

Memorandum 76-43

Subject: Study 77.290 - Nonprofit Corporations (Additional Conforming Provisions)

Attached to this memorandum are additional and conforming revisions that will pick up definitions, penalties, and other provisions that relate to Chapters 15 and 16 of the new Nonprofit Corporation Law. The following brief comments indicate the need for the conforming additions or revisions.

§ 5113. Mailing

A needed definition.

§ 5114. Financial statements to be prepared in accordance with generally accepted accounting principles

This is a new provision, not found in the repealed business corporations law. The definition may be useful, but the staff has simplified the definition by omitting the portion relating to consolidated statements.

§ 5115. Independent accountant

A needed definition.

§ 5149. Acknowledged

A needed definition. The corrective bill would revise the last portion of subdivision (b) to read: ". . . instrument is the act and deed of the ~~corporation~~ person or ~~of the~~ persons executing the same ~~as the case may be~~ ." Should this change be included in Section 5149? Note that the first portion of subdivision (b) refers only to "persons" and does not include "person" only.

§ 5167. Domestic nonprofit corporation

A needed definition. We will need later to draft a definition of foreign nonprofit corporation. Also, we will need to check each section where either domestic nonprofit corporation or foreign nonprofit corporation is used to be sure the terms are used in the defined sense.

§ 5177. Proper county

A needed definition.

§ 5250. Required contents of articles

This provision should be included if the principal office is omitted and designation of an agent for process is mandatory. Memorandum 76-44 has attached a letter objecting to the inclusion of this provision.

Chapter 21.5--Enforcement by Attorney General

Section 1508 of the new business corporations law is taken from former Section 2240, which applied to sections that clearly applied to nonprofit corporations. Note that the section does not deal with the problem of the case where no answer at all is received. Perhaps the failure to answer would be embraced in the phrase "if the answer is not satisfactory."

§ 7200. Failure to keep records or submit financial statements

Section 2200 of the new business corporations law continues the substance of former Section 3015, which apparently applied to nonprofit corporations.

§ 7202. Additional remedies not affected; remission of penalty

Section 2202 of the new business corporations law continues the substance of former Section 3017, which apparently applied to nonprofit corporations.

§ 7254. False report or statement; refusal to keep book or post notice; criminal penalty

Section 2254 of the new business corporations law continues the substance of former Section 3019, which apparently applied to nonprofit corporations.

§ 7255. Fraudulent records; criminal penalty

Section 2255 of the new business corporations law continues the substance of former Section 3020, which apparently applied to nonprofit corporations. The Code Commission Note to Section 3020 notes that "shareholder" was substituted for "member" and stated: "Presumably 'member' is intended to include a shareholder of a stock corporation, since the purpose of the provision applies equally to both."

Code of Civil Procedure § 416.10 (technical amendment)

The amendments are technical. Additional conforming amendments will be required in this section.

Revenue & Taxation Code § 25936 (technical amendment)

This is a technical amendment to a new section added to the Revenue and Taxation Code by the bill that enacted the new business corporations law.

Respectfully submitted,

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Executive Secretary

ADDITIONAL AND CONFORMING PROVISIONS§ 5113. Mailing

5113. Any reference in this division to mailing means first-class mail, postage prepaid, unless registered mail is specified. Registered mail includes certified mail.

Comment. Section 5113 is the same as Section 113.

§ 5114. Financial statements to be prepared in accordance with generally accepted accounting principles

5114. All references in this division to financial statements, balance sheets, statements of assets and liabilities, and statements of principal changes in assets and liabilities of a nonprofit corporation and all references to assets, liabilities, revenue, receipts, expenses, disbursements, and similar accounting items of a nonprofit corporation mean such financial statements or such items prepared or determined in accordance with generally accepted accounting principles then applicable, and fairly presenting the matters which they purport to present, subject to any specific accounting treatment required by a particular section of this division.

Comment. Section 5114 is the same in substance as Section 114 with revisions to reflect the terminology used in this division with respect to the financial matters of nonprofit corporations. The portion of Section 114 relating to consolidated statements where the corporation has subsidiaries has been omitted in Section 5114. See, e.g., Section 6521.

Policy Issues:

Is this section necessary? Recommendation: Yes.

Should the portion relating to consolidated statements be omitted? Recommendation: Yes.

§ 5115. Independent accountant

5115. As used in this division, independent accountant means a certified public accountant or public accountant who is independent of the nonprofit corporation as determined in accordance with generally accepted auditing standards and who is engaged by the nonprofit corporation to audit its financial statements or perform other accounting services.

Comment. Section 5115 is the same in substance as Section 115.

§ 5149. Acknowledged

5149. "Acknowledged" means that an instrument is either:

(a) Formally acknowledged as provided in Article 3 (commencing with Section 1130) of Chapter 4 of Title 4 of Part 4 of Division Second of the Civil Code, or

(b) Accompanied by a declaration in writing signed by the persons executing the same that they are such persons and that the instrument is the act and deed of the corporation or of the persons executing the same, as the case may be.

Any certificate of acknowledgment taken without this state before a notary public or a judge or clerk of a court of record having an official seal need not be further authenticated.

Comment. Section 5149 is the same as Section 149.

Note. "Acknowledged" is used in Section 6534.

§ 5167. Domestic nonprofit corporation

5167. "Domestic nonprofit corporation" means a nonprofit corporation formed under the laws of this state.

Comment. Section 5167 is the same in substance as Section 167.

§ 5177. Proper county

5177. "Proper county" means the county where the principal executive office of the nonprofit corporation is located or, if the principal executive office of the nonprofit corporation is not located in this state, or the nonprofit corporation has no such office, the County of Sacramento.

Comment. Section 5177 is the same in substance as Section 177.

§ 5250. Required contents of articles

5250. The articles of incorporation shall set forth:

* * * * *

(e) The name and address in this state of the nonprofit corporation's initial agent for service of process in accordance with Section 6532.

Comment. Subdivision (e) of Section 5250 is the same in substance as subdivision (c) of Section 202.

Policy Issue:

Should designation of an agent for service of process be mandatory?
Recommendation: Yes. (This issue is discussed and will be considered in connection with the discussion of proposed Section 6532.)

Background: Memorandum 76-36.

CHAPTER 21.5. ENFORCEMENT BY ATTORNEY GENERAL

§ 7150. Enforcement by Attorney General

7150. The Attorney General, upon complaint that a corporation is failing to comply with the provisions of Chapter 6 (commencing with Section), Chapter 7 (commencing with Section), Chapter 15 (commencing with Section 6510), or Chapter 16 (commencing with Section 6610), may in the name of the people of the State of California, send to the principal executive office of such nonprofit corporation notice of the complaint. If the answer is not satisfactory, the Attorney General may institute, maintain, or intervene in such suits, actions, or proceedings of any type in any court or tribunal of competent jurisdiction or before any administrative agency for such relief by way of injunction, the dissolution of entities, the appointment of receivers, or any other temporary, preliminary, provisional, or final remedies as may be appropriate to protect the rights of members or to undo the consequences of failure to comply with such requirements. In any such action, suit, or proceeding, there may be joined as parties all person and entities responsible for or affected by such activity.

Comment. Section 7150 is the same in substance as Section 1508.

CHAPTER 22. CRIMES AND PENALTIES

§ 7200. Failure to keep records or submit financial statements

7200. (a) Every nonprofit corporation is subject to penalty as provided in this section if the nonprofit corporation neglects, fails, or refuses to do any of the following:

(1) Keep or cause to be kept or maintained the record of members, or the books and records of account, required by this division to be kept or maintained.

(2) Prepare or cause to be prepared or submitted any financial statements required by this division to be prepared or submitted, including but not limited to statements required pursuant to Section 6527.

(b) The penalty is twenty-five dollars (\$25) for each day that such failure or refusal continues, beginning 30 days after receipt of a written request that the duty be performed from one entitled to make the request, up to a maximum of one thousand five hundred dollars (\$1,500).

(c) The penalty shall be paid to the member or members jointly making the request for performance of the duty and damaged by the neglect, failure, or refusal, if suit therefor is commenced within 90 days after the written request is made; but the maximum daily penalty because of failure to comply with any number of separate requests made on any one day or for the same act is two hundred fifty dollars (\$250).

Comment. Section 7200 is based on Section 2200. Section 7200 is phrased to use the terminology used in the relevant provisions of the nonprofit corporation law.

Cross-Reference: § 7202--Cumulative remedy.

§ 7201. Failure to enter transfer of membership

[Note. This section will be drafted after the transfer of membership provisions have been drafted. The comparable provision of the business corporations law is Section 2201.]

§ 7202. Additional remedies not affected; remission of penalty

7202. (a) Any penalty prescribed by Section 7200 or Section 7201 is in addition to any remedy by injunction or action for damages or by writ of mandate for the nonperformance of acts or duties enjoined by law upon the nonprofit corporation or its directors or officers.

(b) The court in which an action for any such penalty is brought may reduce, remit, or suspend the penalty on such terms and conditions as it may deem reasonable when it is made to appear that the neglect, failure, or refusal was inadvertent or excusable.

Comment. Section 7202 is the same in substance as Section 2202.

Cross-Reference: §§ 7254, 7255--Criminal liability of directors and officers.

§ 7254. False report or statement; refusal to keep book or post notice; criminal penalty

7254. Every director, officer, or agent of any nonprofit corporation, domestic or foreign, is guilty of a felony if he does any of the following:

(a) Knowingly concurs in making, publishing, or posting either generally or privately to the members or other persons (1) any written report, exhibit, statement of its affairs or pecuniary condition, or notice containing any material statement which is false, or (2) any untrue or willfully or fraudulently exaggerated report, account, or statement of operations, values, activities, revenue or receipts, expenses or disbursements, or prospects, or (3) any other paper or document intended to produce or give, or having a tendency to produce or give, the memberships in such nonprofit corporation a greater value or less apparent value than they really possess.

(b) Refuses to make any book entry or post any notice required by law in the manner required by law.

Comment. Section 7254 is comparable to Section 2254. The language of Section 2254 has been revised to reflect the language used in the nonprofit corporation law.

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§ 7255

§ 7255. Fraudulent records; criminal penalty

7255. (a) Every director, officer, or agent of any nonprofit corporation, domestic or foreign, who knowingly receives or acquires possession of any property of the nonprofit corporation, otherwise than in payment of a just demand, and, with intent to defraud, omits to make, or to cause or direct to be made, a full and true entry thereof in the

books or accounts of the nonprofit corporation is guilty of a public offense.

(b) Every director, officer, agent, or member of any nonprofit corporation, domestic or foreign, who, with intent to defraud, destroys, alters, mutilates, or falsifies any of the books, papers, writings, or securities belonging to the nonprofit corporation or makes or concurs in omitting to make any material entry in any book of accounts or other record or document kept by the nonprofit corporation is guilty of a public offense.

(c) Each public offense specified in this section is punishable by imprisonment in a state prison for not more than 10 years or by imprisonment in a county jail for not exceeding one year or a fine not exceeding five hundred dollars (\$500) or by both such fine and imprisonment.

Comment. Section 7255 is the same in substance as Section 2255.

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CCP § 416.10

CODE OF CIVIL PROCEDURE

§ 416.10 (technical amendment)

SEC. ____ . Section 416.10 of the Code of Civil Procedure is amended to read:

416.10. A summons may be served on a corporation by delivering a copy of the summons and of the complaint:

(a) To the person designated as agent for service of process as provided by any provision in Sections ~~201~~ 202 , 1502, 2105 ~~or~~ 2107 .

5250, 6532, or 6533 of the Corporations Code (or Sections 3301 to 3303, inclusive, or Sections 6500 to 6504, inclusive, of the Corporations Code as in effect on December 31, 1976, with respect to corporations to which they remain applicable);

(b) To the president or other head of the corporation, a vice president, a secretary or assistant secretary, a treasurer or assistant treasurer, a general manager, or a person authorized by the corporation to receive service of process;

(c) If the corporation is a bank, to a cashier or assistant cashier or to a person specified in subdivision (a) or (b); or

(d) When authorized by any provision in Sections 1701, 1702, 2110 or 2111 or Chapter 17 (commencing with Section 6710) of the Corporations Code (or Sections 3301 to 3303, inclusive, or Sections 6500 to 6504, inclusive, of the Corporations Code as in effect on December 31, 1976, with respect to corporations to which they remain applicable); as provided by such provision.

Comment. The amendments of Section 416.10 are technical. The amendment to subdivision (a) to change "201" to "202" corrects an obvious error in reference. The addition of the references to Sections 5250, 6532, and 6533 in subdivision (a) picks up provisions requiring nonprofit corporations to designate agents for service. The addition of the reference to Chapter 17 (commencing with Section 6710) picks up the chapter relating to service of process on domestic nonprofit corporations. [Additional technical additions will be required to Section 416.10, and the Comment to this section will be expanded accordingly.]

REVENUE & TAXATION CODE

§ 25936 (technical amendment)

SEC. ____ . Section 25936 of the Revenue and Taxation Code is amended to read:

25936. Upon certification by the Secretary of State pursuant to subdivision (a) of Section 2204 or subdivision (a) of Section 6540 of the Corporations Code, the Franchise Tax Board shall assess a penalty of two hundred fifty dollars (\$250). Such penalty shall be a final assessment due and payable at the time of assessment but no interest shall accrue thereon. The assessment shall be collected as other taxes, interest and penalties are collected by the Franchise Tax Board unless the Secretary of State decertifies the name of the corporation as provided in subdivision (e) of Section 2204 or subdivision (e) of Section 6540 of the Corporations Code.

Comment. Section 25936 is amended to insert appropriate references to provisions relating to nonprofit corporations.