - BUT, if an Old Act corporation desires to do business in the District, it must file articles of incorporation and otherwise comply with the New Act.
  - Legislative history of the New Act expresses intent to phase out Old Act corporations. See D.C. Council Committee on Public Services and Consumer Affairs, Committee Report on Bill 18-500, at 18.



# Board and Officer Provisions

## Overview of Topics

- Meetings
- Director Terms
- Committees
- Designated Body
- Required Officers
- Standards of Conduct
- Liability
- Indemnification
- Emergency Powers



# Board and Officer Provisions

## Meetings

### ■ Quorum

- Default quorum is now a **majority of directors in office before a meeting begins.**
  - Previously was a majority of the number of directors fixed in the articles or bylaws.
- Different quorum may be established by the articles or bylaws provided it is not lower than the minimum quorum requirement.
- **Minimum quorum** is now one-third of the directors in office or two directors, whichever is greater.
  - Previously was one-third of the number of directors fixed in the articles or bylaws.





# Board and Officer Provisions

## Meetings

### ■ Notice

- Previously, meetings of the board held upon such notice as prescribed in the bylaws or by resolution of the board.
- New defaults:
  - Regular meetings:
    - Must be held with notice of the date, time, place, or purpose of the meeting, unless otherwise provided in the articles or bylaws.
    - May provide a single notice of all regularly scheduled meetings for the year at the beginning of the year (or for a lesser period) without having to give notice of each meeting individually.
  - Special meetings:
    - Must be preceded by at least 2 days' notice of the date, time, and place of the meeting, unless the articles or bylaws provide for a longer or shorter period.
    - Notice need not describe the purpose of the special meeting, unless required by the articles or bylaws.
- Articles or bylaws may authorize oral notice of board meetings.



# Board and Officer Provisions

## Director Terms

- Basic rule maintained:
  - Director terms may be specified in the articles or bylaws.
  - If not specified in the articles or bylaws, the term of a director is 1 year.
- New maximum term:
  - The term of a director may not exceed 5 years, except for:
    - Directors appointed by persons that are not members;
    - Directors who are designated in a manner other than by election or appointment.



# Board and Officer Provisions

## Committees

- Two types:
  - Board committees;
  - Advisory committees.
- Board Committees.
  - May consist of one or more directors (previously at least two directors required).
  - Board approval is required for:
    - Creation of board committees;
    - Appointment of directors to board committees.
  - Required approval threshold is the **greater** of:
    - A majority of all the directors in office; or
    - The number of directors required by the articles or bylaws to take action.



# Board and Officer Provisions

## Committees

- Board Committees.
  - Board committees may exercise the power of the board, to the extent specified by the board or in the articles or bylaws.
  - Board committees may not, however:
    - Authorize distributions;
    - Approve or propose to members actions required to be approved by the members;
    - Fill vacancies on the board or any of its committees;
    - Adopt, amend, or repeal bylaws.
- Advisory Committees.
  - The corporation may create or authorize the creation of one or more advisory committees;
  - Advisory committee members need not be directors;
  - Advisory committees are not board committees and may not exercise any powers of the board.



# Board and Officer Provisions

## Designated Body

- Some, but less than all, of the powers, authority, or functions of the board may be vested by the articles in a **designated body**.
- Members of a designated body shall have the rights, duties, and obligations of directors; to the extent board powers, authority, or functions are vested in a designated body, the directors are relieved from their liabilities with respect to those powers, authority, and functions.
- Purposes:
  - House of delegates-type governance model;
  - Committees authorized to exercise board powers that may include non-directors.



# Board and Officer Provisions

## Officers

- New Act:
  - Two separate officers required, at minimum:
    - Officer responsible for management (e.g., a “president”);
    - Officer responsible for finances (e.g., a “treasurer”).
    - Cannot be the same individual.
  - One officer must be assigned the duties of a secretary.
- Previously a president, secretary, and treasurer were required, and the president and secretary positions could not be held by the same person.



# Board and Officer Provisions

## Standards of Conduct

- Codifies common law fiduciary duties of care and loyalty.
- Directors—when discharging duty as a director, director must act:
  - In good faith;
  - In a manner the director reasonably believes to be in the best interest of the corporation;
  - With the care that a person in a like position would reasonably believe appropriate under similar circumstances.
- Officers—when discharging duty as an officer, officer must act:
  - In good faith;
  - In a manner the officer reasonably believes to be in the best interest of the corporation;
  - With the care that an ordinarily prudent person in a like position would exercise under similar circumstances.





# Board and Officer Provisions

## Standards of Conduct

- Disclosure of material information:
  - A director must disclose to other board or committee members information not already known by them but known by the director to be material to the discharge of his or her decision-making or oversight functions, except to the extent disclosure would violate a duty imposed by law, a legally enforceable obligation of confidentiality, or a professional ethics rule.
  - An officer has a duty to:
    - Inform superior officer, board, or committee thereof to whom the officer reports information about the affairs of the corporation known to the officer, within the scope of the officer's functions, and known by the officer to be material to the superior officer, board, or committee thereof;
    - Inform superior officer, another appropriate person within the corporation, the board, or a committee thereof, of any actual or probable material violation of law involving the corporation, or material breach of duty to the corporation by an officer, employee, or agent of the corporation, that the officer believes has occurred or is likely to occur.



# Board and Officer Provisions

## Standards of Conduct

- Conflicted Interest Transactions
  - A transaction between the corporation and any director, officer, or member having an interest in the transaction shall not be void or voidable solely for that reason, provided:
    - The transaction is **fair to the corporation** at the time it is authorized; or
    - The material facts as to the relationship or interest are **disclosed** and the transaction is then **approved in good faith** by vote of the **disinterested directors or the members**.
- Business Opportunities
  - A director may avoid liability for taking for himself, directly or indirectly, a business opportunity in which the corporation may be interested, provided:
    - The director first **brings the opportunity to the corporation's attention**, and
    - The **corporation disclaims its interest** pursuant to the procedures for a conflicted interest transaction.



# Board and Officer Provisions

## Standards of Conduct

- Loans to directors and officers
  - Continue to be prohibited.
  - New carve-outs:
    - Advances to pay reimbursable expenses reasonably expected to be incurred by a director or officer;
    - Advances to pay premiums on life insurance if advance is secured by the cash value of the policy;
    - Advances for expenses related to indemnification;
    - Loans or advances pursuant to employee benefit plans;
    - A loan secured by the principal residence of an officer;
    - A loan to pay relocation expenses of an officer.



# Board and Officer Provisions

## Liability

- Director Liability to the Corporation or its Members
  - **General Rule**
    - A director will not be liable to the corporation or its members unless the party asserting liability establishes that the director failed to meet the required standards of conduct for directors in discharging his or her duties.
  - **Limited Liability for Money Damages**
    - Notwithstanding the general rule, a director is not liable to the corporation or its members for any action taken or any failure to take any action, as a director, except for liability for:
      - Amount of financial benefit received to which the director is not entitled;
      - Intentional infliction of harm;
      - Approval of or assent to unlawful distribution;
      - Intentional violation of criminal law.
    - **Automatically applies** to directors of **charitable corporations** (i.e., organizations eligible for exempt status under Section 501(c)(3) of the Internal Revenue Code).
    - Directors of **non-charitable corporations** may **only qualify** if the limitation is **specified in the corporation's articles**.



# Board and Officer Provisions

## Liability

- Volunteer Immunity
  - New Act retains provisions of current law providing volunteers of nonprofit corporations with limited immunity from civil liability to third parties in connection with their volunteer service.
  - **Liability Insurance Required**
    - The volunteer immunity protections apply only if the corporation maintains a minimum level of liability insurance:
      - Not less than \$200,000 per individual claim;
      - Not less than \$500,000 per total claims arising from the same occurrence.
    - Exception from the insurance requirement is retained for 501(c)(3)s having annual total functional expenses, exclusive of grants and allocations, of less than \$100,000.
  - Volunteers include directors, officers, and others who perform services for the corporation without compensation other than reimbursement of expenses.
  - Does not relieve the corporation from liability, but the corporation is liable only to the extent of the applicable limit of insurance coverage it maintains.



# Board and Officer Provisions

## Indemnification

- New detailed provisions governing when a corporation must, may, and may not indemnify a director or officer.
- Previously, the Act permitted indemnification against expenses actually and necessarily incurred in connection with the defense of any proceeding in which a director or officer was made a party by reason of having been a director or officer, except where the individual is adjudged liable for negligence or misconduct in performance of a duty.



# Board and Officer Provisions

## Indemnification

- Mandatory
  - The corporation **must indemnify** a director or officer to **the extent he or she was successful, on the merits or otherwise**, in the defense of any proceeding to which he or she was made a party because of his or her position with the corporation **against reasonable expenses** incurred in connection with the proceeding.
  
- Prohibited
  - The corporation **may not**, unless ordered by a court, **indemnify** a director or officer:
    - In connection with **a proceeding by or in the right of the corporation**, except for reasonable expenses incurred in connection with the proceeding if it is determined that he or she has met the relevant standard of conduct;
    - In connection with **any proceeding** for which the director or officer was **adjudged liable** on the basis of **receipt of a financial benefit to which he or she was not entitled**, whether or not involving action in an official capacity.





# Board and Officer Provisions

## Indemnification

- Permissible
  - The corporation **may** indemnify an individual who is a party to a proceeding because he or she was a director or officer against **liability** incurred in the proceeding only if specific procedures are followed:
    - Authorization:
      - Generally must be authorized in each specific instance;
      - But may be authorized in advance through an obligatory provision of the articles or bylaws, or by resolution of the board.
    - Determination:
      - Determination required by vote of the disinterested directors, the members, or by special legal counsel that indemnification is permissible because the director or officer has met the applicable standard of conduct;
      - Must be made in each specific instance.



# Board and Officer Provisions

## Indemnification

- Advance for expenses
  - The corporation may advance funds to pay for or reimburse expenses incurred before final disposition of a proceeding, if:
    - Affirmation from the individual that he or she qualifies;
    - Agreement by the individual to repay any funds advanced if the individual is ultimately not entitled to indemnification; and,
    - Authorization by the board (or may be authorized in advance through an obligatory provision of the articles or bylaws, by resolution of the board, or by contract approved by the board or members).



# Board and Officer Provisions

## Indemnification

- Altering the default:
  - Broader indemnification may be authorized in the articles of incorporation:
    - May permit or make obligatory indemnification of a director for liability to any person for any action taken, or any failure to take any action, as a director, except for liability for:
      - Receipt of financial benefit to which the director is not entitled;
      - Intentional infliction of harm;
      - Approval of or assent to unlawful distribution;
      - Intentional violation of criminal law.
  - Indemnification rights set forth in the statute may be narrowed by a provision in the corporation's articles or bylaws.
- Indemnification of employees, agents, or other volunteers is permitted.



# Board and Officer Provisions

## Emergency Powers

- If emergency powers are authorized in the articles or bylaws, in the event of an emergency, the board may:
  - Modify lines of succession to accommodate incapacity of any director, officer, employee, or agent;
  - Relocate the principal office or designate alternative principal offices, or authorize the officers to do so.
- Emergencies exist if a quorum of directors cannot be readily assembled because of some catastrophic event.
- During an emergency:
  - Notice need only be given to those directors it is practicable to reach, and in any practicable manner;
  - One or more officers of the corporation present at a board meeting may be deemed directors for the meeting.



# Membership Provisions

## Overview of Topics

- “Member” Definition
- Voting
  - Voting Entitlement
  - Voting for Directors
- Meetings
  - Notice
  - Quorum
- Action by Ballot
- Delegates
- Designated Body
- Amendments to Articles and Bylaws
- Inspection of Membership List
- Inspection of Records
- Financial Statements



# Membership Provisions

## “Member” definition

- Previously – “one having membership rights in a corporation in accordance with provisions of its articles of incorporation or bylaws.”
- New law – “any person that has the right to select or vote for election of directors or delegates or vote on any fundamental transaction.”
  - Can have individuals/entities called “members” that do not have membership rights.



# Membership Provisions

## Delegates

- Person elected or appointed to vote in a representative assembly for the election of directors or other matters.
- Created by articles of incorporation or bylaws (note conflict with 29-406.12(a)).
- Purpose:
  - House of Delegates-type governance for making policy decisions.
  - Committee consisting of individuals who are not directors.



# Membership Provisions

## Designated Body

- A person or group that has been vested with some, “but less than all” powers of the board of directors or members (or both). See D.C. Code § 406.12.
  - No illumination on what some but less than all means.
  - Member of a designated body does not have to be: (1) an individual; (2) a director; or (3) a resident of the District of Columbia.
  - If vested with board power, must be created in articles of incorporation.





# Membership Provisions

## Voting

- New Default—each member is entitled to one vote on each matter voted on by the members, except as otherwise provided in articles or bylaws.
- Previously, members were only entitled to vote as provided by articles or bylaws.
  - Organizations with members should review matters on which statute grants right to vote (such as fundamental transactions listed in 29-401.02(20)).
- Voting for directors—plurality of votes cast (unless otherwise provided in articles/bylaws).
- No cumulative voting unless permitted by articles / bylaws (unless “grandfathered in”).



# Membership Provisions

## Meetings

- New default quorum—majority of votes entitled to be cast; can be greater or lesser in articles or bylaws (previously was 1/10 of votes).
- Authorizes Electronic Meetings
  - via the Internet or *“other electronic communications technology that permits members to read or hear the proceedings substantially concurrently with their occurrence, to vote on matters submitted, to pose questions, and to make comments.”*
- Higher default for special meetings with cap at 25%.
  - 10%; previously was 5% (organizations that rely on default would have to amend articles/bylaws).



# Membership Provisions

## Actions by Ballot

- New default is that action can be taken without a meeting by a membership corporation if corporation delivers a ballot to every member entitled to vote.
- Ballot shall follow guidelines for form:
  - Be in form of record (can be electronic).
  - Set forth proposed action.
  - Provide opportunity to vote for or against candidate for election or director.
- Number of votes cast must equal quorum for meeting and number of votes authorizing action must be same as required to take action at meeting.
- Solicitation to vote by ballot must also state (1) number of responses needed for quorum; (2) percentage of approvals needed; and (3) time in which ballot must be received.



# Membership Provisions

## Amendments to Articles and Bylaws

- Articles – Membership Corporation
  - Amendments must be approved by board and submitted to members entitled to vote.
    - Except – administrative amendments.
    - Except – members can propose and adopt amendments without approval by board if proposed by 10% or more of members entitled to vote (or greater or lesser number as specified in articles).
    - Additionally, if required by articles or bylaws, must also submit to a designated body.
- Articles – Nonmembership Corporation
  - Board may adopt amendments (unless otherwise provided in articles of incorporation).
    - Must also be approved by (1) designated body if required by articles or bylaws, (2) persons who appoint directors if other than board\*, and (3) individual who is a designated director\*.



# Membership Provisions

## Amendments to Articles and Bylaws

### ■ Bylaws

- Members may amend or repeal corporation’s bylaws (unless otherwise provided in articles or bylaws).
- Board, of membership or nonmembership corporation, may amend or repeal bylaws (unless otherwise provided in articles or bylaws; or power reserved to members or designated body in whole or in part).
  - However, in a membership corporation, certain amendments require member approval (unless otherwise provided in articles/bylaws and not to be amended by board or designated body).
    - Changing rights of certain members—voting, dissolution, etc.;
    - Levying dues;
    - Relating to termination/suspension of members.



# Membership Provisions

## Inspection of Membership List

- Corporation must prepare list of members entitled to notice of meeting including (i) address of each member and (ii) number of votes member is entitled to cast at meeting.
- Available for inspection by members two days after notice of meeting given until meeting.
- Member must be allowed to copy upon written demand showing “proper and relevant purposes.”
- Also, different procedure under s. 29-405.20(f)—permits corporation to offer alternative method for achieving purpose.
- Failure to make list available does not affect validity of action.



# Membership Provisions

## Inspection of Records

- Members granted right to inspect corporate records required to be maintained by new law upon written demand and 5 days' notice (articles, bylaws, minutes and records of action; all communications with members for last three years; list of directors and officers and business addresses; most recent biennial report).
  - Proper purpose required for: meeting minutes older than three years, accounting records, membership list.
- Right can be abolished by articles or bylaws (except right to see membership list and matters in litigation).



# Membership Provisions

## Financial Statements

- In separate section, requires corporation to provide members with latest annual financial statements upon written demand.
  - Must be accompanied by accountant's report (if applicable) or president's statement that prepared according to generally accepted accounting principles or describing preparation.
  - Nonprofit may impose reasonable charge.
  - Right of inspection cannot be abolished.





# Fundamental Transactions

## Overview of Topics

- Overview
- Amendments by Third Parties
- Domestication
- Notice of Charitable Dissolution
- Other Transactions



# Fundamental Transactions

## Definition

- New Act defines “fundamental transactions” as follows:
  - Amendment to the articles or bylaws;
  - Merger;
  - Membership exchange;
  - Sale of all or substantially all of the assets;
  - Domestication;
  - Conversion;
  - Dissolution.



# Fundamental Transactions

## Amendments

- Articles may require that an amendment to the articles be approved by a specified person or group of persons in addition to the board of directors and members.
- Same for bylaws (only provision allowing third-party approval can be in either the articles or the bylaws).
- Helpful for national-chapter relationships, parent-affiliate relationships.



# Fundamental Transactions

## Domestication

- Domestication permits a nonprofit corporation to transfer its jurisdiction of incorporation without having to create or merge into a different legal entity.
- Domestication must be an authorized transaction under the laws of both the new and old jurisdictions.
- Potential benefits:
  - May be possible to maintain existing recognition of tax-exempt status by the IRS, though no word yet from IRS;
  - Avoid need to assign contracts.



# Fundamental Transactions

## Charitable Dissolution

- Notice to Attorney General:
  - A charitable corporation must now provide a notice to the Attorney General of the District of Columbia that it intends to dissolve prior to delivering articles of dissolution to the District.
  - No timeframe specified.
  - Statute provides that the notice “does not delay or otherwise affect the dissolution process.”



# Fundamental Transactions

## Other Transactions

- Provisions for additional fundamental transactions (other than amendments to the articles of incorporation or bylaws of a membership corporation) not significantly different, although membership approval thresholds and/or requirements have changed for transactions such as mergers and sales of all or substantially all assets.
- Restrictions on disposition of charitable assets:
  - Property held in trust or otherwise dedicated to a charitable purpose may not be diverted from its purpose in a sale of assets unless the corporation obtains an appropriate court order to the extent required by and pursuant to the laws of the District on cy pres or otherwise dealing with the nondiversion of charitable assets.



# Tax Provisions

## Effective Date of Local Income Tax Exemption

- Exemption from local income and franchise tax shall be effective on the effective date of the exemption determination letter issued for the organization by the Internal Revenue Service.
- Previously, local exemption was effective as of the date of application to the District for recognition.
- Application to the District for recognition of local tax exemption still required.



# Questions and Discussion

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