



To: Kathryn Coyne, Director, Delaware Sea Grant

From: Catherine Janasie, Research Counsel II, National Sea Grant Law Center, University of Mississippi School of Law

Re: Advisory Council Bylaws Liability Clause (NSGLC-19-04-07)

Date: December 19, 2019

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### **Advisory Request Summary**

Delaware Sea Grant has asked the National Sea Grant Law Center (NSGLC) to research potential models for a liability clause in the bylaws of the Delaware Sea Grant Advisory Council. While performing this research, we identified two different issues for consideration: 1) the difference between a board of directors and an advisory board or council; and 2) the effect of the liability clause itself.

Under Delaware law, corporations, including non-profit ones, are required to have a board of directors.<sup>1</sup> The board of directors serves as the corporation's governing body with specific voting requirements. Further, each director on the board has a fiduciary duty to the company, and Delaware law insulates them if they rely in good faith on the company's records or statements of the company's employees.<sup>2</sup> A corporation can decide to further protect its board of directors by indemnifying them in its certificate of incorporation, meaning the company will take on the liability of the board of directors in a potential lawsuit.

Advisory boards or councils are different. They are not regulated or protected by statutory law, and they do not have a fiduciary duty to the corporation. However, advisory boards or councils also should not have any decision-making authority. Their advice should have no binding effect on the corporation. As long as the advisory council is not involved in the decision-making process, its members should not be liable. Delaware law recognizes this. In a case deciding the liability of an advisory board to a limited liability partnership, a Delaware court noted that "the ability to offer ideas cannot be construed as an ability to manage the affairs of" the entity and that "the suggestion that the Advisory Board participates in management simply because it contributes information to the decision-making process is untenable."<sup>3</sup> However, if the advisory council or

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<sup>1</sup> Del. Code Ann. Tit. 8, § 141(a). A corporation can indicate in its certificate of incorporation another management structure.

<sup>2</sup> Id. at § 141(e).

<sup>3</sup> Werner v. Miller Tech. Mgmt., L.P., 831 A.2d 318 (Del. Ch. 2003).



board is perceived to be involved in the decision-making process of an entity, the council or board could be liable for those decisions.

Therefore, it is a best management practice to note in the bylaws of an Advisory Council that the purpose of the council is only to provide feedback and advice, and is not involved in the decisionmaking of the organization. This could be done in both the purpose statement and in describing the duties of the board. Further, in practice the Advisory Council should not be involved in the decisionmaking process in order to avoid liability.

Some of the purpose statements that we found started with a strong statement of the Advisory Council's advisory role. Example language for the purpose statement includes:

- "The purpose of the Community Advisory Board (CAB) shall be to advise the Board of Directors of **[STATION]**'s effectiveness in meeting the specialized educational and cultural needs of the communities it serves."<sup>4</sup>
- "The purpose of this Board shall be to advise, assist and support and advocate for the Farmworkers Jobs and Education Program on matters that will strengthen employment opportunities for clients served by our agency."<sup>5</sup>

As to a liability clause being included in the bylaws, such a clause would not insulate the Advisory Council from liability from third parties, unless the entity it is advising has the intent to insulate the Advisory Council from liability and phrases the clause in this way. As Delaware Sea Grant is part of the larger University of Delaware, you likely would not have this power if that was your intent. However, a liability clause could be another place to note that the Advisory Council does not incur liability for only providing advice.

I hope you find this information helpful. If you have further questions, please let us know.

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<sup>4</sup> PUB. MEDIA BUS. ASS'N, SAMPLE COMMUNITY ADVISORY BOARD BYLAWS, <http://www.pmbaonline.org/sites/default/files/Sample%20Community%20Advisory%20Board%20Bylaws%202.docx>.

<sup>5</sup> FARMWORKERS JOBS AND EDUC. PROGRAM, ADVISORY BOARD CHARTER/BY-LAWS, <http://www.fldoe.org/core/fileparse.php/5654/urlt/fjep-advisory-board-charter.pdf>.