

969/023

TENTATIVE DRAFT

of

PORTIONS OF

NEW DIVISION 2 (GENERAL NONPROFIT CORPORATION LAW)

AND

NEW DIVISION 4 (PROVISIONS APPLICABLE TO CORPORATIONS GENERALLY)

May 12, 1976

CALIFORNIA LAW REVISION COMMISSION
STANFORD LAW SCHOOL
STANFORD, CALIFORNIA 94305

DESCRIPTION OF CONTENTS

Contents; plans for augmentation. This binder contains portions of the Law Revision Commission's tentative draft of the new General Non-profit Corporation Law and new Division 4 (Provisions Applicable to Corporations Generally). The tentative draft will be augmented as new provisions are approved. In case of revisions of provisions contained in the binder, replacement pages or replacement chapters will be provided as necessary.

Remainder of statute available in staff draft form. This binder does not contain a complete draft; some chapters have not yet been considered and tentatively approved by the Commission. These chapters are in staff draft form. The general outline of Division 2 in this binder indicates the staff memorandum that includes the staff draft of each chapter that is not included in this binder. The Commission will provide interested persons with a copy of each such memorandum upon request.

"Tentatively Approved" sections. Only those sections with the annotation "Tentatively Approved" have received the tentative approval of the Law Revision Commission. Approval of these sections is tentative only. Some will require revision and coordination with other provisions of the nonprofit corporation statute as they are produced. Moreover, all sections will be reviewed in light of the comments received from the State Bar Committee.

Corrective bill (AB 2849) on General Corporation Law. The material in the binder was prepared before the April 21, 1976, amendments to Assembly Bill 2849 (General Corporation Law corrective bill) were available in printed form. The Commission will review the amendments made in the corrective bill on April 21 and any later amendments to AB 2849 at the same time it reviews the comments of the State Bar Committee on Corporations on the material in the binder.

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Part 1 of Division 2 of the Corporations Code (repealed)
General Nonprofit Corporation Law (§§ 9000-9802)

404/103

§ 5000

Tentatively Approved
January 1976

DIVISION 2. GENERAL NONPROFIT CORPORATION LAW

CHAPTER 1. GENERAL PROVISIONS AND DEFINITIONS

Article 1. General Provisions

§ 5000. Short title

5000. This division shall be known and may be cited as the General Nonprofit Corporation Law.

Comment. Section 5000 continues former Section 9000. For a comparable provision, see Section 100(a)(General Corporation Law).

404/396

§ 5101

Tentatively Approved
January 1976

§ 5101. Application of general provisions

5101. Unless the provision or the context otherwise requires, the provisions of this chapter govern the construction of this division.

Comment. Section 5101 is the same in substance as Sections 5 (Corporations Code) and 101 (General Corporation Law). Unless otherwise provided in this division, the general provisions and definitions found among the general provisions of the Corporations Code are applicable. See, e.g., Sections 6-18.

Substance Tentatively
Approved January 1976

§ 5102. Scope of division

5102. (a) Subject to the provisions of Chapter 23 (transition provisions), the provisions of this division apply to every nonprofit corporation now existing or hereafter formed unless:

(1) The nonprofit corporation is expressly exempted from the operation thereof.

(2) There is a special provision applicable to the nonprofit corporation inconsistent with the provisions of this division, in which case the special provision prevails.

(b) The existence of nonprofit corporations formed or existing on the date of the enactment of this division shall not be affected by the enactment of this division nor by any change in the requirements for the formation of nonprofit corporations nor by the amendment or repeal of the laws under which they were formed or created.

(c) Neither the repeals effected by the enactment of this division nor the enactment of this title nor the amendment thereof shall impair or take away any existing liability or cause of action against any nonprofit corporation, its members, directors, or officers incurred prior to the time of such enactment or amendment.

(d) The provisions of Division 1 (commencing with Section 100) do not apply to nonprofit corporations.

Comment. Subdivision (a) of Section 5102 continues former Section 9001. For express exemptions from the operation of the General Non-profit Corporation Law, see [to be supplied]. For special provisions

applicable to nonprofit corporations that are inconsistent with the General Nonprofit Corporation Law, see [to be supplied]. Special provisions relating to nonprofit corporations in this or other codes that are not expressly repealed remain in effect.

Subdivisions (b) and (c) are the same in substance as subdivisions (b) and (c) of Section 102 (General Corporation Law).

Subdivision (d) supersedes former Section 9002. Unlike former law, the new General Nonprofit Corporation Law provides a complete set of rules governing nonprofit corporations and does not incorporate by reference nor is it governed in any way by the General Corporation Law. It should be noted, however, that court decisions under comparable provisions of the General Corporation Law, to the extent they concern problems common to business and nonprofit corporations, may be useful in construing the provisions of the General Nonprofit Corporation Law.

Note. With each change in the law that the new General Nonprofit Corporation Law makes, the Commission must consider its effect on existing corporations and whether compliance is required. This section and Section 5172.5 ("nonprofit corporation" defined) are related.

The staff is at present researching the special provisions and exemptions for nonprofit corporations.

Provisions relating to the application of this division to foreign nonprofit corporations and to business corporations are being drafted. The interrelation of this division with Division 4 is being studied.

968/696

§ 5113

Tentatively Approved
April 1976

§ 5113. Mailing

5113. (a) Any reference in this division to mailing means first-class mail, postage prepaid, unless registered mail is specified.

(b) Registered mail includes certified mail.

Comment. Section 5113 is the same as Section 113 (General Corporation Law).

Note. The staff is to check the entire statute to determine whether certified mail should be used in cases where registered mail is specified. Is a receipt showing date of mailing available if certified mail is used? It should be noted that Section 8 of the Corporations Code provides that registered mail includes certified mail.

968/702

§ 5114

Tentatively Approved
April 1976

§ 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 (General Corporation Law) 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.

968/703

§ 5115

Tentatively Approved
April 1976

§ 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 (General Corporation Law).

Tentatively Approved
April 1976

Article 2. Definitions

§ 5149. Acknowledged

5149. (a) "Acknowledged" means that an instrument is either:

(1) Formally acknowledged as provided in Article 3 (commencing with Section 1180) of Chapter 4 of Title 4 of Part 4 of Division 2 of the Civil Code; or

(2) Accompanied by a declaration in writing signed by the persons executing the instrument that they are such persons and that the instrument is the act and deed of the persons executing it.

(b) A 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 in substance as Section 149 (General Corporation Law).

Note. Section 5149 includes the substance of the amendments proposed by Assembly Bill 2849. The staff is to determine the necessity of the words "certificate of" in the last paragraph of the section.

Tentatively Approved
March 1976

§ 5151. Approved by (or approval of) the board

5151. "Approved by (or approval of) the board" means approved or ratified by the vote of the board.

Comment. Section 5151 is the same in substance as Section 151 (General Corporation Law). The vote required for approval of the board is [to be supplied]. The phrase defined in this section is used in the following provisions:

§ 5922 (adoption of amendments by board and members)

§ 5923 (adoption of amendments by board alone)

§ 5942 (approvals required for restated articles)

Note. Whether approval of the board should include approval by authorized committees is deferred until consideration of directors and committees. Likewise, the provisions for the vote of directors will be drafted at that time.

Whether it is appropriate to use the word "vote," which is a defined term, will be determined later.

969/018

§ 5154

Tentatively Approved
January 1976

§ 5154. Articles

5154. "Articles" includes the articles of incorporation, amendments thereto, amended articles, and restated articles.

Comment. Section 5154 is the same in substance as Section 154 (General Corporation Law). It continues former Section 102, which was applicable to nonprofit corporations through former Section 9002.

Note. The question whether this section should include certificates of incorporation and agreements of merger is deferred.

404/381

§ 5156

Tentatively Approved
March 1976

§ 5156. Business corporation

5156. "Business corporation" means a corporation organized under Division 1 (commencing with Section 100) of Title 1 or a business corporation organized under any predecessor general corporation law or by any act of the Legislature creating a private corporation prior to the enactment of a general incorporation statute.

Comment. Section 5156 adopts the definition of "corporation" found in Section 162 (General Corporation Law).

Note. Consideration will be given to expanding this definition to all corporations other than nonprofit. The revisions of the definition of corporation in Section 162 by the cleanup bill will be studied.

968/706

§ 5167

Tentatively Approved
April 1976

§ 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 (General Corporation Law).

Note. Whether this definition is appropriately used should be checked for each place it is used in the statute. Also, is the definition intended to cover corporations heretofore or hereafter formed?

968/624

§ 5169

Tentatively Approved
February 1976

§ 5169. Filed

5169. "Filed," unless otherwise expressly provided, means filed in the office of the Secretary of State.

Comment. Section 5169 is the same in substance as Section 169 (General Corporation Law).

Note. The staff has not yet determined whether the proviso of this section is necessary.

Staff Draft

§ 5172.5. Nonprofit corporation

5172.5. "Nonprofit corporation" means a corporation organized under this division or under any predecessor general or special nonprofit corporation law, or by any act of the Legislature creating a private nonprofit corporation prior to the enactment of a general nonprofit incorporation statute.

Comment. Section 5172.5 is new; for a comparable definition of "corporation," see Section 162 (General Corporation Law).

Note. The staff has not yet investigated the extent to which the new statute can or should be applied to preexisting nonprofit corporations or to foreign nonprofit corporations. This section and Section 5111 (scope of division) are related.

The staff has not yet investigated whether any nonprofit corporations created by act of Legislature prior to enactment of a general law do exist. The change in comparable Section 162 by the cleanup bill will be studied.

Tentatively Approved
March 1976§ 5173. Officers' certificate

5173. "Officers' certificate" means a certificate signed and verified by both of the following officers:

- (a) The chairman of the board, the president, or any vice president.
- (b) The secretary, the chief financial officer, the treasurer, or any assistant secretary or assistant treasurer.

Comment. Section 5173 is the same in substance as Section 173 (General Corporation Law). The requirements for verification may be found in Section 5193. The phrase defined in this section is used in the following provisions:

- § 5931 (contents of certificate of amendment)
- § 5940 (restated articles)

968/707

§ 5177

Tentatively Approved
April 1976

§ 5177. Proper county

5177. "Proper county" means:

- (a) The county where the principal executive office of the non-profit corporation is located.
- (b) 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 (General Corporation Law).

Tentatively Approved
March 1976

§ 5179. Proxy

5179. (a) "Proxy" means a written authorization signed by a member or the member's attorney in fact giving another person or persons power to vote with respect to the membership of the member.

(b) "Signed" for the purpose of this section means the placing of the member's name on the proxy (whether by manual signature, typewriting, telegraphic transmission, or otherwise) by the member or the member's attorney in fact.

Comment. Section 5179 is the same in substance as Section 179 (General Corporation Law). For provisions relating to proxies, see Sections 5640 (form of proxy), 5263 (bylaws relating to voting rights), and 5705 (proxies).

Tentatively Approved
March 1976

§ 5193. Verified

5193. (a) "Verified" means that the statement contained in a certificate or other document is declared to be true of the own knowledge of the person executing it by either of the following means:

(1) An affidavit signed under oath before an officer authorized to administer oaths by the laws of this state or of the place where it is executed.

(2) A declaration in writing executed "under penalty of perjury" that states the date and place of execution (whether within or without this state).

(b) Any affidavit sworn to 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 5193 is the same in substance as Section 193 (General Corporation Law). The term defined in this section is used in the following provisions:

§ 5052 (execution of certificate of correction)

§ 5173 (officers' certificate)

Note. The staff has under study the extent to which "certificate or other document" differs from "instrument."

404/383

§ 5194

Not Approved; See Minutes
March 1976

§ 5194. Vote

5194. "Vote" includes authorization by written consent.

Comment. Section 5194 is comparable to Section 194 (General Corporation Law).

Note. Section 194 is subject to Sections 307(f) and 603(d); the staff has not yet examined these provisions.

This section must be reviewed in the light of its potential application to voting by directors and voting by a policymaking committee of members.

404/081

§ 5195

Not Approved; See Minutes
April 1976

§ 5195. Written or in writing

5195. "Written" or "in writing" includes facsimile and telegraphic communication.

Comment. Section 5195 is the same as Section 195 (General Corporation Law). It should be noted that a writing must be in English and comprehensible by ordinary visual means. Section 8.

Note. The Commission requested that "writing" include something similar to Section 8.

Tentatively Approved
February 1976

CHAPTER 2. ORGANIZATION AND BYLAWS

Article 1. Purposes

§ 5210. Any lawful purpose other than distribution of dividends

5210. Subject to the laws and regulations applicable to the particular class of nonprofit corporation or line of activity, a nonprofit corporation may be formed for any lawful purposes other than the distribution of gains, profits, or dividends to members.

Comment. Section 5210 continues the substance of a portion of the first sentence of former Section 9200. Section 5210 permits incorporation for such purposes as religious, charitable, social, educational, cemetery, or for rendering services, but does not limit incorporation to these purposes. The requirement of former Section 9200 that the corporate purposes be ones for which individuals lawfully may associate themselves is not continued; it is unnecessary in light of the general limitation of Section 5210 that the nonprofit corporation be formed only for lawful purposes.

The articles of a nonprofit corporation must preclude distribution of the proceeds of its operations to members except to the extent provided in this division. See Section 5250. It should be noted, however, that this section does not prohibit a nonprofit corporation from operating a business or from making profits thereon. See Section 5235(a) (power to engage in business activity). Any profits must be applied to the lawful corporate purposes (Section 5235(b)) and may not be distributed to members except to the extent permitted by Section 5236. Violation of this section may subject the nonprofit corporation or its directors to the following sanctions: [to be supplied].

The introductory portion of Section 5210 recognizes that there may be limitations on the purposes for which particular types of nonprofit

corporations may be formed. See, e.g., Sections 5211 (medical services corporations) and 5212 (legal services corporations). It should also be noted that a nonprofit corporation may be formed, subject to Section 5210, for the purpose of incorporating an unincorporated association (Section 5213) or subordinate body (Section 5214).

043/172

§ 5211

Tentatively Approved
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§ 5211. Medical services corporation

5211. (a) A nonprofit corporation may be formed under this division for the purpose of defraying or assuming the cost of professional services of licentiates under any chapter of Division 2 (commencing with Section 500) of the Business and Professions Code or of rendering any such services, but it may not engage directly or indirectly in the performance of the corporate purposes or objects unless all of the following requirements are met:

(1) At least one-fourth of all licentiates of the particular profession residing in California become members.

(2) Membership in the nonprofit corporation and an opportunity to render professional services upon a uniform basis are available to all licensed members of the particular profession or, in the case of refractions or eye applications, to all licentiates expressly authorized by law to render such services.

(3) Voting by proxy and cumulative voting are prohibited.

(4) A certificate is issued to the nonprofit corporation by the particular professional board whose licentiates have become members, finding compliance with the requirements of subdivisions (1), (2), and (3).

(b) Any such nonprofit corporation shall be subject to supervision by the particular professional board under which its members are licensed and shall also be subject to Section [9505] of the Corporations Code.

Comment. Section 5211 continues former Corporations Code Sections 9201 and 9201.1.

Note. A new section number has yet to be assigned to Corporations Code Section 9505 (property subject to supervision by Attorney General).

043/171

§ 5212

Tentatively Approved
February 1976

§ 5212. Legal services corporation

5212. (a) Nonprofit corporations may be formed under this division for the purpose of administering a system or systems of defraying the cost of professional services of attorneys, but the nonprofit corporation may not engage directly or indirectly in the performance of the corporate purposes or objects unless all of the following requirements are met:

(1) The attorneys furnishing professional services pursuant to such system or systems are acting in compliance with the Rules of Profes-

sional Conduct of the State Bar of California concerning such system or systems.

(2) Membership in the nonprofit corporation and an opportunity to render professional services upon a uniform basis are available to all active members of the State Bar of California.

(3) Voting by proxy and cumulative voting are prohibited.

(4) A certificate is issued to the nonprofit corporation by the State Bar of California finding compliance with the requirements of subdivisions (1), (2), and (3).

(b) Any such nonprofit corporation shall be subject to supervision by the State Bar of California and shall also be subject to Section [9505] of the Corporations Code.

Comment. Section 5212 continues former Corporations Code Section 9201.2.

Note. A new section number has yet to be assigned to Corporations Code Section 9505 (property subject to supervision by Attorney General).

999/552

§ 5213

Tentatively Approved
February 1976

§ 5213. Incorporation of unincorporated association

5213. (a) A corporation may be formed under this division, subject to the requirements of this section, for the purpose of incorporating an existing unincorporated association or

organization. As used in this section, "unincorporated association" includes but is not limited to society, library, school, college, club, church, trustees of a charitable trust, and chamber of commerce.

(b) The articles of incorporation shall set forth the name of the existing unincorporated association.

(c) The articles of incorporation shall be subscribed by the presiding officer or acting presiding officer and the secretary or clerk or similar officer of the association or by at least a majority of its governing board or body, and there shall be attached thereto the affidavit of the subscribing officers, board, or body that the association has duly authorized its incorporation and has authorized the officers, board, or body to execute the articles of incorporation.

(d) The members of the association shall be members of the non-profit corporation so created unless they file their dissent in writing with the secretary thereof.

Comment. Subdivision (a) of Section 5213 continues former Section 9202; subdivision (a) is subject to Section 5210 (proper corporate purposes). Subdivision (b) continues subdivision (f) of former Section 9300; subdivision (b) is in addition to the requirements of Section 5250 (required contents of articles). Subdivision (c) continues subdivision (b) of former Section 9304, with the exception of the acknowledgment requirement, which is omitted as unnecessary; subdivision (c) is an exception to the provisions of Section 5221 (execution of articles). Subdivision (d) continues former Section 9604.

Note. The staff has not yet devised an appraisal remedy for dissenting members of an unincorporated association.

Tentatively Approved
February 1976

§ 5214. Incorporation of subordinate body

5214. (a) A corporation may be formed under this division, subject to the requirements of this section, for the purpose of incorporating a subordinate body instituted or created under the authority of a head or national association, lodge, order, beneficial association, fraternal or beneficial society, labor union, foundation, federation, or any other society, organization, or association. The fact that the head or national body is unincorporated does not prevent the incorporation of the subordinate body.

(b) The rules governing the incorporation and operation of unincorporated associations govern the incorporation of a subordinate body.

(c) The seal of the subordinate body shall be its corporate seal.

(d) Whenever the charter of a subordinate body incorporated pursuant to this section is surrendered to, taken away, or revoked by the head or national body granting it, the subordinate body shall dissolve. After paying its debts and obligations or making adequate provision therefor, the subordinate body may collect obligations owed to it and may sell property which is not designed for the exclusive use of the organization. Notwithstanding Article 3 (commencing with Section 7030) of Chapter 20, the subordinate body shall then deliver any remaining property or obligations owed to it and any remaining proceeds of the sale of property to the head or national body to be disposed of in accordance with the laws of the head or national body.

Comment. Subdivisions (a)-(c) of Section 5214 continue former Section 9203; for the rules governing incorporation of unincorporated associations, see Section 5213. Subdivision (d) continues former Section 9802; it is an exception to the provisions of Sections 7030-7037 (distribution of assets on dissolution of nonprofit corporation). The Commission invites comments concerning this subdivision.

Note. The staff has not yet collected for the Comment cases relating to subdivision (d).

The provision relating to corporate seal will be reviewed in the light of other provisions relating to corporate seals.

968/618

§ 5220

Tentatively Approved
February 1976

Article 2. Formation

§ 5220. Nonprofit corporation formed by executing and filing articles

5220. A nonprofit corporation may be formed under this division by executing and filing articles of incorporation.

Comment. Section 5220 supersedes a portion of former Section 9200 which provided that a nonprofit corporation may be formed by three or more persons. Section 5220 deletes the concept of incorporators, who perform no necessary function. One or more initial directors execute and file the articles and are fully empowered to govern the affairs of the nonprofit corporation until the selection of their successors. See Sections 5221 (execution of articles) and 5250 (required contents of articles). For a comparable provision, see Section 200(a) (General Corporation Law).

968/617

§ 5221

Tentatively Approved
February 1976

§ 5221. Execution of articles

5221. One or more persons named in the articles of incorporation to act in the capacity of an initial director shall execute the articles by personally signing the articles.

Comment. Section 5221 supersedes former Section 9304(a). Under Section 5221, "other persons desiring to associate with" the first directors are no longer permitted to sign the articles. Section 5221

also eliminates the acknowledgment requirements of former Section 9304(a) since they served no useful purpose. For an exception to the provision of Section 5221, see Sections 5213 (incorporation of unincorporated association) and 5214 (incorporation of subordinate body). For a comparable provision, see Section 200(b) (General Corporation Law).

043/187

§ 5222

Tentatively Approved
February 1976

§ 5222. Filing of articles

5222. The corporate existence begins upon the filing of the articles and continues perpetually unless otherwise expressly provided in the articles.

Comment. Section 5222 is the same in substance as Section 200(c) (General Corporation Law) except that the exception for other laws is not continued because it is inapplicable to nonprofit corporations. Section 5222 supersedes former Section 9304.5. It eliminates the requirement that articles be filed with the county clerk of the county in which the nonprofit corporation is to have its principal office. See Section 5169 ("filed" means filed with Secretary of State). For the duty of the Secretary of State to file and endorse the date of filing on the articles, see Section 5115.

Section 5222, unlike former Section 9304.5, authorizes the nonprofit corporation to limit in the articles the term of its existence. See also Section 5251(b)(1) (permitted contents of articles).

Tentatively Approved
February 1976

§ 5223. Evidence of corporate formation and existence

5223. For all purposes other than an action in the nature of quo warranto, a copy of the articles of a nonprofit corporation duly certified by the Secretary of State is conclusive evidence of the formation of the corporation and prima facie evidence of its corporate existence.

Comment. Section 5223 is the same in substance as Section 209 (General Corporation Law). It continues former Section 313, which was applicable to nonprofit corporations through former Section 9002. See, e.g., Barber v. Irving, 226 Cal. App.2d 560, 38 Cal. Rptr. 142 (1964); see also Cavin Memorial Corp. v. Requa, 5 Cal. App.3d 345, 85 Cal. Rptr. 107 (1970). For an action in the nature of quo warranto, see Section 303 of the Code of Civil Procedure.

Note. The staff has not yet researched or included in the Comment material relating to the interrelation of this section with the alter ego doctrine.

Substance Tentatively
Approved February 1976

§ 5224. Additional requirement for charitable corporations

5224. Promptly upon formation, a nonprofit corporation organized for charitable purposes shall send a copy of its articles to the Attorney General.

Comment. Section 5224 is new. It is designed to assist the Attorney General in his supervisory duties under the Uniform Supervision of Trustees for Charitable Purposes Act.

Not Approved; See Minutes
February 1976

Article 3. Powers

§ 5230. Powers of nonprofit corporation

5230. Subject to any limitation provided by statute or in its articles, a nonprofit corporation has the following powers which may be exercised only in furtherance of its corporate purposes:

(a) Adopt, use, and at will alter a corporate seal, but failure to affix a seal does not affect the validity of any instrument.

(b) Adopt, amend, and repeal bylaws.

(c) Conduct its affairs, including engaging in business, within and without this state and qualify to conduct its affairs in any other state, territory, dependency, or foreign country.

(d) Appoint such subordinate officers, employees, or other agents as the activities of the nonprofit corporation may require and allow them reasonable compensation for services rendered.

(e) Sue and be sued.

(f) Make contracts.

(g) Receive property by devise or bequest and otherwise acquire and hold any real or personal property including shares of stock, bonds, and securities of other corporations and nonprofit corporations.

(h) Act as trustee under any trust incidental to the principal purposes of the nonprofit corporation and receive, hold, administer, and expend funds and property subject to such trust.

(i) Convey, exchange, lease as lessor, mortgage, encumber, transfer upon trust, or otherwise dispose of any real or personal property.

(j) Borrow money, contract debts, and issue bonds, notes, and debentures, and secure the payment or performance of its obligations.

(k) Make charitable contributions.

(l) Participate with others in any partnership, joint venture, or other association, transaction, or arrangement of any kind which the nonprofit corporation would have power to conduct itself, whether or not such participation involves sharing or delegation of control with or to others.

(m) Do all other acts necessary or expedient for the administration of the affairs and attainment of the purposes of the nonprofit corporation.

Comment. Section 5230 empowers a nonprofit corporation to engage in a wide range of activities in furtherance of its corporate purposes. However, as provided by the introductory clause, the listed powers may be subject to limitations provided by other statutes or the nonprofit corporation may restrict the statutory powers available by a provision in its articles. See Sections 5250(b) and 5252(b). Section 5230 does not substantially alter prior law applicable to nonprofit corporations. See former Section 9501. However, for clarity, several powers which would have been included within the general grant of authority of subdivision (h) of former Section 9501 are listed in this section.

Subdivisions (a) and (b) are the same as subdivisions (a) and (b), respectively, of Section 207 (General Corporation Law). Subdivision (c) is derived from subdivision (e) of former Section 801 (former General Corporation Law) and subdivision (c) of Section 207 (General Corporation Law). Subdivision (d) is based on subdivision (d) of former Section 801 (former General Corporation Law).

Subdivisions (e), (f), (g), (h), (i), and (j) are nearly identical to subdivisions (a), (b), (c), (d), (e), and (f), respectively, of former Section 9501 (former General Nonprofit Corporation Law). It

should be noted that subdivision (h), empowering the nonprofit corporation to act as a trustee, does not excuse compliance with other laws regulating trustees. The language of subdivision (c) of former Section 9501 to the effect that the nonprofit corporation could receive property by devise or bequest "subject to the laws regulating the transfer of property by will" has been omitted from subdivision (g) of Section 5230 because it is superfluous in light of the introductory provision.

Subdivision (k) is derived from subdivision (g) of former Section 302 (former General Corporation Law). Subdivision (l) is based on subdivision (h) of Section 207 (General Corporation Law) but provides a limitation derived from Section 7502(a)(11) of the Pennsylvania Corporation Not-for-profit Code to the effect that the nonprofit corporation may participate in partnerships and the like only when the nonprofit corporation would have power to conduct such activities itself.

Subdivision (m) is identical to subdivision (h) of former Section 9501 (General Nonprofit Corporation Law).

Note. This section is to be substantially revised in accordance with Commission decisions at the February 1976 meeting.

045/197

§ 5231

Substance Tentatively
Approved February 1976

§ 5231. Defense of ultra vires

5231. (a) No limitation upon the activities, purposes, or powers of the nonprofit corporation or upon the powers of the members, officers, or directors, or the manner of exercise of such powers, contained in or implied by the articles or by Chapters 18, 19, and 20 shall be asserted as between the nonprofit corporation or member and any

third person, except in a proceeding (1) by a member or the state to enjoin the doing or continuation of unauthorized activities by the nonprofit corporation or its officers, or both, in cases where third parties have not acquired rights thereby, (2) to dissolve the nonprofit corporation, or (3) by the nonprofit corporation or by a member suing in a representative suit against the officers or directors of the nonprofit corporation for violation of their authority.

(b) Any contract or conveyance made in the name of a nonprofit corporation which is authorized or ratified by the board, or is done within the scope of authority, actual or apparent, conferred by the board or within the agency power of the officer executing it, except as the board's authority is limited by law other than this division, binds the nonprofit corporation, and the nonprofit corporation acquires rights thereunder whether the contract is executed or wholly or in part executory.

(c) This section applies to contracts and conveyances made or to be performed by foreign nonprofit corporations in this state and to all conveyances by foreign nonprofit corporations of real property situated in this state.

Comment. Section 5231 is the same in substance as Section 208 (General Corporation Law). It continues provisions of former Section 803 which were applicable to nonprofit corporations through former Section 9002. See, e.g., Osteopathic Physicians & Surgeons v. California Medical Ass'n, 224 Cal. App.2d 378, 36 Cal. Rptr. 641 (1964). For an exception to Section 5231, see Section 5232 (enjoining ultra vires act of charitable corporation).

Note. The staff has not yet:

(1) Drafted provisions relating to dissolution or to foreign nonprofit corporations.

(2) Researched whether the board's authority is limited by law outside the General Nonprofit Corporation Law.

(3) Revised subdivision (a) for clarity or researched the meaning of "the state" and "where third parties have acquired rights thereby."

045/198

§ 5232

Tentatively Approved
February 1976

§ 5232. Enjoining ultra vires act of nonprofit corporation holding assets on charitable trust

5232. (a) Notwithstanding Section 5231, in the case of a nonprofit corporation that holds its assets on a charitable trust or is organized for a charitable purpose, a limitation described in subdivision (a) of Section 5231 may be asserted in an action to enjoin the doing or continuation of unauthorized activities by the nonprofit corporation or its officers, or both, regardless of whether third parties have acquired rights thereby.

(b) In an action under this section, the court may enjoin the performance of a contract if all the parties to the contract are parties to the action and if it is equitable to do so.

Comment. Section 5232 is new; for a comparable provision, see ALI-ABA Model Nonprofit Corporation Act § 6(a). See also Holt v. College of Osteopathic Physicians & Surgeons, 61 Cal.2d 750, 40 Cal. Rptr. 244, 394 P.2d 932 (1964) (minority trustees of charitable corporation may seek to

enjoin unauthorized corporate activity). Section 5232 establishes an exception to the limitations on use of the ultra vires doctrine found in Section 5231.

404/108

§ 5235

Tentatively Approved
February 1976

§ 5235. Power to engage in business activity

5235. (a) Subject to any limitations contained in the articles and applicable laws, a nonprofit corporation may engage in business activity.

(b) Any gain or profit that results from business activity of a nonprofit corporation shall be applied only to lawful activities in furtherance of or incidental to the purposes for which the nonprofit corporation is formed.

Comment. Section 5235 is new.

Subdivision (a) supersedes the portion of the second sentence of former Section 9200 which provided that "carrying on business at a profit as an incident to the main purposes of the corporation" is not forbidden. Subdivision (a) makes clear that a corporation may carry on a business for profit whether or not the business is "incident" to its main purposes. See People ex rel. Groman v. Sinai Temple, 20 Cal. App.3d 614, 99 Cal. Rptr. 603 (1971). For a comparable provision, see Section 206 (General Corporation Law). One major limitation on the business activity of nonprofit corporations is found in subdivision (b).

Subdivision (b) requires that any gains or profits of the business be applied to the purposes of the nonprofit corporation. It should be

noted that a nonprofit corporation may not have as a purpose the distribution of gains, profits, or dividends to members. Section 5210. Nor may a nonprofit corporation distribute any such gains, profits, or dividends to members. Section 5236. Violation of this section may subject the nonprofit corporation or its directors to the following sanctions: [to be supplied].

404/120

§ 5236

Tentatively Approved
February 1976

Staff Revision May 1976

§ 5236. Distributions to members prohibited.

5236. (a) A nonprofit corporation shall not distribute any gains, profits, or dividends to members.

(b) Notwithstanding subdivision (a), a nonprofit corporation may, subject to any limitations in the bylaws, do any of the following, none of which shall be deemed to be a distribution of gains, profits, or dividends:

- (1) Pay compensation to members for services rendered.
- (2) Confer benefits upon members in conformity with the purposes for which it is formed.
- (3) Make distributions to members upon dissolution or winding up to the extent permitted by this division.
- (4) Make any payments to members authorized by Chapter 5 (commencing with Section 5500).

Comment. Section 5236 is new; for a comparable provision, see the last portion of Section 26 of the ALI-ABA Model Non-Profit Corporation Act.

Subdivision (a) continues a limitation formerly found in the second sentence of Section 9200. A nonprofit corporation may not be formed for profit-distribution purposes (Section 5210), and this limitation must be stated in the articles. Section 5250. While subdivision (a) continues the limitation of former law that profits, gains, or dividends may not be distributed, this limitation is subject to the provisions of subdivision (b). Violation of this provision may subject the nonprofit corporation or its directors to the following sanctions: [to be supplied].

Subdivision (b) lists major areas of withdrawal of corporate proceeds which do not violate the prohibition of subdivision (a). Paragraph (1) is new; compensation may be limited or precluded in the articles or bylaws. Paragraph (2) supersedes the portion of former Section 9200 permitting the formation of a nonprofit corporation for the purpose of rendering services. It makes clear that a nonprofit corporation may provide benefits to its members without violating the prohibition against distributions of gains, profits, or dividends as such. This codifies case law. People ex rel. Groman v. Sinai Temple, 20 Cal. App.3d 614, 99 Cal. Rptr. 603 (1971) (discount on price of cemetery land to members of nonprofit corporation is proper). Paragraph (3) continues portions of former Section 9200 permitting distributions on dissolution. For limitations on such distributions, see Sections 7030-7037. Paragraph (4) makes clear that the nonprofit corporation may repay debts owed to members and purchase or redeem other corporate instruments held by members to the extent permitted in Sections 5500-5577 (corporate finance), without violating subdivision (a). See also Sections 5532 and 5550.

Note. The portions of this section relating to paragraph (4) have been added by the staff and have not been reviewed by the Commission.

Substance Tentatively
Approved February 1976

Article 5. Articles of Incorporation

§ 5250. Required contents of articles

5250. The articles shall set forth:

(a) The name of the nonprofit corporation.

(b) That the nonprofit corporation is organized pursuant to the General Nonprofit Corporation Law for any lawful purposes and that the nonprofit corporation shall not distribute gains, profits, or dividends to members except to the extent permitted in the General Nonprofit Corporation Law. If the nonprofit corporation is organized for charitable purposes, the articles shall specifically so state. The articles shall not set forth any further or additional statement with respect to the purposes or powers of the nonprofit corporation except by way of limitation or except as expressly required by any law of this state other than this division or by any federal or other statute or regulation (including the Internal Revenue Code and regulations thereunder as a condition of acquiring or maintaining a particular status for tax purposes).

(c) The names and addresses of one or more persons who are to act in the capacity of initial directors.

Comment. Section 5250 supersedes former Section 9300; for a comparable provision, see Section 202 (General Corporation Law).

Subdivision (a) continues subdivision (a) of former Section 9300. For limitations on corporate names, see Chapter 2 (commencing with Section 14820) of Division 4.

Subdivision (b) eliminates the requirement of subdivision (b) of former Section 9300 of a statement of specific and primary purposes, but adds the requirement that a nonprofit corporation organized for charitable purposes must specifically so state. See Section 5252(b).

Absent a limitation in the articles, a nonprofit corporation may engage in any lawful activity, and Section 5230 confers full corporate powers.

Subdivision (b) also continues the requirement of subdivision (c) of former Section 9300 that the nonprofit corporation state that it is organized under the General Nonprofit Corporation Law and adds the requirement that the articles state that the nonprofit corporation may not make distributions to members except as provided in this division. A nonprofit corporation may be formed for any lawful purpose other than to make such distributions (Section 5210), and such distributions are prohibited except to the extent provided in Section 5236.

Subdivision (c) supersedes a portion of the first sentence of subdivision (e) of former Section 9300. For provisions relating to initial directors, see Section 5313.

Note. The staff has not yet drafted a grandfather clause to excuse compliance with newly required provisions.

968/675

§ 5251

Substance Tentatively Approved March 1976

§ 5251. Permitted contents of articles

5251. The articles may set forth any provision, not in conflict with law, for the management of the activities and for the conduct of the affairs of the nonprofit corporation, including any provision which is required or permitted by this division to be stated in the bylaws.

Comment. Section 5251 is the same in substance as Section 204(d); it supersedes former Section 9303. See also Sections 5155.5 ("bylaws" means articles or bylaws) and 5260.5 (contents of bylaws). The authority to regulate the corporate affairs under Section 5251 includes all aspects of corporate activities, including dissolution.

The pattern of the general Nonprofit Corporation Law is to specify rules regulating the affairs of nonprofit corporations absent contrary provisions in the articles or bylaws. Some of the rules may not be varied, however. See, e.g., Section 5236 (distributions to members prohibited). Other rules may be varied only in the articles; Section 5252 relates to rules of this type.

968/684

§ 5252

Not Approved; See Minutes
March 1976

§ 5252. Provisions effective only if stated in the articles

5252. The following provisions shall not be effective unless expressly provided in the articles:

(a) A provision limiting the duration of the nonprofit corporation's existence to a specified date.

(b) A provision limiting or restricting the activity in which the nonprofit corporation may engage or the powers which the nonprofit corporation may exercise or both.

(c) A provision conferring upon the holders of any evidences of indebtedness, issued or to be issued by the nonprofit corporation, the right to vote in the election of directors and on any other matters on which members may vote.

(d) Any other provision required by this division to be provided in the articles to be effective.

Comment. Subdivision (a) of Section 5252 is the same in substance as Section 204(a)(4) (General Corporation Law). See also Section 5222 (corporate existence is perpetual unless otherwise provided in the articles).

Subdivision (b) is the same in substance as Section 204(a)(6) (General Corporation Law). See also Sections 5250 (articles), 5230 (corporate powers may be limited in articles), and 5235 (right to engage in business activity may be limited in articles).

Subdivision (c) is the same in substance as Section 204(a)(7) (General Corporation Law). It continues provisions of former Section 306 which were applicable to nonprofit corporations through former Section 9002.

Subdivision (d) is new.

Staff Draft

Article 6. Bylaws§ 5260. Adoption of bylaws

5260. (a) Bylaws may be adopted, amended, or repealed by the members or by the board subject to the power of the members to amend or repeal the bylaws.

(b) Notwithstanding subdivision (a):

(1) The articles or bylaws may restrict or eliminate the power of the board to adopt, amend, or repeal any or all bylaws.

(2) The articles or bylaws may require the approval of members entitled to exercise a greater fraction or percentage of the vote than would otherwise be required under this division for the adoption, amendment, or repeal of bylaws.

Comment. Section 5260 continues the substance of former Section 9400. For a comparable provision, see Section 211 (General Corporation Law). For the vote required under subdivision (a), see Sections 5615, 5630 (members) and 5339 (directors).

Staff Draft

§ 5260.5. Permitted contents of bylaws

5260.5. The bylaws may contain any provision, not in conflict with law or the articles for the management of the activities and for the

conduct of the affairs of the nonprofit corporation, including but not limited to any provision required or permitted by this article.

Comment. Section 5260.5 is the same in substance as the introductory portion of Section 212(b) (General Corporation Law). It is new to nonprofit corporation law. For provisions required or permitted in the bylaws by this article, see Sections 5261-5265.

405/368

§ 5261

Tentatively Approved
February 1976

Staff Revision May 1976

§ 5261. Bylaws relating to members

5261. The bylaws may provide for:

(a) The authorized number and qualifications of members of the nonprofit corporation, if any.

(b) The different classes of membership, if any.

(c) The property, voting, and other rights or interests of members or classes of members. If the property, voting, or other rights or interests, or any of them, are unequal, the rules by which the respective property, voting, or other rights or interests of members or classes of members are fixed and determined.

(d) The liability of members to, and the method of collection of, dues or assessments.

Comment. Section 5201 continues the substance of the first two sentences of former Section 9301. See also former Sections 9402(b) and 9403. See also Section 5251 and Comment thereto (articles may set forth any matter required or permitted to be stated in the bylaws).

In the absence of a provision in the articles or bylaws required by this section, the nonprofit corporation is governed by rules contained in Chapter 4 (commencing with Section 5400).

Subdivision (a). If the nonprofit corporation makes no provision for the number and qualifications of members, only natural persons may be members, and no member may hold more than one membership. Section 5400.

Subdivision (b). If the nonprofit corporation makes no provision for different classes of membership, it shall be deemed to have but one class. Section 5401(a).

Subdivision (c). If the nonprofit corporation makes no provision for property, voting, or other rights and interests of members or classes, or does not set forth the rules by which they are fixed and determined, the rights and interests of members are equal as to any right or interest not so fixed. Section 5401(b).

Subdivision (d). A nonprofit corporation may levy dues or assessments only pursuant to provisions in its articles or bylaws. Section 5410. See also Section 5510 (levy of dues or assessments). It should be noted that a nonprofit corporation which levies dues or assessments may be subject to the Corporate Securities Law. See, e.g., Sections 25019 ("security" defined) and 25100(j) (exemption of certain securities).

Note. The staff has revised the introductory portion of this section to be consistent with succeeding sections.

Tentatively Approved
February 1976

§ 5262. Additional bylaws relating to members

5262. The bylaws may provide for:

(a) The admission, election, appointment, withdrawal, suspension, and expulsion of members.

(b) The transfer, forfeiture, and termination of membership, and whether the property interest of members shall cease at their death or the termination of membership, and the mode of ascertaining the property interest, if any, at the death or the termination of membership.

(c) Fees of admission and transfer fees.

Comment. Subdivision (a) of Section 5262 continues the substance of former Section 9402(a). Unless the bylaws make reasonable provision for withdrawal of members, a member may withdraw upon 30 days' written notice to the nonprofit corporation. Section 5408. It should be noted that a nonprofit corporation may expel a member only in substantial compliance with its provisions for expulsion and only if the member has been afforded a reasonable opportunity to be heard. See Section _____. See also Erickson v. Gospel Foundation of California, 43 Cal.2d 581, 275 P.2d 474 (1954); Ascherman v. San Francisco Medical Society, 39 Cal. App.3d 623, 114 Cal. Rptr. 68 (1974).

Subdivision (b) continues the substance of former Section 9402(c). Absent a provision for transfer of memberships, no member may transfer his membership or any right arising therefrom. Section 5407. Absent a provision relating to termination of membership, the rights of a member do not cease on death or other termination. (Section 5406.) It should be noted that one ground for forfeiture of membership may be failure to pay dues, assessments, or charges. Section 5510.

Subdivision (c) continues the first portion of former Section 9403.

Note. If provisions relating to purchase and redemption of memberships are authorized, this section should be revised accordingly.

The staff has not yet drafted a provision relating to due process in the expulsion of members.

Not Approved; See Minutes
March 1973

§ 5263. Bylaws relating to voting rights

5263. (a) The bylaws may provide for the manner of voting by members and whether cumulative voting and proxy voting shall be allowed.

(b) A bylaw affecting the voting rights of members shall not be adopted, amended, or repealed by the board.

Comment. Subdivision (a) of Section 5263 continues former Section 9402(d). For provisions relating to cumulative voting, see Section 5708; for provisions relating to proxy voting, see Sections 5179 (proxy defined), 5640 (form of proxy), and 5705 (proxies). Where the bylaws provide a manner of voting other than at a meeting or by written consent, they should also specify any notice requirements and the vote necessary for member action.

Subdivision (b) is new. It is an exception to the rule of Section 5260(a) (manner of adoption, amendment, and repeal of bylaws).

Note. This section will be revised in light of all other decisions made with respect to members' voting rights.

Tentatively Approved
April 1976

§ 5264. Bylaws relating to meetings

5264. The bylaws may provide for:

(a) The time, place, and manner of calling, giving notice of, and conducting regular and special meetings of members or directors.

(b) The requirements of a quorum of directors or members.

Comment. Section 5264 continues portions of former Section 9401(a) and (b).

Subdivision (a) permits the bylaws to specify details concerning meetings. See also Sections 5330 (directors' meetings) and 5620 (notice of members' meetings). Absent a designation of the place of meetings, members' meetings are held at the principal executive office of the nonprofit corporation. See Sections 5610 (members' meetings) and 5336 (directors' meetings). The bylaws may specify persons authorized to call meetings. See Sections 5613 (special meetings of members) and 5331 (directors' meetings). As to the manner of notice of meetings, see Sections 5623 (members' meetings) and 5332 (directors' meetings).

Subdivision (b) permits the bylaws to specify a quorum for meetings, which may be greater or less than a majority; absent a specification, a majority constitutes a quorum. Sections 5614 (quorum of members) and 5338 (quorum of directors).

CHAPTER 3. DIRECTORS AND MANAGEMENT

[Not included--See Memorandum 76-47, May 1976 Meeting]

Tentatively Approved
February 1976

CHAPTER 4. MEMBERS

§ 5400. Members

5400. Unless the bylaws provide otherwise:

(a) Only natural persons may be members of a nonprofit corporation.

(b) No member may hold more than one membership, a fractional membership, or a joint interest in a membership.

(c) If the bylaws provide for members other than natural persons, a natural person may be a member and have an interest in one or more members other than natural persons even though the bylaws do not provide that a member may hold more than one membership.

Comment. Section 5400 is new; it provides general rules regarding who or what may be members of nonprofit corporations and how the membership may be held which apply in the absence of a bylaw to the contrary.

Subdivision (a) makes clear that the nonprofit corporation must provide for the admission to membership of other than natural persons. Hence, if the nonprofit corporation desires to permit business corporations, other nonprofit corporations, or partnerships or other unincorporated associations to be members, it must affirmatively provide therefor. Former law did not provide a rule applicable where the bylaws remained silent. When a nonprofit corporation provides that corporations, partnerships, associations, families, or other groups may become members, it should make any other necessary provisions regarding classes of members, voting rights of the different types of members (including multiple or fractional voting), the benefits and privileges available to different membership classes, additional qualifications for admission to membership, and dues and assessments. See Section 5261. See also Section 5703 (voting of membership held by corporation).

Subdivision (b) makes clear that, unless a different rule is provided in the nonprofit corporation's bylaws, each member may have no more or less than one membership. The former General Corporation Law permitted the corporation to forbid voting of fractional shares. See former Section 2215. Former law permitted different classes of memberships but forbade the holding of more than one membership. See former Section 9602. The prohibition of holding more than one membership was emasculated by the rule that different classes of memberships could be established with different voting power. See Erickson v. Gospel Foundation of California, 43 Cal.2d 581, 275 P.2d 474 (1954) (bylaw permitting one vote for every donation by a member of \$1,000 to the nonprofit corporation in effect created different membership classes). Under subdivision (b), the nonprofit corporation may create different classes of members by permitting the acquisition of more than one membership and may provide for family or group memberships. Where such special membership classes are provided, the nonprofit corporation should also consider special provisions concerning voting rights, benefits and privileges, membership qualifications, and dues and assessments. See Section 5261. See also Section 5704 (voting of membership held by two or more persons).

405/371

§ 5401

Tentatively Approved
February 1976

§ 5401. Membership classes

5401. (a) A nonprofit corporation shall have such memberships or classes thereof as the bylaws specify and, in the absence of any such classification of members, there shall be deemed to be but one class.

(b) Unless the bylaws set forth the rule fixing the respective voting, property, and other rights and interests of each member or class of members, the rights and interests of members shall be equal as to any right or interest not so fixed.

Comment. Section 5401 continues the substance of former Section 9602 with the exception of the prohibition of a member holding more than one membership, which is superseded by Section 5400.

405/406

§ 5402

Tentatively Approved
February 1976

§ 5402. Directors as members

5402. Where the bylaws of a nonprofit corporation do not provide for members or where the nonprofit corporation has, in fact, no members other than the persons constituting the board, the directors are, for the purpose of any law relating to nonprofit corporations, the members of the nonprofit corporation and shall exercise all the rights and powers of members.

Comment. Section 5402 continues the substance of former Section 9603. See Coon v. Freeman, 1 Cal.3d 542, 463 P.2d 441, 83 Cal. Rptr. 217 (1970).

Tentatively Approved
February 1976

§ 5403. Reduction of members below stated number

5403. (a) If the members of a nonprofit corporation having a stated number of members are reduced below that number by death, withdrawal, or otherwise, the nonprofit corporation shall not be dissolved for that reason.

(b) Unless the bylaws provide otherwise, the surviving or continuing members may, in the absence of a quorum, by majority vote of the surviving or continuing members fill vacancies and continue the corporate existence.

Comment. Section 5403 continues the substance of former Section 9605 with the addition of the words "by majority vote of the surviving or continuing members" to make clear that only a majority of the remaining members may fill vacancies and continue the corporate existence.

Substance Tentatively
Approved February 1976

§ 5405. Membership certificates

5405. (a) Membership in a nonprofit corporation may be evidenced by a certificate.

(b) A statement that the nonprofit corporation is not one for profit shall be printed in clear type upon the face of each membership

certificate which is transferable and which represents an ownership interest in the nonprofit corporation.

Comment. Section 5405 continues the substance of former Section 9607, making clear that the limitation of subdivision (b) applies only to certificates of ownership.

405/410

§ 5406

Not Approved; See Minutes
February 1976

§ 5406. Termination of membership

5406. (a) Memberships may be terminated in the manner provided in the bylaws.

(b) Unless the bylaws or the law under which the nonprofit corporation was formed provide otherwise, all rights of a member in the nonprofit corporation, or in its property, cease on death or other termination of the membership.

Comment. Section 5406 continues the substance of former Section 9608.

Note. The staff has not yet researched whether any law under which nonprofit corporations have been formed provide for continuation of rights on termination of membership.

101/139

§ 5407

Tentatively Approved
February 1976

§ 5407. Transfer of membership

5407. (a) No member may transfer the membership or any right arising therefrom unless the bylaws so provide.

(b) Where the bylaws provide for transfer of the membership or any right arising therefrom, they may also provide that the nonprofit corporation is not bound by the transfer until notice is received in the manner specified in the bylaws.

Comment. Subdivision (a) of Section 5407 continues the substance of former Section 9609.

Subdivision (b) is new; it enables the nonprofit corporation to keep its membership list updated.

101/140

§ 5408

Substance Tentatively
Approved February 1976

§ 5408. Withdrawal of members

5408: (a) Unless the bylaws provide a procedure for withdrawal of members, a member may surrender membership upon 30 days' written notice to the nonprofit corporation.

(b) Unless the bylaws otherwise provide, surrender of membership terminates all future rights, powers, and obligations of the membership, but it does not terminate the member's liability for dues, assessments, and charges incurred prior to surrender.

Comment. Section 5408 is new. It codifies the holding in Haynes v. Annandale Golf Club, 4 Cal.2d 28, 47 P.2d 470 (1935) (nonprofit organization may impose only reasonable restrictions on a member's right to resign), and provides a procedure for resignation in the absence of a procedure in the bylaws.

101/141

§ 5409

Tentatively Approved
February 1976

§ 5409. Liability of members

5409. Members of a nonprofit corporation are not personally liable for the debts, liabilities, or obligations of the nonprofit corporation.

Comment. Section 5409 continues the substance of former Section 9610.

101/142

§ 5410

Tentatively Approved
February 1976

§ 5410. Levy of dues and assessments

5410. A nonprofit corporation may levy dues or assessments or both upon its members pursuant to a provision of its bylaws authorizing the levy of dues or assessments.

Comment. Section 5410 continues the substance of former Section 9611.

Tentatively Approved
February 1976

CHAPTER 5. CORPORATE FINANCE

Article 1. General Provisions

§ 5510. Levy of dues and assessments

5510. (a) The bylaws may authorize dues or assessments or both to be levied upon all members or classes of membership alike, or in different amounts or proportions or upon a different basis upon different members or classes of membership and may exempt some members or classes of membership from either dues or assessments or both.

(b) The bylaws may fix the amount and method of collection of dues or assessments or both, or may authorize the board to fix the amount thereof from time to time, and make them payable at such times or intervals and upon such notice and by such methods as the board may prescribe.

(c) The bylaws may fix the amount and method of collection of charges owed to the nonprofit corporation.

(d) Dues, assessments, or charges, or all of them, may be made enforceable by action or by sale or forfeiture of membership, or both, upon reasonable notice.

Comment. Section 5510 augments Sections 5261(d)(liability of members to dues and assessments) and 5410 (authority of nonprofit corporations to levy dues and assessments).

Subdivision (a) continues the substance of the third sentence of former Section 9301.

Subdivision (b) continues the substance of the fourth sentence of former Section 9301.

Subdivision (c) is new.

Subdivision (d) continues the substance of the last sentence of former Section 9301 with the addition of a provision for the collection

of charges owed to the nonprofit corporation in the manner of dues or assessments.

Note. The staff has not yet drafted provisions to permit members to avoid the effect of unduly burdensome assessments by withdrawal or otherwise.

404/109

§ 5520

Not Approved; See Minutes
February 1976

§ 5520. Attorney General supervision of trust property

5520. (a) A nonprofit corporation which holds property subject to any charitable trust is subject at all times to examination by the Attorney General, on behalf of the state, to ascertain the condition of its affairs and to what extent, if at all, it may fail to comply with trusts which it has assumed or may have departed from the general purposes for which it is formed.

(b) In case of any such failure or departure, the Attorney General shall institute, in the name of the state, the proceedings necessary to correct the noncompliance or departure.

Comment. Section 5520 continues former Section 9505.

Note. Section 10207 (charitable and eleemosynary corporations) is a comparable provision which we will dispose of when we consider the other provisions of Part 3 (commencing with Section 10200).

The staff has not yet reviewed this section for coordination with the Uniform Supervision of Trustees for Charitable Purposes Act, nor has it considered whether it should be expanded to refer to business corporations or how it should be revised for clarity.

The Comment has not yet been revised to indicate that the deletion of "public trust" does not alter existing law or to refer to cases broadly construing the meaning of "charitable trust."

404/082

§ 5610

Tentatively Approved
April 1976

CHAPTER 6. MEMBERS' MEETINGS AND CONSENTS

Article 1. Meetings

§ 5610. Place of meeting

5610. (a) Meetings of members may be held at a place within or without the state that is stated in or fixed in accordance with the bylaws.

(b) If no other place is stated or so fixed, member meetings shall be held at the principal executive office of the nonprofit corporation.

Comment. Section 5610 is the same in substance as Section 600(a) (General Corporation Law). It supersedes a portion of former Section 2200 and the first sentence of former Section 2210, which were applicable to nonprofit corporations through former Section 9002. See also Section 5264 (bylaws relating to meetings).

Under subdivision (a), the bylaws may provide a manner in which the meeting place is fixed, such as by resolution of the board or in the notice of the meeting.

404/400

§ 5611

Tentatively Approved
April 1976

§ 5611. Annual meeting

5611. (a) Unless otherwise provided in the bylaws, an annual meeting of members shall be held for the election of directors. Any

other proper business may be transacted at the annual meeting.

(b) The annual meeting shall be held on a date and at a time stated in or fixed in accordance with the bylaws.

Comment. Section 5611 is the same in substance as Section 5610(b) (General Corporation Law).

Subdivision (a) continues portions of former Section 2201, which was applicable to nonprofit corporations through former Section 9002. See Burnett v. Banks, 130 Cal. App.2d 631, 279 P.2d 579 (1955). If business other than election of directors is to be transacted at the annual meeting, notice thereof must be given. Section 5622.

Subdivision (b) supersedes former Section 2200, which was applicable to nonprofit corporations through former Section 9002 and which provided an annual meeting at 11:00 a.m. on the first Tuesday in April, unless otherwise provided in the bylaws. See also Section 5264 (bylaws relating to meetings).

404/401

§ 5612

Not Approved; See Minutes
April 1976

§ 5612. Failure to hold annual meeting

5612. (a) If a nonprofit corporation which is required by law or its bylaws to hold an annual meeting fails to hold the annual meeting for a period of 60 days after the date designated therefor or, if no date has been designated, for a period of 15 months after the organization of the nonprofit corporation or after its last annual meeting, the superior court of the proper county may summarily order a meeting to be held upon the application of 50 members or 10 percent of the members,

whichever is smaller, after notice to the nonprofit corporation giving it an opportunity to be heard.

(b) The memberships represented at the meeting, either in person or by proxy, and entitled to vote thereat, shall constitute a quorum for the purpose of the meeting, notwithstanding any provision of the articles or bylaws or in this division to the contrary.

(c) The court may issue such orders as may be appropriate including, without limitation, orders designating the time and place of the meeting, the record date for determination of members entitled to vote, and the form of notice of the meeting.

Comment. Section 5612 is the same in substance as Section 600(c) (General Corporation Law). It is new to nonprofit corporation law. Subdivision (a) differs from Section 600(c) in that a single member may not require the annual meeting to be held. Subdivision (b) supersedes the quorum provisions of Section 5614. Subdivision (c) supersedes the time and place provisions of Sections 5610 and 5611, the notice provisions of Article 2 (commencing with Section 5620), and the record date provisions of Section 5701.

Note. The possibility of providing a general enforcement procedure that would indicate the matters that could be considered at the meeting and that could be used in place of this section is under investigation by the staff.

Tentatively Approved
April 1976

§ 5613. Special meetings

5613. (a) A special meeting of the members may be called by any of the following:

- (1) The board.
- (2) The chairman of the board.
- (3) The president.
- (4) Members entitled to cast not less than 10 percent of the votes on the business to be transacted at the meeting.
- (5) Such other persons as provided in the bylaws.

(b) A special meeting may be called for any purpose, but the only business that may be transacted is that which is stated in the notice of the meeting.

Comment. Subdivision (a) of Section 5613 is the same in substance as Section 600(d) (General Corporation Law). It continues former Section 9600 and, in addition, permits special meetings to be called by the chairman of the board, the president, and other persons designated in the bylaws. See also Section 5264 (bylaws relating to meetings).

Subdivision (b) is new. For the contents of the notice of the meeting, see Section 5622.

404/676

§ 5614

Tentatively Approved
April 1976

§ 5614. Quorum

5614. (a) Unless otherwise provided in the bylaws, a majority of the members represented at the meeting and entitled to vote on the business to be transacted constitutes a quorum at a meeting of members.

(b) The bylaws may provide that a quorum of members is greater or less than a majority.

Comment. Subdivision (a) of Section 5614 is comparable to a portion of the first sentence of Section 602(a) (General Corporation Law). Subdivision (b) continues a portion of former Section 9401(b). See also former Section 2211.

404/975

§ 5615

Tentatively Approved
April 1976

§ 5615. Vote required

5615. Except as provided in Section 5617, if a quorum is present, the affirmative vote of a majority of the votes represented at the meeting and entitled to be cast on the matter shall be the act of the members unless the vote of a greater number or voting by classes is required by this division or the bylaws.

Comment. Section 5615 is comparable to the second sentence of Section 602(a) (General Corporation Law). The vote on any matter is subject to proper notice requirements pursuant to Sections 5620-5628.

999/557

§ 5616

Tentatively Approved
April 1976

§ 5616. Adjournment absent a quorum

5616. Except as provided in Section 5617, in the absence of a quorum, any meeting of members may be adjourned from time to time by the vote of a majority of the votes represented at the meeting and entitled to be cast on the matter, but no other business may be transacted.

Comment. Section 5616 is the same in substance as Section 602(c) (General Corporation Law). It continues provisions of former Section 2213 which were applicable to nonprofit corporations through former Section 9002.

045/222

§ 5617

Tentatively Approved
April 1976

§ 5617. Vote required absent a quorum

5617. The members present at a meeting duly called or held at which a quorum is present may continue to transact business until adjournment notwithstanding the withdrawal of enough members to leave less than a quorum if any action taken (other than adjournment) is approved by at least a majority of the votes required to constitute a quorum.

Comment. Section 5617 is the same in substance as Section 602(b) (General Corporation Law). It continues provisions of former Section 2212, which were applicable to nonprofit corporations through former Section 9002, and adds the requirement of the vote necessary to take action.

045/223

§ 5620

Substance Tentatively Approved
April 1976

Article 2. Notice of Meetings

§ 5620. When notice required

5620. (a) Whenever members are required or permitted to take action at a meeting, notice of the meeting shall be given in the manner provided in this article.

(b) Notwithstanding any other provision of this article, the bylaws of a nonprofit corporation may prescribe reasonable notice requirements.

Comment. Subdivision (a) of Section 5620 is comparable to the first sentence of Section 601(a) (General Corporation Law).

Subdivision (b) continues former Section 9401(a). Whether a particular bylaw provides a reasonable notice requirement depends on all the circumstances of the particular case including, but not limited to, the number of members and their location.

045/224

§ 5621

Tentatively Approved
April 1976

§ 5621. Time of notice

5621. The notice of the meeting shall be given not less than 10 nor more than 60 days before the date of the meeting.

Comment. Section 5621 is the same in substance as a portion of the first sentence of Section 601(a) (General Corporation Law). It supersedes former Section 2206, which was applicable to nonprofit corpora-

tions through former Section 9002, and required notice seven days before the meeting unless the bylaws provided otherwise. It should be noted that the bylaws may prescribe reasonable requirements for the time of notice. Section 5620(b).

045/225

§ 5622

Tentatively Approved
April 1976

§ 5622. Contents of notice

5622. The notice of the meeting shall state all of the following:

- (a) The place of the meeting.
- (b) The date and hour of the meeting.
- (c) In the case of a special meeting, the general nature of the business to be transacted and that no other business may be transacted.
- (d) In the case of the annual or a regular meeting, those matters which the board, at the time of the notice, intends to present for action by the members but that, subject to the provisions of Section 5628, any proper matter may be presented at the meeting for action by the members.
- (e) The notice of a meeting at which directors are to be elected shall include the names of nominees known to the board at the time of the notice.

Comment. Section 5622 is the same in substance as the last two sentences of Section 601(a)(General Corporation Law) except that the notice must include names of all nominees, not just those presented by management. Subdivisions (a) and (b) continue provisions of former

Section 2207, which were applicable to nonprofit corporations through former Section 9002. Subdivisions (c)-(e) supersede the provisions of former Section 2207 that required the notice of meeting to state the general nature of the business to be transacted.

Under subdivision (d), whether matter presented at a meeting is proper for action by the members is determined by reference to the provisions of this division and to the bylaws. It should be noted that the bylaws may prescribe reasonable requirements for the contents of notice. Section 5620(b).

101/151

§ 5623

Tentatively Approved
April 1976

§ 5623. Manner of giving notice

5623. (a) Notice of a members' meeting shall be given either personally or by mail or other means of written communication, addressed to the member at the address of the member appearing on the books of the nonprofit corporation or given by the member to the nonprofit corporation for the purpose of notice.

(b) If no address of the member appears or is given, or if the notice is returned to the nonprofit corporation marked by the United States Postal Service to indicate that it is unable to deliver the notice to the member at the address of the member, notice shall be posted and shall be available at the principal executive office of the nonprofit corporation.

(c) The notice shall be deemed to have been given at the time when

delivered personally or deposited in the mail or sent by other means of written communication.

(d) An affidavit of the giving of notice in accordance with this section, executed by the secretary or an assistant secretary, is prima facie evidence of the giving of the notice.

Comment. Section 5623 is comparable to Section 601(b)(General Corporation Law). It supersedes former Section 2205, which was applicable to nonprofit corporations through former Section 9002. See also Section 5264 (bylaws relating to meetings). Unlike the General Corporation Law provision, Section 5623 does not permit notice of the meetings of a nonprofit corporation by publication nor does it deal with the manner of giving reports.

The mail requirement of Section 5623 refers to first-class mail, postage prepaid. See Section 5113. The provision for other means of written communication includes, but is not limited to, facsimile and telegraphic communication. See Section 5195. It should be noted that the bylaws may prescribe reasonable requirements for the manner of giving notice. Section 5620(b).

968/997

§ 5624

Staff Draft

§ 5624. Persons to whom notice given

5624. Notice of a meeting shall be given to members entitled to vote on the business to be transacted at the meeting.

Comment. Section 5624 is the same in substance as a portion of the first sentences of Section 601(a) and (c)(General Corporation Law). It should be noted that the bylaws may prescribe reasonable requirements for the persons to whom notice is given. Section 5620(b).

Not Approved; See Minutes
April 1976

§ 5625. Notice of special meeting.

5625. (a) Upon request in writing to the chairman of the board, president, vice president, or secretary by the members or other persons provided in the bylaws entitled to call a special meeting of members, the officer forthwith shall cause notice to be given in the manner provided in this article that a meeting will be held at a time requested by the person calling the meeting, not less than 35 nor more than 60 days after receipt of the request.

(b) If the notice is not given within 20 days after receipt of the request, the person entitled to call the meeting may do either of the following:

(1) Give notice of the meeting.

(2) Under the procedure provided in [Section 305(e)], apply to the superior court of the proper county for, and the court shall summarily order the giving of, the notice. The court may issue such orders as may be appropriate, including without limitation, orders designating the time and place of the meeting, the record date for determination of members entitled to vote, and the form of notice.

Comment. Section 5625 is the same in substance as Section 601(c) (General Corporation Law). It continues provisions of former Section 2203, which were applicable to nonprofit corporations through former Section 9002, with changes to: (1) permit a request for a special meeting to be made on the chairman of the board; (2) increase the time within which the meeting must be held and within which the nonprofit corporation must respond in order to enable the nonprofit corporation to

prepare proxy materials; and (3) permit a member to obtain a court order for notice in recognition of the fact that member lists may not be accessible to the person calling the meeting.

It should be noted that the bylaws may prescribe reasonable requirements for notice of special meetings. Section 5620(b).

Note. The staff has not yet drafted provisions comparable to Section 305(c). The Commission has tentatively determined to provide a single uniform court enforcement provision, which will be incorporated by reference in this section.

101/153

§ 5626

Tentatively Approved
April 1976

§ 5626. Notice of adjourned meeting

5626. (a) Except as provided in subdivision (b), when a members' meeting is adjourned to another time or place, notice need not be given of the adjourned meeting if the time and place are announced at the meeting at which the adjournment is taken. At the adjourned meeting, the members may transact any business that might have been transacted at the original meeting.

(b) If the adjournment is for more than 45 days or if after the adjournment a new record date is fixed for the adjourned meeting, a notice of the adjourned meeting shall be given to each member of record entitled to vote at the meeting.

Comment. Section 5626 is the same in substance as Section 601(d) (General Corporation Law). It continues provisions of former Section 2208, which were applicable to nonprofit corporations through former

Section 9002, but extends the length of time for adjournment without notice from 30 to 45 days. It should be noted that the bylaws may prescribe reasonable requirements for notice of adjourned meetings. Section 5620(b).

101/154

§ 5627

Tentatively Approved
April 1976

§ 5627. Validation of defectively noticed meeting

5627. (a) The transactions of a meeting of members, however called and noticed and wherever held, are as valid as though had at a meeting duly held after regular call and notice if all of the following conditions are satisfied:

(1) A quorum is present.

(2) Either before or after the meeting, each member entitled to vote who was not represented at the meeting signs a written waiver of notice, a consent to the holding of the meeting, or an approval of the minutes of the meeting. Neither the business to be transacted at nor the purpose of any regular or special meeting of members need be specified in a written waiver of notice unless otherwise required by Section 5623.

(3) All waivers, consents, and approvals are filed with the corporate records or made a part of the minutes of the meeting.

(b) Attendance of a person at a meeting constitutes a waiver of notice of the meeting except in either of the following cases:

(1) The person objects, at the beginning of the meeting, to the transaction of any business because the meeting is not lawfully called or convened.

(2) The person expressly objects at the meeting to the consideration of matters not included in the notice.

Comment. Section 5627 is the same in substance as Section 601(e) (General Corporation Law). It supersedes provisions of former Sections 2209 and 2210, which were applicable to nonprofit corporations through former Section 9002. It should be noted that the bylaws may prescribe reasonable requirements for validation of a defectively noticed meeting. Section 5620(b).

101/155

§ 5628

Tentatively Approved
April 1976

§ 5628. Notice required for approval of specific proposals

5628. Notwithstanding any provision of the bylaws, any member approval at a meeting, pursuant to Sections [310, 902, 1201, 1900, or 2007], other than unanimous approval by those entitled to vote is valid only if the general nature of the proposal so approved was stated in the notice of meeting or in a written waiver of notice.

Comment. Section 5628 is the same in substance as Section 601(f) (General Corporation Law). It supersedes provisions of former Section 2201, which were applicable to nonprofit corporations through former Section 9002. Section 5620(b), permitting bylaws to prescribe reasonable notice requirements, does not permit waiver of the notice requirement of this section.

Note. The staff has not yet reviewed and drafted comparable sections to replace those referred to in this section.

Tentatively Approved
April 1976

Article 3. Consents

§ 5630. Consent to action without a meeting and prior notice

5630. Unless otherwise provided in the bylaws, any action which may be taken at a meeting of members may be taken without a meeting and without prior notice if consent in writing, setting forth the action so taken, is signed by members having not less than the minimum number of votes that would be necessary to authorize or take such action at a meeting at which all members entitled to vote thereon were present and voted.

Comment. Section 5630 is the same in substance as Section 603(a) (General Corporation Law). It supersedes provisions of former Section 2239, which applied to nonprofit corporations through former Section 9002. Section 5630 reduces the former requirement of unanimous consent, subject to the provisions of Sections 5631-5633.

Note. The Commission has tentatively determined to permit membership action by means other than vote at a meeting or written consent. The staff has not yet drafted provisions for alternative means of voting.

Tentatively Approved
April 1976

§ 5631. Notice required for consent

5631. (a) Unless consent of all members entitled to vote on the matter has been solicited in writing, notice of a corporate action

approved by members without a meeting shall be given in the manner provided in Section 5623 to those members entitled to vote on the matter who have not consented in writing.

(b) The notice required by subdivision (a) shall be given:

(1) At least 10 days before the consummation of an action approved by the members pursuant to Section [310, 317, 1201, or 2007].

(2) Promptly after the taking of any other corporate action.

Comment. Section 5631 is the same in substance as Section 603(b) (General Corporation Law). It is new to nonprofit corporation law.

Note. The staff has not yet reviewed and drafted comparable provisions to replace those referred to in this section.

101/158

§ 5632

Tentatively Approved
April 1976

§ 5632. Revocation of consent

5632. (a) A written consent may be revoked by the member giving the consent, a transferee of the membership, a personal representative of the member, or the proxyholder of the member, transferee, or personal representative.

(b) The revocation shall be in writing and is effective upon its receipt by the secretary of the nonprofit corporation.

(c) A revocation may be made prior to the time that written consents by the number of members required to authorize the proposed action

have been filed with the secretary of the nonprofit corporation but not thereafter.

Comment. Section 5632 is the same in substance as Section 603(c) (General Corporation Law). It continues provisions of former Section 2217 which were applicable to nonprofit corporations through former Section 9002.

101/159

§ 5633

Not Approved; See Minutes
April 1976

§ 5633. Consents required to elect directors

5633. Notwithstanding Section 5630, directors may not be elected by written consent except by unanimous written consent of all members entitled to vote for the election of directors.

Comment. Section 5633 is the same in substance as Section 603(d) (General Corporation Law). It is new to nonprofit corporation law.

Note. The staff has not yet ascertained whether this section is appropriate for nonprofit corporations.

Not Approved; See Minutes
April 1976

Article 4. Form of Proxy or Written Consent

§ 5640. Form of proxy or written consent

5640. (a) A form of proxy or written consent shall afford an opportunity on the form to specify as to each matter or group of matters (other than election to office) for which the proxy or written consent is solicited, a choice among approval, disapproval, or abstention. Where the person solicited specifies a choice, the membership shall be voted in accordance therewith.

(b) In an election of directors, a form of proxy in which the candidates are named and which is marked by a member "withhold" or otherwise marked in a manner indicating that the authority to vote for the election of directors is withheld, shall not be voted either for or against the election of a director.

(c) Failure to comply with this section shall not invalidate any corporate action taken but may be the basis for challenging any proxy or written consent, and the superior court may compel compliance therewith at the suit of any member.

Comment. Section 5640 is comparable to Section 604 (General Corporation Law) except that it applies to all nonprofit corporations. It supersedes former Section 2225.5 which was applicable to nonprofit corporations through former Section 9002.

Note. This section is to be split into separate provisions relating to proxies and written consents. The section should make clear that a general proxy is not prohibited.

Tentatively Approved
March 1976

CHAPTER 7. VOTING OF MEMBERSHIPS

§ 5700. Voting rights and manner of voting

5700. (a) Unless the bylaws provide otherwise, every member of a nonprofit corporation is entitled to one vote.

(b) The manner of voting may be:

(1) At a meeting or by written consent pursuant to Chapter 6 (commencing with Section 5610).

(2) By ballot, mail, or any reasonable means provided in the bylaws.

Comment. Subdivision (a) of Section 5700 continues a portion of the first sentence of former Section 9601. For a comparable provision, see Section 700(a) (General Corporation Law). Although the established norm for nonprofit corporations is one vote per member (see Green Gables Home Owner's Ass'n v. Sunlite Homes, 202 P.2d 143 (1949)), the bylaws may provide different classes of membership with differing voting rights (see Section 5261; see also Erickson v. Gospel Foundation, 43 Cal.2d 581, 275 P.2d 474 (1954)). Absent a specification of the rules fixing the respective voting rights of each member or class of members, the voting rights of members are equal. Section 5401.

Subdivision (b) continues the second sentence of former Section 9601. It makes clear that the bylaws may provide any reasonable means or combination of means of voting but, absent such provision, the requirements of Chapter 6 (Members' Meetings and Consents) control. Where a nonprofit corporation adopts alternative means of voting, it should make clear its notice requirements and the vote required for member action.

Not Approved; See Minutes
March 1976

§ 5701. Record date for determining members

5701. (a) In order that the nonprofit corporation may determine the members entitled to notice of any meeting or to vote or entitled to receive any allotment of any rights or entitled to exercise any rights in respect of any other lawful action, the board may fix, in advance, a record date which shall not be more than 60 nor less than 10 days prior to the date of such meeting nor more than 60 days prior to any other action.

(b) If no record date is fixed:

(1) The record date for determining members entitled to notice of or to vote at a meeting of members shall be at the close of business on the business day next preceding the day on which notice is given or, if notice is waived, at the close of business on the business day next preceding the day on which the meeting is held.

(2) The record date for determining members entitled to give consent to corporate action in writing without a meeting, when no prior action by the board is necessary, shall be the day on which the first written consent is given.

(3) The record date for determining members for any other purpose shall be at the close of business on the day on which the board adopts the resolution relating thereto or the 60th day prior to the date of such other action, whichever is later.

(c) A determination of members of record entitled to notice of or to vote at a meeting of members shall apply to any adjournment of the

meeting unless the board fixes a new record date for the adjourned meeting, but the board shall fix a new record date if the meeting is adjourned for more than 45 days from the date set for the original meeting.

(c) Members on the record date are entitled to notice and to vote or to receive the allotment of rights or to exercise the rights, as the case may be, notwithstanding any transfer or termination of any memberships on the books of the nonprofit corporation after the record date except as otherwise provided in the articles or bylaws.

Comment. Section 5701 supersedes provisions applicable to nonprofit corporations by former Sections 2214 and 2215 through former Section 9002. Section 5701 extends the permissible record date from 50 to 60 days prior to the event to which it relates, adds a 10-day cutoff prior to meetings of members, and provides rules governing the record date absent a date fixed by the board. For a comparable provision, see Section 701 (General Corporation Law).

Note. This section will be relocated as a general provision, and replaced by a provision that a nonprofit corporation may permit new members after the record date to vote, and preclude persons no longer members after the record date from voting.

This provision should also be reviewed in the light of any restrictions on the ability of directors to adopt bylaws affecting voting rights of members.

Not Approved; See Minutes
March 1976

§ 5702. Voting of membership held by partnership, association, family,
or other group

5702. (a) Unless the articles or bylaws otherwise provide, a membership standing in the name of a partnership, association, family, or other group shall be voted by a person designated by the partnership, association, family, or other group to act as its representative. The name of the representative shall be delivered in writing to the non-profit corporation prior to the record date of the vote at which the representative is to act. Unless the articles or bylaws preclude voting by proxy, a representative so designated may vote by proxy.

(b) A new representative may be designated and the name of the new representative given in writing to the nonprofit corporation prior to the record date of the vote at which the new representative is to act. The designation of a new representative revokes any prior designation.

Comment. Section 5702 is new. It should be noted that only natural persons may be members of a nonprofit corporation unless the articles or bylaws provide otherwise. Section 5400. Moreover, where a nonprofit corporation allows partnership, association, family, and other group memberships, Section 5702 permits the articles or bylaws to provide differing voting requirements, such as majority or fractional voting by members of the partnership, association, family, or other group.

Note. Partnerships, associations, families, or other groups should be voted in the manner provided in Section 5704.

Tentatively Approved
March 1976

§ 5703. Voting of membership held by corporation

5703. (a) Unless the bylaws otherwise provide, a membership standing in the name of a business corporation or another nonprofit corporation, domestic or foreign, may be voted by such officer, agent, or proxyholder as the bylaws of the business or other nonprofit corporation may prescribe or, in the absence of such provision, as the board of the business or other nonprofit corporation may determine or, in the absence of such determination, by the chairman of the board, president, or any vice president of the business or other nonprofit corporation, or by any other person authorized to do so by the chairman of the board, president, or any vice president of the business or other nonprofit corporation.

(b) Memberships which are purported to be voted or any proxy purported to be executed in the name of a business corporation or nonprofit corporation, domestic or foreign (whether or not any title of the person signing is indicated) shall be presumed to be voted or the proxy executed in accordance with the provisions of this section unless the contrary is shown.

Comment. Section 5703 is the same in substance as Section 703(a) (General Corporation Law). It should be noted that only natural persons may be members of a nonprofit corporation unless the bylaws provide otherwise. Section 5400. Moreover, where a nonprofit corporation allows corporate members, Section 5703 permits the bylaws to require differing voting requirements, such as designation of a voting representative.

Subdivision (a) continues provisions applicable to nonprofit corporations by former Section 2222 through former Section 9002.

Subdivision (b) is new.

Note. The term "business corporation" should be broadly defined for purposes of this section.

404/389

§ 5704

Tentatively Approved
March 1976

§ 5704. Voting of membership held by two or more persons

5704. (a) This section applies where a membership stands of record in the names of two or more persons, whether fiduciaries, members of a partnership, joint tenants, tenants in common, husband and wife as community property, tenants by the entirety, or where two or more persons (including proxyholders) have the same fiduciary relationship respecting the same membership, unless the secretary of the nonprofit corporation is given written notice to the contrary and is furnished with a copy of the instrument or order appointing them or creating the relationship wherein it is so provided.

(b) Unless the bylaws otherwise provide, the acts with respect to voting of the persons in whose names the membership stands shall have the following effect:

(1) If only one person votes, such act binds all.

(2) If more than one person votes, the act of the majority so voting binds all; but, where the vote is evenly split on any particular

matter, each faction may vote the membership in question proportionately. If the instrument so filed or the registration of the membership shows that the membership is held in unequal interests, a majority or even split for the purposes of this paragraph shall be a majority or even split in interest.

Comment. Section 5704 is the same in substance as Section 704 (General Corporation Law), with the inclusion of families, partnerships, associations, and other groups. It continues provisions applicable to nonprofit corporations by former Section 2223 through former Section 9002. It should be noted, however, that no member may hold a fractional membership or a joint interest in a membership unless the bylaws so provide. Section 5400. Moreover, where a nonprofit corporation allows memberships in the names of two or more persons, Section 5704 permits the bylaws to provide differing voting requirements, such as designation of a single voting representative or fractional voting.

Note. This section should be expanded to include families, partnerships, associations, and other groups.

404/390

§ 5705

Not Approved; See Minutes
March 1976

§ 5705. Proxies

5705. (a) Unless the bylaws provide otherwise, every member of a nonprofit corporation entitled to vote may vote or act by proxy. Any proxy purporting to be executed in accordance with the provisions of this division shall be presumptively valid.

(b) No proxy shall be valid after the expiration of 11 months from the date thereof unless otherwise provided in the proxy. Every proxy continues in full force and effect until revoked by the person executing it prior to the vote pursuant thereto except as otherwise provided in this section. Such revocation may be effected by a writing delivered to the nonprofit corporation stating that the proxy is revoked or by a subsequent proxy executed by, or by attendance at the meeting and voting in person by, the person executing the proxy. The dates contained on the forms of proxy presumptively determine the order of execution, regardless of the postmark dates on the envelopes in which they are mailed.

(c) A proxy is not revoked by the death or incapacity of the maker unless, before the vote is counted, written notice of such death or incapacity is received by the nonprofit corporation.

Comment. Section 5705 states the basic rules governing proxies. The term "proxy" is defined in Section 5129, which also provides the manner of execution of proxies. See also Sections 5640 (form of proxy) and 5263 (bylaws).

The first sentence of subdivision (a) continues a portion of former Section 9601; the second sentence is new. For a comparable provision, see Section 705(a) (General Corporation Law). Unlike the General Corporation Law, the General Nonprofit Corporation Law permits nonprofit corporations to preclude proxy voting. See also Section 5263 (bylaws relating to voting rights).

Subdivision (l) supersedes provisions applicable to nonprofit corporations by former Sections 2226 and 2228 through former Section 9002. Cf. Braude v. Havenner, 38 Cal. App.3d 526, 113 Cal. Rptr. 386 (1974). Unlike the former provisions, subdivision (b) imposes no seven-year maximum duration for a proxy and makes no provision for irrevocable

proxies. The last sentence of subdivision (b) is new. For a comparable provision, see Section 705(b)(General Corporation Law).

Subdivision (c) continues provisions applicable to nonprofit corporations by former Section 2227 through former Section 9002. Cf. Braude v. Havenner, 38 Cal. App.3d 526, 113 Cal. Rptr. 386 (1974). For a comparable provision, see Section 705(c)(General Corporation Law).

Note. This section should be revised to provide a maximum three-year duration for proxies unless coupled with an interest. Proxies coupled with an interest are not revocable at will.

404/391

§ 5706

Tentatively Approved
March 1976

§ 5706. Voting agreements

5706. (a) An agreement between two or more members of a nonprofit corporation, if in writing and signed by the parties thereto, may provide that, in exercising any voting rights, the memberships held by them shall be voted as provided by the agreement or as the parties may agree or as determined in accordance with a procedure agreed upon by them.

(b) An agreement under this section may be made for any period of time not exceeding 10 years, but the fact that by its term it will or may last beyond a 10-year period does not affect the validity of the agreement during a period of 10 years from the date it was made. At any time within two years prior to the time of expiration of the agreement as originally made or as last extended as provided in this subdivision, one or more parties to the agreement may by written agreement extend the duration of the agreement with respect to their memberships for an ad-

ditional period not exceeding 10 years from the expiration date of the agreement as originally made or as last extended as provided in this subdivision.

(c) If the bylaws permit transfer of memberships, the parties may transfer the memberships covered by an agreement under this section to a third party or parties with authority to vote them in accordance with the terms of the agreement.

(d) An agreement under this section shall not be denied specific performance by a court on the ground that the remedy at law is adequate or on other grounds relating to the jurisdiction of a court of equity.

Comment. Section 5706 is the same in substance as Section 706(a) (General Corporation Law), with a 10-year limitation on duration derived from Section 706(l) (General Corporation Law). Section 5706 supersedes the voting trust provisions of former Sections 2230 and 2231 which were applicable to nonprofit corporations through former Section 9002.

Note. The meaning of the phrase "as the parties may agree" should be ascertained by communication with the State Bar Committee, and deleted if it has no satisfactory meaning.

404/392

§ 5707

Tentatively Approved
March 1976

§ 5707. Inspectors of election

§ 5707. (a) In advance of any meeting of members, the board may appoint inspectors of election to act at the meeting and any adjournment thereof. If inspectors of election are not so appointed, or if any

persons so appointed fail to appear or refuse to act, the chairman of any meeting of members may, and on the request of any member or a member's proxy shall, appoint inspectors of election (or persons to replace those who so fail or refuse) at the meeting. The number of inspectors shall be either one or three. If appointed at a meeting on the request of one or more members or proxies, the majority of memberships represented in person or by proxy shall determine whether one or three inspectors are to be appointed.

(b) The inspectors of election shall determine the number of memberships outstanding and the voting power of each, the memberships represented at the meeting, the existence of a quorum and the authenticity, validity and effect of proxies, receive votes, ballots or consents, hear and determine all challenges and questions in any way arising in connection with the right to vote, count and tabulate all votes or consents, determine when the polls shall close, determine the result, and do such acts as may be proper to conduct the election or vote with fairness to all members.

(c) The inspectors of election shall perform their duties impartially, in good faith, to the best of their ability, and as expeditiously as is practical. If there are three inspectors of election, the decision, act, or certificate of a majority is effective in all respects as the decision, act, or certificate of all. Any report or certificate made by the inspectors of election is prima facie evidence of the facts stated therein.

Comment. Section 5707 continues provisions applicable to nonprofit corporations by former Sections 2232 and 2233 through former Section

9002. For a comparable provision, see Section 707 (General Corporation Law).

Note. This section should be revised to eliminate plurals and further subdivide.

100/969

§ 5708

Not Approved; See Minutes
March 1976

§ 5703. Cumulative voting

5708. No member may cumulate votes for directors unless the articles or bylaws so provide.

Comment. Section 5708 continues the last sentence of former Section 2235 and the last sentence of former Section 9601. Nonprofit corporations, unlike business corporations, need not permit cumulative voting by members. Contrast Section 708 (General Corporation Law). See also Section 5263 (bylaws relating to voting rights). It should be noted, however, that cumulative voting in certain types of nonprofit corporations is prohibited. See Sections 5211 and 5212 (medical and legal services corporations).

Note. This section should be revised to provide for cumulative voting where three or more positions are to be filled. The Comment should note that, where there are fewer positions to be filled at an election, cumulative voting is not effectual. Whether the whole slate of directors for charitable or other nonprofit corporations should be required to be elected annually should be considered in connection with this section.

Subdivisions (c)-(e) of Section 703 of the new business corporation law should be examined for their applicability to nonprofit corporations.

Tentatively Approved
March 1976

§ 5709. Contested elections or appointments

5709. (a) Upon the filing of an action therefor by a member or by a person who claims to have been denied the right to vote, the superior court of the proper county shall try and determine the validity of any election or appointment of any director of any domestic nonprofit corporation, or of any foreign nonprofit corporation if the election was held or the appointment was made in this state. In the case of a foreign nonprofit corporation, the action may be brought at the option of the plaintiff in the county in which the foreign nonprofit corporation has its principal office in this state or in the county in which the election was held or the appointment was made.

(b) Upon the filing of the complaint, and before any further proceedings are had, the court shall enter an order fixing a date for the hearing, which shall be within five days unless for good cause shown a later date is fixed, and requiring notice of the date for the hearing and a copy of the complaint to be served upon the nonprofit corporation and upon the person whose purported election or appointment is questioned and upon any person (other than the plaintiff) whom the plaintiff alleges to have been elected or appointed, in the manner in which a summons is required to be served, or, if the court so directs, by registered mail; and the court may make such further requirements as to notice as appear to be proper under the circumstances.

(c) The court may determine the person entitled to the office of director or may order a new election to be held or appointment to be

made, may determine the validity, effectiveness and construction of voting agreements, the validity of the issuance of memberships and the right of persons to vote, and may direct such other relief as may be

just and proper.

Comment. Section 5709 continues provisions applicable to nonprofit corporations by former Sections 2236-2238 through former Section 9002. See Brade v. Havenner, 38 Cal. App.3d 526, 113 Cal. Rptr. 386 (1974). This section provides an equitable remedy in which the scope of inquiry is not limited to technical and procedural questions. 38 Cal. App.3d at 530. For the definition of "proper county," see Section 5177.

Note. The staff has not yet researched foreign nonprofit corporations.

This section should be further subdivided and tabulated.

The staff has not yet investigated the need for a provision giving the court continuing jurisdiction.

Tentatively Approved
March 1976

CHAPTER 8. MEMBERS' DERIVATIVE ACTIONS

Article 1. Right to Bring Derivative Action

§ 5810. Right of member to bring derivative action

5810. A member of a domestic or foreign nonprofit corporation may institute and maintain an action in the right of the nonprofit corporation only as provided in this chapter.

Comment. Section 5810 makes explicit the right of a member of a nonprofit corporation to bring a derivative suit. Before the enactment of this chapter, Section 834 of the former General Corporation Law (predecessor of Section 800 of the new General Corporation Law) governed such actions in the right of nonprofit corporations. See former Sections 103 ("shareholder" includes "member") and 9002 (incorporating provisions of General Corporation Law). See also Ashton v. Dashaway Ass'n, 81 Cal. 61, 22 P. 660 (1890). References in Section 800 to voting trusts and voting trust certificates have not been continued in this chapter because the General Nonprofit Corporation Law does not provide for voting trusts.

Note. The staff will give further consideration to the inclusion of foreign nonprofit corporations in this section when we consider the general subject of foreign nonprofit corporations.

Substance Tentatively
Approved March 1976

§ 5811. Action by member; contemporaneous membership rule

5811. An action may be brought pursuant to this chapter only by a plaintiff who satisfies both of the following requirements:

(a) The plaintiff is a member of the nonprofit corporation at the time the action is commenced.

(b) Except as otherwise provided in Section 5812, the plaintiff was a member of the nonprofit corporation at the time of the transaction (or any part thereof) complained of or holds a membership which devolved upon the plaintiff by operation of law from a person who was a member at such time.

Comment. Section 5811 is based on a portion of subdivision (b)(1) of Section 800 of the General Corporation Law and subdivision (a)(1) of former Section 834. Section 5811, however, states its rules in substantive rather than procedural form.

Substance Tentatively
Approved March 1976

§ 5812. Exception to contemporaneous membership rule; notice and hearing

5812. (a) A plaintiff who does not satisfy the requirement of subdivision (b) of Section 5811 may be permitted to maintain an action under this chapter if the plaintiff shows and the court determines that all of the following conditions exist:

- (1) There is a strong prima facie case in favor of the claim asserted on behalf of the nonprofit corporation.
 - (2) No other similar action has been or is likely to be instituted.
 - (3) The plaintiff became a member before there was disclosure to the public or to the plaintiff of the alleged wrongdoing.
 - (4) Unless the action can be maintained, the defendant may retain a gain derived from the defendant's alleged willful breach of a fiduciary duty.
 - (5) The requested relief will not result in unjust enrichment of the nonprofit corporation or any member of the nonprofit corporation.
- (b) The court's determinations shall be made at a preliminary hearing held on noticed motion.

Comment. Section 5812 provides an exception to the contemporaneous membership rule provided in subdivision (b) of Section 5811. Section 5812 is substantively the same as a portion of subdivision (b)(1) of Section 800 of the General Corporation Law. The procedure normally applicable to noticed motions applies to motions under this section; hence, the provision in subdivision (b)(1) of Section 800 concerning the nature of the evidence at the hearing has not been continued.

Substance Tentatively
Approved March 1976

Article 2. Preconditions to Derivative Action

§ 5820. Effort to secure action from board; exception

5820. (a) Before bringing an action pursuant to this chapter, the plaintiff shall make an effort to secure from the board the action the plaintiff desires unless the effort would be futile.

(b) Such efforts or the reasons for not making them shall be alleged with the particularity in the complaint.

Comment. Section 5820 is based on a portion of subdivision (b)(2) of Section 300 of the General Corporation Law and subdivision (a)(2) of former Section 334. Like Section 5811, subdivision (a) of Section 5820 is stated as a substantive rather than a procedural rule. Subdivision (b) continues the requirement of subdivision (b)(2) of Section 800 that the efforts to secure the desired action from the board be stated with particularity in the complaint.

Substance Tentatively
Approved March 1976

§ 5821. Notice to nonprofit corporation of cause of action

5821. Before bringing an action pursuant to this chapter, the plaintiff shall do either of the following:

(a) Inform the nonprofit corporation or the board in writing of the ultimate facts of each cause of action against each defendant.

(b) Deliver to the nonprofit corporation or the board a true copy of the complaint that the plaintiff proposes to file.

Comment. Section 5821 is based on a portion of subdivision (b)(2) of Section 800 of the General Corporation Law and subdivision (a)(2) of former Section 834. Like subdivision (a) of Section 5811, Section 5821 is stated in substantive rather than procedural form.

Substance Tentatively
Approved March 1976

Article 3. Security for Defendant's Expenses; Exception

§ 5830. Motion for security for defendant's expenses; extension of time

5830. (a) Except as otherwise provided in Section 5839, in an action pursuant to this chapter, at any time within 30 days after service of summons upon the nonprofit corporation or upon a defendant who is an officer or director of the nonprofit corporation or held such office at the time of the transaction complained of, the nonprofit corporation or such other defendant may move the court for an order requiring the plaintiff to furnish security for the reasonable expenses, including attorney's fees [and expenses for which the nonprofit corporation may become liable pursuant to Section _____], that may be incurred by the moving party in connection with the action as provided in this article.

(b) On application of the nonprofit corporation or such other defendant, the court may, for good cause shown, extend the 30-day period provided by subdivision (a) for an additional period or periods not exceeding 60 days.

Comment. Subdivision (a) of Section 5830 is the same in substance as a portion of subdivision (c) of Section 800 of the General Corporation Law. Section 5839, which is noted in the introductory phrase of subdivision (a), makes the motion procedure inapplicable where the action is brought by 50 members or at least 10 percent of the members, whichever number is smaller.

Subdivision (b) is the same in substance as the last sentence of subdivision (c) of Section 800 of the General Corporation Law and the last sentence of subdivision (b) of former Section 834.

See Section 5838 (bond to avoid motion proceedings).

Note. The blank section reference in subdivision (a) is intended to hold a place until the provisions concerning indemnification of officers and directors are considered.

404/960

§ 5831

Substance Tentatively
Approved March 1976

§ 5831. Grounds of motion for security

5831. (a) A motion by the nonprofit corporation shall be made upon the grounds that there is no reasonable possibility that the prosecution of the cause of action alleged in the complaint against the nonprofit corporation will benefit the nonprofit corporation or its members.

(b) A motion by a defendant who is an officer or director or held such office at the time of the transaction complained of shall be made upon either or both of the following grounds:

(1) That there is no reasonable possibility that the prosecution of the cause of action alleged in the complaint against such defendant will benefit the nonprofit corporation or its members.

(2) That such defendant did not participate in the transaction complained of in any capacity.

Comment. Section 5831 is the same in substance as a portion of subdivision (c) of Section 800 of the General Corporation Law and a portion of subdivision (b) of former Section 334. Section 5831 makes more specific the nature of the showing required to be made by each type of defendant in order to prevail on the motion for security under this article.

Substance Tentatively
Approved March 1976

§ 5832. Hearing and determination of motion; amount of security

5832. (a) If the court, after the hearing on the motion, determines that the grounds for the motion have been established, the court shall order the plaintiff to furnish security.

(b) The security shall be in an amount equal to the probable reasonable expenses, including attorney's fees [and, in the case of the nonprofit corporation, expenses for which the nonprofit corporation may become liable pursuant to Section ____], that the prevailing moving party has shown it will have incurred by the conclusion of the action.

(c) The amount of the security shall not exceed fifty thousand dollars (\$50,000) in the aggregate for all defendants.

Comment. Section 5832 is based on portions of subdivision (d) of Section 800 of the General Corporation Law. The grounds of the motion are stated in Section 5831. Subdivision (a) of Section 5832 differs from subdivision (d) of Section 800 in that it does not contain specific provisions for taking evidence since it is contemplated that general law regarding noticed motions applies. Hence, at the hearing, the usual showing is by affidavits or declarations although the court may receive oral and documentary evidence as well. 4 B. Witkin, California Procedure, Proceedings Without Trial, §§ 24-25, at 2693-2694 (2d ed. 1971).

Subdivision (b) makes clear that, in order to have recourse to the security, the nonprofit corporation must be a prevailing moving party. See Section 5836; compare Section 300. [Section ____, referred to in this subdivision, provides for indemnification of officers, directors, and agents of the nonprofit corporation.]

Subdivision (c) provides a maximum amount of security that may be required of the plaintiff and is the same as the limit provided by subdivision (d) of Section 800.

Substance Tentatively
Approved March 1976

§ 5833. Increase or decrease of security; noticed motion; maximum amount

5833. (a) The amount of the security initially determined may be increased or decreased by the court, after further hearing upon noticed motion, if the court determines that the security has or may become inadequate or excessive.

(b) The court may not in any event increase the total amount of the security beyond fifty thousand dollars (\$50,000) in the aggregate for all defendants.

Comment. Section 5833 is the same in substance as a portion of subdivision (d) of Section 800 of the General Corporation Law. See Comment to Section 5832.

Staff Draft

§ 5834. Time for furnishing security; effect of failure to furnish

5834. (a) The plaintiff required to furnish security or increase the amount of the security shall do so not later than 20 days after service of the court's order or within such other reasonable time as the court may order.

(b) If the plaintiff does not comply with subdivision (a), the action shall be dismissed as to the defendant in whose favor the order requiring the security was made.

Comment. Section 5834 is based on a portion of subdivision (d) of Section 800 of the General Corporation Law but makes a clarifying change and an addition. Subdivision (a) provides that the plaintiff has 20 days within which to furnish security where the court does not specify some other reasonable time. Section 800 provides only for a reasonable time to be set by the court. Subdivision (a) also makes clear that the time limit for furnishing the security applies where an order increasing the amount of the security is made pursuant to Section 5833. If the court authorizes the undertaking to be decreased under Section 5833, compliance by the plaintiff is optional.

Subdivision (b) is the same in substance as a portion of subdivision (d) of Section 800.

405/434

§ 5835

Staff Draft

§ 5835. Stay of proceedings

5835. If a motion is filed pursuant to this article, no pleadings need be filed by the nonprofit corporation or any other defendant and the prosecution of the action is thereby stayed until 10 days after the motion is denied or, if granted, until 10 days after the required security has been furnished and the defendant has been given written notice thereof.

Comment. Section 5835 continues the provisions of subdivision (f) of Section 800 of the General Corporation Law for an automatic stay for 10 days and for postponement of the filing of pleadings by the defendants but varies in several respects. Section 5835 provides that, where the motion for security is granted, the 10-day stay period runs from the

time when security is furnished and the defendant has received notice thereof. Where the motion is granted but the plaintiff fails to furnish security within the allotted time, the action is dismissed. See Section 5834.

405/435

§ 5836

Tentatively Approved
March 1976

§ 5836. Recourse to security

5836. The prevailing moving party shall have recourse to the security upon the termination of the action in an amount determined by the court at a hearing upon noticed motion.

Comment. Section 5836 is based on a portion of subdivision (d) of Section 800 of the General Corporation Law. Section 5836, however, makes clear that only parties who prevailed on the motion may have recourse to the security and that the court makes its determination on noticed motion.

405/437

§ 5837

Tentatively Approved
March 1976

§ 5837. Effect of court's determinations

5837. The determinations of the court under this article have no effect on the determination of any issues on the merits of the action.

Comment. Section 5837 is the same in substance as a portion of subdivision (d) of Section 800 of the General Corporation Law.

Staff Draft

§ 5838. Bond to avoid motion proceedings

5838. If at any time the plaintiff posts a good and sufficient bond in the aggregate amount of fifty thousand dollars (\$50,000) to secure the reasonable expenses, including attorney's fees, of the parties entitled to make a motion pursuant to this article, the plaintiff shall be deemed to have complied with this article and with any order for security made hereunder. Any pending motion for security shall be dismissed and no further or additional bond or other security may be required.

Comment. Section 5838 is the same in substance as subdivision (e) of Section 300 of the General Corporation Law.

Staff Draft

§ 5839. Exception to security for defendant's expenses

5839. If an action is brought pursuant to this chapter by at least 50 members or at least 10 percent of the members, whichever number is smaller, the plaintiffs shall not be required to furnish security for the defendant's expenses.

Comment. Section 5839 permits plaintiffs who meet the stated numerical requirements to avoid having to furnish security for the defendant's expenses under this article. This section has no predecessor in California law but is similar to Section 7765 of the Pennsylvania Corpo-

ration Not-for-profit Code. Of course, all such plaintiffs must satisfy the requirements of Article 1 (commencing with Section 5810) and Article 2 (commencing with Section 5820) of this chapter.

Note. This section was considered at the March 1976 meeting, but no decision was reached.

Tentatively Approved
March 1976

Article 4. Discontinuation of Derivative Action

§ 5840. Discontinuation of action; court approval

5840. An action brought pursuant to this chapter shall not be dismissed, discontinued, compromised, or settled without the approval of the court.

Comment. Section 5840 codifies the rule stated in Ensher v. Ensher, Alexander & Barsoom, Inc., 187 Cal. App.2d 407, 9 Cal. Rptr. 732 (1960).

Tentatively Approved
March 1976

CHAPTER 9. AMENDMENT OF ARTICLES

Article 1. Purposes of Amendments

§ 5910. Permissible amendments of articles

5910. (a) By complying with the provisions of this chapter, a non-profit corporation may amend its articles from time to time, in any and as many respects as may be desired, so long as its articles as amended contain only such provisions as it would be lawful to insert in original articles filed at the time of the filing of the amendment.

(b) It is the intent of the Legislature in adopting this section to exercise to the fullest extent the reserve power of the state over non-profit corporations and to authorize any amendment of the articles covered by subdivision (a) regardless of whether any provision contained in the amendment was permissible at the time of the organization of the nonprofit corporation.

Comment. Section 5910 is the same in substance as Section 900(a) (General Corporation Law). It supersedes former Sections 3600-3602, which were applicable to nonprofit corporations through former Section 9305.

Tentatively Approved
March 1976

Staff Revision May 1976

§ 5911. Amendment to delete initial director

5911. Notwithstanding Section 5910, a nonprofit corporation shall not amend its articles to alter the statement in the original articles of the name and address of an initial director except to correct an error in the statement or to delete the statement after the nonprofit corporation has filed a statement under Section 6531.

Comment. Section 5911 is comparable to Section 900(b) (General Corporation Law). It supersedes former Section 3603, which was applicable to nonprofit corporations through former Section 9305. A correction of an error in the articles may be made by a certificate of correction. See Article 3 (commencing with Section 14835) of Chapter 3 of Division 4.

Note. The staff revision deletes references to the initial agent, which is not required to be stated in the articles. The Commission has also tentatively determined not to include a statement of directors in the Section 6531 statement; Section 5911 may require revision or deletion accordingly.

Tentatively Approved
March 1976

§ 5912. Extension of corporate existence

5912. (a) A nonprofit corporation formed for a limited period may at any time subsequent to the expiration of the term of its corporate

existence, if it has continuously acted as a nonprofit corporation and conducted activity as such, extend the term of its existence by an amendment to its articles removing any provision limiting the term of its existence and providing for perpetual existence.

(b) The certificate of amendment shall set forth that the nonprofit corporation continuously acted as a nonprofit corporation and conducted activities as such from the expiration of its term of corporate existence to the date of the amendment.

(c) For the purpose of the adoption of an amendment described in subdivision (a), persons who have been functioning as directors of the nonprofit corporation shall be considered to have been validly elected even though their election may have occurred after the expiration of the original term of the corporate existence.

(d) If the filing of the certificate of amendment providing for perpetual existence would be prohibited by the provisions of Section 14321 if it were original articles, the Secretary of State shall not file the certificate unless by the same or a concurrently filed certificate of amendment the articles of the nonprofit corporation are amended to adopt a new available name.

Comment. Section 5912 is the same in substance as Section 909 (General Corporation Law). It supersedes former Sections 3700-3703, which were applicable to nonprofit corporations through former Section 9305.

Unlike the former provisions, Section 5912 applies only to extensions of corporate existence made after expiration of the nonprofit corporation's term of existence; extensions prior to expiration are made pursuant to the general amendment provisions of this chapter. The vote required to amend the articles to extend corporate existence is the vote required for other amendments to the articles. Contrast former Section 3701.

Not Approved; See Minutes
March 1976

§ 5913. Amendment of articles of charitable corporation

5913. If a nonprofit corporation holds assets on a charitable trust or is organized for charitable purposes, the nonprofit corporation shall give written notice to the Attorney General of any proposed amendment of the articles to alter any of the following provisions:

- (a) The name of the nonprofit corporation.
- (b) The purposes for which the nonprofit corporation is organized.
- (c) The law under which the nonprofit corporation is organized.

Comment. Section 5913 is new. Compare former Section 3602(b) (limitation on amendment of articles to exist under a law other than the law under which a corporation was organized or exists). It is designed to assist the Attorney General in enforcement of its supervisory duties over charitable trusts.

Note. Further information concerning the meaning of subdivision (c) is necessary.

Tentatively Approved
March 1976

Article 2. Adoption and Approval of Amendments

§ 5920. Vote required in articles

5920. Notwithstanding any other provision of this article, where the articles set forth a provision requiring the vote of a larger proportion or all of the members or any class of members, or a larger proportion or all of the directors, than is otherwise required by this article for approval of any amendment of the articles or an amendment of a particular kind or for a particular purpose, the amendment shall be adopted only with the approval so required.

Comment. Section 5920 supersedes the last paragraph of former Section 3632, which was applicable to nonprofit corporations through former Sections 9303 and 9305.

Note. AB 2849 (clean-up bill) would add a new provision to require that any provision of the articles imposing a larger than ordinary vote requirement for corporate action may be amended only by the same larger than ordinary vote. We will follow the progress of the proposed amendment.

Not Approved; See Minutes
March 1976

§ 5921. Adoption of amendments before members admitted

5921. Before any members have been admitted or where the nonprofit corporation has, in fact, no members other than the persons constituting

the board, an amendment of the articles may be adopted by a writing signed by a majority of the directors.

Comment. Section 5921 supersedes provisions applicable to non-profit corporations by former Section 3630 through former Section 9305. For a comparable provision, see Section 901 (General Corporation Law).

Unlike the former provision, Section 5921 permits adoption of amendments by directors rather than incorporators and permits adoption by majority rather than two-thirds vote.

Note. The need for this section should be reviewed in light of the general provisions relating to directors exercising the rights of members where there are no other members.

368/240

§ 5922

Not Approved; See Minutes
March 1976

§ 5922. Adoption of amendments by board and members

5922. (a) An amendment of the articles may be adopted if approved by the board and by the members entitled to vote thereon. Approval of the members may be either before or after the approval of the board.

(b) Approval of the members shall be by a majority of the votes cast but in no case by a vote of less than two-thirds of a quorum required for a meeting of members.

Comment. Section 5922 continues and clarifies the portion of the first paragraph of former Section 3632 that related to nonprofit corporations. For a comparable provision, see Section 902(a) (General Corporation Law). The phrase "approved by (or approval of) the board" is defined in Section 5151. For a quorum of a meeting of members, see Section 5614.

399/312

§ 5923

Tentatively Approved
March 1976

Staff Revision May 1976

§ 5923. Adoption of amendments by board alone

5923. Notwithstanding Section 5922, an amendment deleting the name and address of an initial director may be adopted with approval of the board alone.

Comment. Section 5923 is the same in substance as Section 902(c) (General Corporation Law). An amendment described in this section may not be made unless the nonprofit corporation has filed a statement under Section 6502. See Section 5911. The phrase "approval of the board" is defined in Section 5151.

Note. Subdivision (b) of Section 902 (General Corporation Law) permits amendment by approval of the board alone in cases of corporations organized prior to August 14, 1929; the staff has not been able to discern the reason for this provision but plans to communicate with the State Bar Committee concerning it.

The staff revision deletes references to the initial agent, which is not required to be stated in the articles.

368/243

§ 5924

Tentatively Approved
March 1976

§ 5924. Adoption of amendments by policymaking committee

5924. (a) If the bylaws of a nonprofit corporation so provide and if consistent with the articles, any member action required for the adoption of an amendment to the articles may be taken by the vote of at least two-thirds of the members of a policymaking committee.

(b) The policymaking committee shall be created by the members of the nonprofit corporation to represent and act for the members in this matter, with or without authority to represent and act for the members in other matters. Only members of the nonprofit corporation who are representative of the membership shall serve on the committee.

Comment. Section 5924 continues former Section 3632.5, adding the requirement that the committee members be representative.

Note. Whether the term "vote" is used properly here as a defined term is to be investigated.

368/244

§ 5925

Tentatively Approved
March 1976

§ 5925. When class vote required

5925. (a) Notwithstanding any other provision of this division, a proposed amendment of the articles or bylaws must be approved by vote of not less than a majority of the votes cast by members of a class, whether or not the class is entitled to vote thereon by provisions of the articles or bylaws, if the amendment would adversely affect the property, voting, or other rights or interests of the members of the class to a greater extent than members of other classes.

(b) In addition to approval by a class as provided in subdivision (a), a proposed amendment of the articles or bylaws must also be approved as required by statute.

Comment. Section 5925 is new; for a comparable provision, see Section 903 (General Corporation Law).

Subdivision (a) requires a class vote in cases where an amendment of the articles or bylaws would adversely affect members of a particular class to a greater extent than members of other classes. Such an amendment might have an adverse effect either directly through restrictions on class rights and privileges or indirectly through increase of rights and privileges of other members or creation of new memberships that will have the effect of diluting the rights of the class members.

Subdivision (b) makes clear that class approval of adverse amendments is not alone sufficient for adoption of the amendments. The amendments must meet the other statutory requirements for approval. See, e.g., Sections 5260 (adoption of bylaw amendments) and 5922 (adoption of articles amendments).

Note. This section should be placed in the chapter relating to voting rights.

Tentatively Approved
March 1976

Article 3. Certificates of Amendment

§ 5930. Certificate of amendment

5930. Upon adoption of an amendment of the articles, the nonprofit corporation shall file a certificate of amendment.

Comment. Section 5930 supersedes former Section 3670, which was applicable to nonprofit corporations through former Section 9305.

Note. The staff has not yet collected cases for inclusion in the Comment relating to the effect of delay or failure to file certificates of amendment.

Tentatively Approved
March 1976

§ 5931. Contents of certificate of amendment

5931. The certificate of amendment shall be an officers' certificate, which states the following:

(a) The wording of the amendment or amended articles in accordance with Section 5932.

(b) That the amendment was approved by the required number of directors in accordance with Article 2 (commencing with Section 5920). If the amendment is one which may be adopted by the board alone, a statement of the facts entitling the board alone to adopt the amendment.

(c) If the amendment is one for which the approval of the members is required, the applicable one of the following:

(1) That the amendment was approved by the required number of members in accordance with Article 2 (commencing with Section 5920).

(2) That the amendment was approved by the required number of members of a representative policymaking committee in accordance with Section 5925.

(3) If the amendment was one for which the approval of a class of members was also required, in addition to the information in paragraph (1) or (2), that the number of members of the class voting in favor of the amendment equaled or exceeded the vote required.

Comment. Section 5931 is comparable to Sections 905 and 906 (General Corporation Law). It supersedes former Sections 3671 and 3672, which were applicable to nonprofit corporations through former Section 9305. Section 5931 omits some of the requirements of the former sections for the contents of the certificate of amendment, including a statement of the time and place of the meeting at which the resolution adopting the amendment was approved and the number of members voting in favor of the resolution. The phrase "officers' certificate" is defined in Section 5173.

Note. Section 905 of the business corporations law provides an exception for amendments of the articles pursuant to a merger; we will deal with this when we consider mergers.

368/247

§ 5932

Tentatively Approved
March 1976

§ 5932. Certificate of amendment to establish wording of amendment

5932. The certificate of amendment shall establish the wording of the amendment or amended articles by one or more of the following means:

(a) By stating that the articles shall be amended to read as therein set forth in full.

(b) By stating that any provision of the articles, which shall be identified by the numerical or other designation given it in the articles or by stating the wording thereof, shall be stricken from the articles or shall be amended to read as set forth in the certificate.

(c) By stating that the provision set forth therein shall be added to the articles.

Comment. Section 5932 is the same in substance as a portion of Section 907 (General Corporation Law). It supersedes former Section 3631, which was applicable to nonprofit corporations through former Section 9305.

368/248

§ 5933

Tentatively Approved
March 1976

§ 5933. Effect of filing certificate of amendment

5933. (a) Upon filing the certificate of amendment, the articles are amended in accordance with the certificate.

(b) A copy of the certificate of amendment, certified by the Secretary of State, is prima facie evidence of the performance of the conditions necessary to the adoption of the amendment.

Comment. Section 5933 is the same in substance as Section 908 (General Corporation Law). It continues former Section 3673, which was applicable to nonprofit corporations through former Section 9305.

Tentatively Approved
March 1976

Article 4. Restatement of Articles

§ 5940. Restated articles

5940. A nonprofit corporation may restate in a single certificate the entire text of its articles as amended by filing an officers' certificate entitled "Restated Articles of Incorporation of _____ (insert name of nonprofit corporation)."

Comment. Section 5940 is the same in substance as Section 910(a) (General Corporation Law). It continues a portion of the first paragraph of former Section 3800, which was applicable to nonprofit corporations through former Section 9305.

Tentatively Approved
March 1976
Staff Revision May 1976

§ 5941. Contents of restated articles

5941. The certificate of restated articles shall set forth the articles as amended to the date of the certificate except that:

(a) The certificate shall omit the signatures of the initial directors and, after the nonprofit corporation has filed a statement under Section 6531, the names and addresses of the initial directors. Such omissions are not alterations or amendments of the articles.

(b) The certificate may also itself alter or amend the articles in any respect, in which case the certificate must comply with Article 3 (commencing with Section 5930).

Comment. Section 5941 is comparable to Section 910(a) (General Corporation Law). It supersedes a portion of the first paragraph of former Section 3300, which was applicable to nonprofit corporations through former Section 9305. Unlike the former provision, Section 5941 requires the restated articles to omit the signatures and the names and addresses of initial directors.

Note. Section 910(a) of the business corporations law permits the restated articles to omit provisions of agreements of merger (other than amendments to the articles of the surviving corporation). We will consider this matter in connection with merger generally.

The staff revision deletes references to the initial agent, which is not required to be stated in the articles. The Commission has also tentatively determined not to include a statement of directors in the Section 6531 statement; Section 5941 may require revision or deletion accordingly.

368/251

§ 5942

Tentatively Approved
March 1976

§ 5942. Approvals required for restated articles

5942. (a) If the certificate of restated articles does not itself alter or amend the articles in any respect, it shall be approved by the board and shall be subject to the provisions of this chapter relating to an amendment of the articles which may be adopted by the board alone.

(b) If the certificate of restated articles does itself alter or amend the articles, it shall be subject to the provisions of this chapter relating to the amendment or amendments so made.

Comment. Section 5942 is the same in substance as Section 919(b) (General Corporation Law). It supersedes the second paragraph of former Section 3803, which was applicable to nonprofit corporations through former Section 9305. The phrase "approved by the board" is defined in Section 5151.

368/252

§ 5943

Tentatively Approved
March 1976

§ 5943. Effect of restated articles

5943. Restated articles filed pursuant to this article shall supersede for all purposes the original or previously restated articles and all amendments filed prior to the filing of the restated articles.

Comment. Section 5943 is the same in substance as Section 910(d) (General Corporation Law). It supersedes former Section 3802, which was applicable to nonprofit corporations through former Section 9305.

Note. The meaning of the phrase "for all purposes," and its effect on the original date of incorporation, have not yet been ascertained.

CHAPTER 10. SALE OF ASSETS

[Not included--See Memorandum 76-40, May 1976 Meeting]

CHAPTER 11. MERGER

[Not included--See Memorandum 76-46, May 1976 Meeting]

CHAPTER 12. REORGANIZATIONS

[Not included--See Memorandum 76-53, May 1976 Meeting]

CHAPTER 13. DISSENTERS' RIGHTS

[Not included--See Memorandum 76-5¹, May 1976 Meeting]

CHAPTER 14. BANKRUPTCY REORGANIZATIONS AND ARRANGEMENTS

[Not included--See Memorandum 76-33, May 1976 Meeting]

Substance Tentatively Approved March 1976
Revised April 1976

CHAPTER 15. RECORDS AND REPORTS

Article 1. Books and Records Generally

§ 6510. Required Books and Records

6510. Each nonprofit corporation shall keep:

- (a) Adequate and correct books and records of account.
- (b) Minutes of the proceedings of members, board, and committees of the board.
- (c) A record of members, which shall include (1) the name and address of each member, (2) where a member may hold more than one membership, the number of memberships held by each member, (3) where there is more than one class of memberships, the class of each membership held by each member, and (4) the date when the member became a holder of record of each membership.
- (d) A record of the termination of each membership, together with the date of termination, if such a record is necessary to determine those members entitled to vote or otherwise to participate in the affairs of the nonprofit corporation.
- (e) A record of the holders of capital certificates, which shall include (1) the name and address of each holder, (2) the number and amount of capital certificates held by each holder, and (3) the date when the holder became a holder of record of each capital certificate.

Comment. Section 6510 is comparable to the first sentence of Section 1500 (General Corporation Law).

Subdivision (c) is drawn from Section 1500 and from Section 621(a) of the New York Not-for-Profit Corporation Law. Subdivision (c)(4), which requires that the record of members show the date when the member became the holder of record of the membership, is taken from the New York section; this is a new requirement for nonprofit corporations, and no comparable requirement is found in Section 1500.

Subdivision (d), which requires a record of termination of memberships if such a record is needed for the purposes of the nonprofit corporation, is drawn from former Section 9606 which applied to nonprofit corporations. However, Section 9606 apparently required that the record of termination of memberships be retained forever.

The record of the date when a member became a holder of record and the record of termination of memberships are required primarily so that the record of members will be sufficient to determine the members as of any relevant record date. See Section 5701.

Subdivision (e) is new. For the provisions relating to capital certificates, see Sections [to be supplied later].

Cross-Reference:

Bylaws, place where kept, § 5266

Note. The provision relating to capital certificates will be retained only if the Commission determines to provide for capital certificates. This matter has not yet been considered.

405/756

§ 6511

Tentatively Approved March 1976

Revised April 1976

§ 6511. Form of records; place where kept

6511. (a) The minutes shall be kept in written form. The other books and records required by Section 6510 shall be kept either in

written form or in any other form capable of being converted into written form.

(b) The records described in subdivisions (c) and (d) of Section 6510 shall be kept by the nonprofit corporation at its principal executive office or at the office of its registrar.

Comment. Subdivision (a) of Section 6511 is the same in substance as the last two sentences of Section 1500 (General Corporation Law). Sections 6510 and 6511 supersede former Section 9606 which required every nonprofit corporation to keep a "membership book." Nothing in this article prevents a nonprofit corporation from continuing to keep its record of members in a membership book. However, Section 6511 permits the membership record to be kept in any other written form or in any other form capable of being converted into written form. Whatever the form of the membership record, the record must be sufficient to determine the information required by subdivisions (c) and (d) of Section 6510 as of any relevant record date. See Section 5701.

Subdivision (b) is consistent with Section 1500.

Cross-References:

Duty to convert records into written form, § 6612

"Written" defined, § 5195

405/133

§ 6512

Tentatively Approved March 1976

Renumbered April 1976

§ 6512. Liability for false report, record, or entry

6512. An officer, director, employee, or agent of a nonprofit corporation who does any of the following is liable jointly and sever-

ally for all the damages resulting therefrom to the nonprofit corporation or to any person injured thereby who relied thereon or to both:

(a) Makes, issues, delivers, or publishes any report, circular, certificate, financial statement, balance sheet, public notice, or document respecting the nonprofit corporation or its memberships, assets, liabilities, capital, activities, revenues, receipts, or accounts which is false in any material respect, knowing it to be false, or participates in the making, issuance, delivery, or publication thereof with knowledge that the same is false in a material respect.

(b) Makes or causes to be made in the books, minutes, records, or accounts of a nonprofit corporation any entry which is false in any material particular knowing such entry is false.

(c) Removes, erases, alters, or cancels any entry in any books or records of the nonprofit corporation, with intent to deceive.

Comment. Section 6512 is the same in substance as Section 1507 (General Corporation Law) except for changes made to reflect the fact that a nonprofit corporation does not issue shares of stock.

406/247

§ 6520

Tentatively Approved March 1976

Technical Revision April 1976

Article 2. Annual Report; Financial Statements

§ 6520. Annual report required unless bylaws otherwise provide

6520. Except to the extent the bylaws otherwise provide, a non-profit corporation is subject to the requirements of Sections 6521 to 6525, inclusive.

Comment. Section 6520 makes the provisions of this article relating to annual reports applicable to nonprofit corporations except to the extent the bylaws contain inconsistent provisions. Thus, for example, the bylaws may dispense entirely with the requirement of an annual report or may provide for an annual report that contains different or more or less information than is required by this article. Likewise, the bylaws may require that a copy of the annual report be mailed to each member rather than be presented at the annual meeting of members as required by this article. As to the application of this article to foreign nonprofit corporations, see Section 6529 and Section [2115].

Cross-Reference:

Bylaws, provisions concerning annual report, § ____ [provision based on Section 212(b)(9)]

406/248

§ 6521

Tentatively Approved March 1976

§ 6521. Presentation of annual report

6521. The board shall prepare and present at the annual meeting of members an oral or written annual report as provided in this article.

The annual report, if written, shall be filed with the records of the nonprofit corporation. Either a copy or a summary of the annual report shall be entered in the minutes of the proceedings of the annual meeting of members.

Comment. Section 6521 requires an annual report unless this requirement is waived in the bylaws. See Section 6520. Section 6521 is comparable to subdivision (a) of Section 1501 (General Corporation Law), but the provision authorizing waiver of the annual report requirement for business corporations is limited to a corporation with less than 100 holders of records of its shares. Any nonprofit corporation may waive the requirement of an annual report by an appropriate provision in its bylaws and, unlike the comparable provision of Section 1501, the authority to waive the requirement of an annual report is not limited to nonprofit corporations with less than a specified number of members.

Former Section 9402 provided that the bylaws of a nonprofit corporation might make provision for the making of annual reports and financial statements to members, but this was not a mandatory requirement. As to charitable corporations, see the Comment to Section 6527.

Section 6521 requires the annual report to be presented at the annual meeting of members and, if written, to be filed with the records of the nonprofit corporation, and either a copy or summary thereof entered in the minutes. These requirements are drawn from Section 519 of the New York Not-for-Profit Corporation Law except that the New York section requires a written annual report whereas Section 6521 permits an oral annual report as well. The requirement of Section 1501 that a copy of the annual report of a business corporation be sent to each shareholder is not carried over into the nonprofit corporation law in order to avoid the expense of duplicating and mailing copies of the annual reports to all the members of the nonprofit corporation. However, nothing in this article prevents the nonprofit corporation from sending each member a copy of its annual report; and, if the nonprofit corporation prepares and presents a written annual report at the annual meeting of members, the nonprofit corporation is required by Section 6524 either

to send a copy to a member upon written request or to permit the member to examine a copy of the annual report. See also Sections 6526(b), 6523(a). In addition, even if the bylaws dispense with the requirements of this article, Section 6526 provides a procedure whereby five percent or more of the members may obtain comparable information.

Cross-References:

Bylaws, provisions concerning annual reports, [provision comparable to § 212(b)(3)]

Nonprofit corporation without members, § 6525

406/250

§ 6522

Substance Tentatively Approved March 1976

Revised April 1976

§ 6522. Annual report; financial information

6522. (a) As used in this section, "report date" means a date which is the end of a fiscal year terminating not more than 12 months prior to the date of the annual meeting.

(b) The annual report shall show all of the following:

(1) The assets (including any held in trust) and liabilities of the nonprofit corporation as of the report date.

(2) The major changes in assets (including any held in trust) and liabilities during the fiscal year ending on the report date.

(3) The revenue or receipts of the nonprofit corporation, both unrestricted and restricted to particular purposes, for the fiscal year ending on the report date.

(4) The expenses or disbursements of the nonprofit corporation, for both general and restricted purposes, during the fiscal year ending on the report date.

(c) The statements required by subdivision (b) shall be accompanied by a report thereon of independent accountants or, if there is no such report, the certificate of an authorized officer of the nonprofit corporation that such statements were prepared without audit from the books and records of the nonprofit corporation.

Comment. Section 6522 applies unless the bylaws otherwise provide. See Section 6520. Section 6522 adopts the substance of provisions of Section 519 of the New York Not-for-Profit Corporation Law. Subdivision (c), which is not found in the New York law, is the same in substance as the last portion of subdivision (a) of Section 1501 (General Corporation Law). The initial annual report may be for a fiscal year of less than 12 months, but the annual reports thereafter would be for a 12-month fiscal year.

Definitions:

Independent accountant, § 5115

Comparable Provisions:

Section 1501(a)

New York Not-for-Profit Corporation Law § 519

Pennsylvania Nonprofit Corporation Law § 7555

406/252

§ 6523

Not Approved

§ 6523. Additional required information

6523. The annual report shall also include:

Note. This section will contain provisions comparable to subdivision (b) of Section 1500 if such provisions are determined to be appropriate after the subject matter of those provisions has been considered.

406/253

§ 6524

Tentatively Approved March 1976

Revised and Renumbered April 1976

§ 6524. Member's right to examine copy of annual report

6524. If a written annual report was prepared and presented to the immediately preceding annual meeting of members, upon written request of a member, the nonprofit corporation shall, at its option, either:

(a) Make a copy of the annual report reasonably available for examination by the member, or

(b) Mail a copy of the annual report to the member.

Comment. Section 6524 applies unless the bylaws otherwise provide. See Section 6520. Section 6524 provides a means whereby a member may examine a copy of the annual report. It permits the nonprofit corporation, at its option, to mail a copy of the annual report to the member instead of permitting the examination.

406/254

§ 6525

Tentatively Approved March 1976

Revised and Renumbered April 1976

§ 6525. Corporation having no members

6525. The board of a nonprofit corporation having no members shall direct the chief executive officer and chief fiscal officer to present at the annual meeting of the board a report in accordance with this article. This report shall be filed with the minutes of the annual meeting of the board.

Comment. Section 6525 is the same in substance as a provision of Section 519 of the New York Not-for-Profit Corporation Law. The section applies unless the bylaws otherwise provide. See Section 6520.

Comparable Provisions:

New York Not-for-Profit Corporation Law § 519

Pennsylvania Nonprofit Corporation Law § 7555

405/961

§ 6526

Substance Tentatively Approved March 1976

Revised and Renumbered April 1976

§ 6526. Members' right to obtain fiscal information

6526. (a) As used in this section, "authorized member" means a member authorized in writing by members holding not less than five percent of the voting power.

(b) If a written annual report was presented at the immediately preceding annual meeting of members in compliance with Sections 6521 to

6523, inclusive, the nonprofit corporation shall deliver or mail a copy of such annual report to any authorized member who makes a written request for a copy. The report shall be delivered or mailed to the member making the request within 10 days after the nonprofit corporation receives the request.

(c) If the nonprofit corporation did not present a written annual report at the last immediately preceding annual meeting of members in compliance with Sections 6521 to 6523, inclusive, an authorized member may make a written request to the nonprofit corporation for a statement containing the information specified in Section 6522 that would have been included in the annual report if one had been prepared and presented at the immediately preceding annual meeting of members.

(d) An authorized member may make a written request to the nonprofit corporation for a statement containing information comparable to that specified in Section 6522 for a period specified in the request ending not less than 30 days prior to the date of the request. Unless the nonprofit corporation and the member making the request otherwise agree, the period specified in the request shall commence immediately upon the end of the period covered by the annual report referred to in subdivision (b) or the statement referred to in subdivision (c), as the case may be, and shall be for a period of three months or a multiple of three months.

(e) Except as provided in subdivision (f), the nonprofit corporation shall deliver or mail to the member making the request the statement or statements requested within 30 days after the nonprofit corporation receives the request.

(f) In lieu of providing the requested statements, the nonprofit corporation may, within 10 days after it receives the request, respond to the request by delivering or mailing to the member making the request a statement that the nonprofit corporation elects to open its books and records of account to inspection under Chapter 16 (commencing with Section 6610) of Division 2 of the Corporations Code and that such books and records of account will be made available to the member or his agent or attorney for inspection during usual business hours at an address specified in the statement. This subdivision applies only if the address specified in the statement is in this state and is either (1) an address within the county where the principal executive office of the nonprofit corporation is located or (2) an address within the county where the principal business office of the nonprofit corporation in this state is located if the address of its principal executive office is not in this state.

(g) The statements referred to in subdivisions (c) and (d) shall be accompanied by a report thereon, if any, by an independent accountant engaged by the nonprofit corporation or the certificate of an authorized officer of the nonprofit corporation that such statements were prepared without audit from the books and records of the nonprofit corporation.

(h) A copy of the statements prepared pursuant to subdivisions (c) and (d) shall be kept on file in the principal office of the nonprofit corporation for 12 months, and they shall be exhibited at all reasonable times to any member demanding an examination of them. A copy of the statements shall be mailed to any member requesting a copy upon payment by the member of such reasonable charge as the nonprofit corporation may

impose to cover the cost of reproducing the copy of the statements and mailing the copy to the member.

Comment. Section 6526 is generally comparable to subdivisions (c), (d), and (e) of Section 1501 (General Corporation Law), but there are significant differences between Section 6526 and the comparable provisions of Section 1501. Nothing in Section 6526 limits the right of a member under Section 6630 to inspect the financial records of the nonprofit corporation for a "purpose reasonably related to such member's interests as a member." Inspection of the financial records may be necessary to determine, for example, whether a financial statement obtained under Section 6526 is accurate or to obtain information concerning the member's own account or for some other proper purpose. See the Comment to Section 6630.

Subdivision (a) defines "authorized member" by adopting a five-percent-of-the-voting-power requirement. This requirement is comparable to the five-percent-of-outstanding-shares requirement of subdivision (c) of Section 1501 (General Corporation Law).

Subdivision (b) gives an authorized member—defined in subdivision (a)—an absolute right to obtain a copy of the annual report if a written annual report was presented at the immediately preceding annual meeting in compliance with Sections 6521-6523. Compare Section 6524 (right of member to examine copy of annual report). Subdivision (b) does not apply if an oral annual report was presented at the annual meeting (as permitted by Section 6521) or if the bylaws dispense with the requirements of Sections 6521-6523 (see Section 6520) or if the nonprofit corporation failed to comply with Sections 6521-6523. Where subdivision (b) does not apply, the authorized member can obtain comparable information pursuant to subdivision (c). See also Section 6528.

Subdivisions (c), (d), and (e) are very similar to the first two sentences of subdivision (c) of Section 1501 (General Corporation Law). No provision similar to subdivision (f) is found in Section 1501; this subdivision is included in recognition of the fact that a nonprofit corporation frequently will not prepare fiscal statements with the regularity of business corporations. Subdivision (g) is the same in

substance as subdivision (e) of Section 1501. Subdivision (h) is similar to subdivision (d) of Section 1501 except that a nonprofit corporation is permitted to impose a reasonable charge to cover the cost of reproducing and mailing copies of fiscal statements. No charge is authorized, however, under subdivision (e) to cover the cost of providing the member who made the original request with the statement or statements requested. The nonprofit corporation is permitted to impose a charge for subsequent copies of statements so that possible abuse of the right to obtain subsequent copies can be limited. Absent a charge, it is possible that each of the members who give the original written authorization (five percent or more of the voting power) might make such requests, probably in the original written authorization, and thus impose an undue financial burden on the nonprofit corporation.

Policy Issues:

Do members of nonprofit corporations need a method of obtaining fiscal information similar to that provided members of business corporations under Section 1501? Decision: Yes.

Is the five-percent-of-members-authorization requirement appropriate as a condition for requiring the nonprofit corporation to prepare the necessary fiscal statements? Decision: Yes.

Should the nonprofit corporation be permitted to elect to open its books and records of account to inspection as an alternative to providing the requested statements? Decision: Yes.

Should this election be limited to cases where the books and records of account are open to examination in California? Decision: Yes.

Should the nonprofit corporation be permitted to charge members for copies of statements provided pursuant to this section (the member making the original request is not charged for the statement)? Decision: Yes.

Note. Should the office referred to in subdivision (h) be in "principal executive office" or "principal office in this state?"

Note. "Voting power" is a term to be defined later. The use of the term in this section will be reviewed when the definition is drafted.

Tentatively Approved March 1976

Renumbered April 1976

§ 6527. Reports to Attorney General not affected

6527. Nothing in this article relieves a nonprofit corporation from the requirements of Section 12586 of the Government Code. If the report sent to the Attorney General in compliance with the requirements of Section 12586 of the Government Code includes the information required by this article, that report shall be deemed to satisfy the requirements of this article if a copy of the report sent to the Attorney General is entered in the minutes of the proceedings of the annual meeting of members.

Comment. Section 6527 makes clear the relationship of the requirements of this article and the requirement imposed by Government Code Section 12586 that reports be made to the Attorney General by charitable corporations and those which hold property in trust or accept property to be used for a charitable purpose. Nothing in this article relieves such a corporation from complying with the requirement imposed by Government Code Section 12586 that the corporation make the reports required by the Attorney General. However, if the report made by such a corporation to the Attorney General includes the information required by this article, a separate report need not be prepared in order to comply with the requirements of this article.

Substance Tentatively Approved March 1976
Revised and Renumbered April 1976

§ 6528. Judicial enforcement

6528. (a) The superior court of the proper county shall enforce the duty of making the annual report required by this article. If the annual report was not prepared and presented at the immediately preceding annual meeting as required by this article, the court shall enforce the duty of making the annual report by making an order that requires the nonprofit corporation to do all of the following:

(1) Prepare a written report that satisfies the requirements of this article for an annual report for such annual meeting and deliver such report to the member within such time as the court specifies.

(2) Not more than 10 days after delivery of the written report to the member, enter a copy of the report in the minutes of the proceedings of the annual meeting at which the annual report should have been presented.

(3) Comply with the duty of making the annual report required by this article at future annual meetings.

(b) In addition to the penalties provided for in Section 7200, the superior court of the proper county shall enforce the duty of making and mailing or delivering the statements required by Section 6526 and, for good cause shown, may extend the time therefor.

(c) In any action or proceeding under this section, the court may award an amount to reimburse the member for reasonable expenses incurred by the member, including reasonable attorney's fees, in connection with such action or proceeding if the court determines both of the following:

(1) Prior to commencing the action or proceeding, the member made a written demand to the nonprofit corporation that it comply with the requirements of this article, specifying the specific action demanded of the nonprofit corporation.

(2) The nonprofit corporation willfully failed without justification to comply with such demand within a reasonable time.

Comment. Subdivision (a) of Section 6528 provides for judicial enforcement of the duty of making the annual report and indicates the relief that the court shall order. It should be noted that the duty of making the annual report required by this article may be dispensed with entirely by the bylaws or the bylaws may provide for an annual report that contains different or more or less information than is required by this article. See Section 6520.

Subdivision (b) is based on subdivisions (f) and (g) of Section 1501 (General Corporation Law), but the member seeking to recover reasonable expenses under subdivision (c) of Section 6528 must make a stronger showing of arbitrary corporate action than the shareholder must make under subdivision (g) of Section 1501.

405/966

§ 6529

Not Approved

§ 6529. Application of article

6529. This article applies to any domestic nonprofit corporation and also to a foreign nonprofit corporation having its principal executive office in this state or customarily holding meetings of its board in this state.

Comment. Section 6529 is the same in substance as subdivision (c) of Section 1501. The application of this article is not limited to the foreign nonprofit corporations described in Section 6529. See Section [provision comparable to Section 2115].

Note. The Commission has deferred consideration of this section until the provision comparable to Section 2115 has been considered.

406/466

§ 6530

Tentatively Approved April 1976

Article 3. Statement Identifying Chief Executive Officer and
Principal Office; Designation of Agent for Service

§ 6530. Applicable filing period defined

6530. For the purposes of this article, the applicable filing period for a nonprofit corporation is the calendar quarter during which its original articles were filed and the immediately preceding calendar quarter.

Comment. Section 6530 is the same as the first sentence of Section 1502(c).

Note. Former Section 3301 (last paragraph) contains a definition of "nonprofit corporation" that may include some nonprofit corporations that will not be covered by the new statute. This matter will need to be reviewed when the scope of the statute has been determined and a broader definition of "nonprofit corporation" provided here so that the scope of the existing statute will be retained.

Note. This article will be considered for compilation in Division 4 at a later time.

406/467

§ 6531

Tentatively Approved April 1976

§ 6531. Statement identifying chief executive officer and principal
office

6531. (a) Within 90 days after the filing of its original articles and every five years thereafter during the applicable filing period, every nonprofit corporation shall file, on a form prescribed by the Secretary of State, a statement containing all of the following:

(1) The name and complete business or residence address of its chief executive officer.

(2) The street address of its principal executive office.

(3) If the address of its principal executive office is not in this state, the street address of its principal office in this state, if any.

(b) Nothing in this section prevents a nonprofit corporation from filing a statement under this article more frequently than every fifth year.

Comment. Section 6531 is based on former Section 3301 which required a filing only once every five years. Compare Section 1502(a) (General Corporation Law) which requires an annual filing. Unlike former Section 3301, which required the statement to list the name and address of the president, vice president, secretary, and treasurer of the corporation, Section 6531 requires only the name and addresses the chief executive officer of the corporation. A new statement must be filed within 30 days of a change of any in the information required by Section 6531. See Section 6533.

The fee for filing the statement is prescribed in Government Code Section 12210 [to be amended to apply to all corporations].

406/468

§ 6532

Tentatively Approved April 1976

§ 6532. Designation of agent for service

6532. The statement required by Section 6531 shall also designate, as the agent of such nonprofit corporation for the purpose of service of process, any natural person residing in this state or a corporation

which has complied with Section 1505 and whose capacity to act as such agent has not terminated. If a natural person is designated, the statement shall set forth such person's complete business or residence address. If a corporate agent is designated, no address for it shall be set forth.

Comment. Section 6532 is the same in substance as Section 1502(b) (General Corporation Law). Unlike former Section 3301(a), the designation of an agent for service is mandatory rather than permissive. One of the changes made by the new General Corporation Law is that the designation of an agent for service is now mandatory; formerly, designation of an agent for service was permissive under former Section 3301(a).

968/639

§ 6533

§ 6533. New statement required when information changes

6533. Whenever any of the information required by Section 6531 changes, the nonprofit corporation shall, not later than 30 days after such change, file a current statement containing all of the information required by Sections 6531 and 6532. In order to change its agent for service of process or the address of the agent, the nonprofit corporation shall file a current statement containing all the information required by Sections 6531 and 6532.

Comment. Section 6533 is the same in substance as the first two sentences of Section 1502(d) (General Corporation Law) except that the filing of a new statement not later than 30 days after the information changes is mandatory. This departure from Section 1502 is necessary because filing under this article is required only every five years rather than annually as is required under Section 1502.

Tentatively Approved April 1976

§ 6534. Statement of resignation as agent; notice to corporation

6534. An agent designated for service of process pursuant to this article or [to be supplied later] may file a signed and acknowledged written statement of resignation as such agent. Thereupon, the authority of the agent to act in such capacity shall cease and the Secretary of State forthwith shall give written notice of the filing of the statement of resignation by mail to the nonprofit corporation addressed to its principal executive office.

Comment. Section 6534 is the same in substance as Section 1503 (General Corporation Law).

Cross-Reference:

"Acknowledged" defined, § 5149

Tentatively Approved April 1976

§ 6535. When designation of new agent required

6535. If a natural person who has been designated agent for service of process pursuant to this article or [to be supplied later] dies, is adjudicated incompetent, or resigns or no longer resides in the state or if the corporate agent for such purpose resigns, dissolves, withdraws from the state, forfeits its right to transact intrastate business, has its corporate rights, powers, and privileges suspended, or ceases to

exist, the nonprofit corporation shall, upon notice of such fact, forthwith file a designation of a new agent conforming to the requirements of this article or [to be supplied later].

Comment. Section 6535 is the same in substance as Section 1504 (General Corporation Law) except that the phrases "is adjudicated incompetent" and "upon notice of such fact" have been added.

968/642

§ 6536

Not Approved

§ 6536. Renewal forms

6536. The Secretary of State shall mail a form for compliance with this article to each nonprofit corporation approximately three months prior to the close of the applicable filing period. The form shall state the due date of the statement and shall be mailed to the last address of the nonprofit corporation according to the records of the Secretary of State. Neither the failure of the Secretary of State to mail the form nor the failure of the nonprofit corporation to receive it is an excuse for failure to comply with this article.

Comment. Section 6536 is the same in substance as the last three sentences of Section 1502(c).

Note. This section should codify existing practice. The office of the Secretary of State should be contacted to determine existing practice. The cost of sending renewal statements annually as contrasted with every five years should be obtained from the office of the Secretary of State. The views of the office of the Secretary of State whether renewal forms should be sent annually even though the statement is required to be filed only once every five years should be obtained.

Tentatively Approved April 1976

§ 6537. New statement supersedes previous statement; disposal of superseded statement

6537. (a) Whenever the nonprofit corporation files a statement pursuant to this article, it supersedes any previously filed statement and any statement in its articles as to the agent for service of process and the address of the agent.

(b) The Secretary of State may destroy or otherwise dispose of any statement filed pursuant to this article after it has been superseded by the filing of a new statement.

Comment. Subdivision (a) of Section 6537 is the same in substance as the last sentence of Section 1502(d) (General Corporation Law); subdivision (b) is the same in substance as Section 1502(e) (General Corporation Law).

Tentatively Approved April 1976

§ 6538. Statement not construed as notice

6538. This article shall not be construed to place any person dealing with the nonprofit corporation on notice of, or under any duty to inquire about, the existence or content of any statement filed pursuant to this article.

Comment. Section 6538 is the same in substance as Section 1502(f) (General Corporation Law).

Not Approved

§ 6539. Procedure upon failure to file statement

6539. (a) Upon the failure of a nonprofit corporation to file the statement required by this article, the Secretary of State shall mail a notice of such delinquency to the nonprofit corporation. The notice shall also contain information concerning the application of this article and advise the nonprofit corporation of the penalty imposed by Section 25936 of the Revenue and Taxation Code for failure to timely file the required statement after notice of delinquency has been mailed by the Secretary of State. If, within 60 days after the mailing of the notice of delinquency, a statement pursuant to this article has not been filed by the nonprofit corporation, the Secretary of State shall certify the name of such nonprofit corporation to the Franchise Tax Board.

(b) Upon certification pursuant to subdivision (a), the Franchise Tax Board shall assess against the nonprofit corporation a penalty of two hundred fifty dollars (\$250) pursuant to Section 25936 of the Revenue and Taxation Code.

(c) The penalty herein provided shall not apply to a nonprofit corporation which on or prior to the date of certification pursuant to subdivision (a) has dissolved or has been merged into another corporation.

(d) The penalty herein provided shall not apply to any nonprofit corporation, the corporate powers, rights, and privileges of which have been suspended by the Franchise Tax Board pursuant to Section 23301 or 23001.5 of the Revenue and Taxation Code more than six months prior to the last day of the filing period pursuant to this article and which the

9-2034

corporate powers, rights, and privileges have not been revived on or prior to the last day of the filing period. The Secretary of State need not mail a form pursuant to Section 6536 nor a notice of delinquency pursuant to this section to a nonprofit corporation whose corporate powers, rights, and privileges have been suspended more than six months prior to the last day of the filing period and which corporate powers, rights, and privileges have not been revived on or prior to such last day of the filing period.

(e) If, after certification pursuant to subdivision (a) the Secretary of State finds the required statement was filed before the expiration of the 60-day period after mailing of the notice of delinquency, the Secretary of State shall promptly decertify the name of the nonprofit corporation to the Franchise Tax Board. The Franchise Tax Board shall then promptly abate any penalty assessed against the nonprofit corporation pursuant to Section 25936 of the Revenue and Taxation Code.

Comment. Section 6539 is the same in substance as Section 2204 (General Corporation Law).

Note. This section was discussed but not approved. The views of the office of the Secretary of State should be solicited whether the system provided by this section is as simple and as effective as it might be. The Commission believes that the section is unduly complicated and that it will not accomplish the purpose it seeks to accomplish. If the procedure provided by the section is not considered appropriate and desirable by the office of the Secretary of State, the views of the office of the Secretary of State as to an appropriate procedure should be requested. It would also be appropriate to obtain the views of the Franchise Tax Board on the desirability of this section.

Tentatively Approved April 1976
Renumbered April 1976

CHAPTER 16. RIGHTS OF INSPECTION

Article 1. General Provisions

§ 6610. Inspection by agent or attorney; right to copy and make extracts

6610. (a) Inspection under this chapter may be made in person or by agent or attorney.

(b) The right of inspection includes the right to copy and make extracts.

Comment. Section 6610 is the same as comparable provisions in Sections 1600, 1601, and 1602 (General Corporation Law).

Tentatively Approved April 1976
Renumbered April 1976

§ 6611. Records to be made available in written form

6611. If a record subject to inspection under this chapter is not maintained in written form, a request for inspection is not complied with unless and until the nonprofit corporation at its expense makes the record available in written form.

Comment. Section 6611 is the same in substance as Section 1605 (General Corporation Law).

Cross-Reference:

"Written form" requirements, §§ 8, 5195

Tentatively Approved April 1976

Article 2. Membership Records§ 6620. Authorized member defined

6620. As used in this article, "authorized member" means a member having the written authorization of at least five percent of the voting power or such lesser authorization as is specified in the bylaws.

Comment. Section 6620 adopts the five-percent requirement of Section 1600 (General Corporation Law) but permits a lesser authorization to be specified in the bylaws.

Note. This section will be reviewed in connection with the general definition of "voting power." Probably voting power should mean the power to vote for the election of directors.

Tentatively Approved April 1976

§ 6621. Adoption of bylaw providing procedure for communicating to members

6621. (a) As used in this section:

(1) "Candidate's statement" means a statement of not more than 200 words, or such greater number of words as may be provided in the bylaw, giving biographical information for and a statement of the views of the nominee or person sought to be nominated.

(2) "Nominee" means any person who has been nominated, by petition or otherwise, for election as a director.

(3) "Proxy solicitation statement" means a statement of not more than 300 words, or such greater number of words as may be provided in the bylaw, soliciting the proxies of members.

(4) "Voting members" means the members of the nonprofit corporation entitled to vote for directors.

(b) Unless the bylaws require that it be adopted by the members, the board may adopt a bylaw pursuant to this section.

(c) A bylaw adopted pursuant to this section shall, at a minimum, include all of the following:

(1) A statement that the bylaw is adopted pursuant to this section.

(2) A procedure to permit an authorized member to communicate with the voting members for the purpose of seeking support for the nomination of any person or persons for election as directors of the nonprofit corporation. The authorized member shall be permitted to communicate the name of each person so sought to be nominated, together with a candidate's statement for each such person. The number so sought to be nominated by an authorized member shall not exceed the number of positions to be filled at the next election of directors.

(3) A procedure to permit any nominee to communicate to the voting members a candidate's statement for the nominee.

(4) If proxies may be used in voting for directors, a procedure to permit an authorized member to communicate with the voting members for the purpose of soliciting proxies. The authorized member shall be permitted to communicate a proxy solicitation statement and a proxy form to be returned, at the expense of the member giving the proxy or at the expense of the authorized member, at the latter's election, by a member who desires to give a proxy to the authorized member except that, if the management of the nonprofit corporation solicits proxies and provides envelopes for returning the proxies with the postage to be paid by the

nonprofit corporation, the procedure provided by the bylaw shall include the same provision for returning proxies solicited by an authorized member.

(d) If a bylaw is adopted pursuant to this section, the limitations as to the number of words permitted in a candidate's statement or proxy solicitation statement apply to all such statements, whether sent on behalf of the nonprofit corporation, its management, or an authorized member or nominee.

(e) No candidate's statement or proxy solicitation statement may be altered or modified by the nonprofit corporation without the written consent of the person submitting the statement except to eliminate matter which would likely result in the imposition of liability on the nonprofit corporation.

(f) The procedure provided in the bylaw for communicating with the voting members:

(1) May include a separate mailing, inclusion in a publication mailed to voting members, or any other reasonable method whereby substantially all of the voting members receive the communication.

(2) Shall impose on the nonprofit corporation all costs of printing or otherwise reproducing, and mailing or otherwise transmitting, the communication to the voting members.

(g) The bylaw may provide that Section 6622 does not apply to the nonprofit corporation.

Comment. Section 6621, which is new, permits a nonprofit corporation to adopt a bylaw to provide a procedure for communicating to voting members. If such a procedure is provided, the nonprofit corporation may refuse to permit inspection and copying of its membership list. See

subdivision (g). This will permit a nonprofit corporation that considers its membership list to be a valuable trade secret, for example, to protect the membership list from possible improper use. The bylaw may be enforced by appropriate court orders if necessary. See Section 6651.

The bylaw may be adopted by the board unless the bylaws require that it be adopted by the members. See subdivision (b). The minimum requirements for the bylaw are stated in subdivisions (c)-(f).

Subdivision (e) requires that the statement submitted for communication to the voting members may be altered or modified to eliminate matters which would likely result in the imposition of liability on the nonprofit corporation. This will permit, for example, deletion of material which the nonprofit corporation establishes is libelous.

Subdivision (f)(2) requires that the nonprofit corporation assume all costs of printing and mailing of the communications to the voting members. The cost of mailing would include such expenses as the cost of envelopes, postage, and labor to put the material in the envelopes if the procedure provided in the bylaw results in these expenses.

Note. The staff has not yet checked the SEC proxy rules for provisions that might be adapted for use in this section.

405/799

§ 6622

Substance Tentatively Approved
April 1976

§ 6622. Right to inspect and obtain membership record

6622. (a) This section does not apply in either of the following cases:

- (1) The nonprofit corporation has adopted a bylaw which (i) satisfies the requirements of Section 6621 and (ii) includes a provision making this section not applicable to the nonprofit corporation; or

(2) A court has ordered a procedure for the nomination and election of directors, as authorized by Section 6624, and the court order includes a provision that this section shall not apply to the nonprofit corporation.

(b) As used in this section, "membership record" means the record required by subdivisions (c) and (d) of Section 6510.

(c) Every member has the right to inspect the membership record during usual business hours upon five business days' prior written demand upon the nonprofit corporation for a purpose reasonably related to such member's interests as a member. The written demand shall be under oath and shall state the purpose of the inspection. The use of the information obtained shall be limited to the purpose stated in the demand.

(d) An authorized member has the absolute right to do either or both of the following:

(1) Inspect the membership record during usual business hours upon five business days' prior written demand upon the nonprofit corporation.

(2) Obtain from the nonprofit corporation, upon five business days' prior written demand, a list of the members entitled to vote for directors, showing the name and address of each such member, the class of membership held by the member if there are classes of members entitled to vote for director, and the number of memberships held by the member, as of the most recent record date for which such a list has been compiled or as of a date specified by the authorized member subsequent to the date of the demand. The nonprofit corporation may require, as a condition of obtaining the membership list, that the demand be accompanied by a tender of a reasonable charge specified by the nonprofit

corporation, not in excess of the actual cost to the nonprofit corporation of furnishing the list.

(e) Upon the filing of a verified petition and after a hearing, notice of which shall be given to such persons and in such manner as the court may direct, the superior court of the proper county may, for good cause shown, make an order doing any or all of the following:

(1) Allowing the nonprofit corporation additional time to comply with subdivision (d).

(2) Postponing any previously noticed meeting of the members if the nonprofit corporation has failed to comply with a proper demand under subdivision (d) within the time limits prescribed either in subdivision (d) or in an order made pursuant to paragraph (1) of this subdivision, but any such postponement shall not exceed a period equal to the period of delay by the nonprofit corporation.

(3) Imposing just and proper conditions for the exercise of the rights granted under this section.

(f) The remedy provided by paragraph (2) of subdivision (e) is in addition to any other legal or equitable remedies to which the authorized member may be entitled.

Comment. Section 6622 does not apply to a nonprofit corporation which (1) has adopted a bylaw pursuant to Section 6621, which satisfies the requirements of that section and makes Section 6622 not applicable to the nonprofit corporation or (2) is subject to a court order prescribing the procedure for nomination and election of directors, which order includes a provision that Section 6622 does not apply to the corporation.

Subdivision (c) is the same in substance as subdivision (c) of Section 1600 (General Corporation Law) except that (1) the nonprofit corporation is given five business days to comply with the demand for

inspection, (2) the demand must be under oath and state the purpose of the inspection and (3) the use of the information obtained is limited to the purpose stated in the demand. The member is required to state in his demand a purpose reasonably related to such member's interests as a member and the burden is on the member to establish the required relationship. See Section 6650(a). An injunction would be an appropriate remedy to prevent use of the information obtained for a purpose other than the one stated in the demand.

Subdivision (d) is based on subdivision (a) of Section 1600.

Subdivision (e) permits the nonprofit corporation to seek judicial relief where the nonprofit corporation is unable to comply with subdivision (d) within the time specified in that subdivision or where the nonprofit corporation seeks to impose just and proper conditions on the exercise of the rights granted by Section 6622. Subdivision (e) also permits an authorized member to seek a postponement of a previously noticed meeting of the members where the nonprofit corporation has not timely complied with subdivision (d) or a court order made pursuant to subdivision (e). Compare Section 6650(a) (power of court to impose just and proper conditions when member seeks to enforce right of inspection). In order to obtain a postponement of a membership meeting, the authorized member must have made a "proper" demand under subdivision (d), including payment or tender of the charge specified in that subdivision. Paragraph (2) of subdivision (e) is the same in substance as a portion of subdivision (b) of Section 1600 except that the court is given discretion under subdivision (e) whether to order that the meeting be postponed.

Subdivision (f) is the same in substance as a provision of subdivision (b) of Section 1600.

992/902

§ 6623

Not Approved April 1976

§ 6623. Application of article

6623. This article applies to any domestic nonprofit corporation and to any foreign nonprofit corporation keeping its record of members or a duplicate thereof in this state or having its principal executive office in this state.

Comment. Section 6623 is the same in substance as the last sentence of subdivision (d) of Section 1600. The application of this article is not limited to foreign nonprofit corporations described in Section 6623. See Section [provision comparable to Section 2115].

Policy Issue:

Should this section be phrased like Section 6641?

Note. This section will be considered when pseudo-foreign corporations have been considered.

405/802

§ 6624

Substance Tentatively Approved
April 1976

§ 6624. Authority of court not limited

6624. (a) Nothing in this article limits the authority of the court to prescribe a different procedure that includes additional requirements, limitations, or conditions, including a lesser percentage of voting power to qualify as an authorized member for the purposes of this article, as the court determines are necessary to provide a procedure for the nomination and election of directors that is fair and equitable in view of the circumstances, practices, and nature of the particular nonprofit corporation.

(b) This article is intended to provide for a right of inspection of membership records and the solicitation of proxies in connection with the nomination and election of directors and nothing in this article limits the power of the court to permit reasonable access to membership records for other legitimate purposes.

Comment. Subdivision (a) of Section 6624 recognizes the power of the court to determine that electoral procedures for directors are unfair and unlawful and as a court of equity to require the nonprofit corporation to put into effect such electoral process as the court may consider just and proper under the circumstances of the particular case. See Braude v. Havenner, 38 Cal. App.3d 526, 113 Cal. Rptr. 386 (1974).

Subdivision (b) makes clear that this article does not limit the power of the court to permit reasonable access to membership records for other legitimate purposes.

Cross-Reference:

Court order making Section 6622 not applicable, § 6622(a)(2)

Substance Tentatively Approved
April 1976

Article 3. Financial Records and Minutes

§ 6630. Inspection of financial records and minutes

6630. (a) As used in this section:

(1) "Financial records" means the books and records referred to in subdivisions (a) and (e) of Section 6510.

(2) "Minutes" means the minutes referred to in subdivision (b) of Section 6510.

(b) The financial records and minutes of the nonprofit corporation shall be open to inspection by any member during usual business hours upon five business days' prior written demand for a purpose reasonably related to such member's interests as a member. The written demand shall be under oath and shall state the purpose of the inspection.

Comment. Section 6630 is based on subdivision (a) of Section 1601 (General Corporation Law). The requirement that the demand be under oath and state the purpose of the inspection is taken from Pennsylvania nonprofit corporation law. See Pa. Stat. Ann. tit. 15, § 7508(b)(1972). The requirement that the nonprofit corporation be given five business days to comply with the demand is not found in the comparable provision of the General Corporation Law, but it is included here to permit the nonprofit corporation time to determine whether the demand is for a proper purpose and to schedule the inspection so that there will be a minimum disruption of its office personnel.

Under Section 6630, any member may inspect the financial records and minutes only for a purpose reasonably related to such member's interests as a member. Under Section 6526, a member authorized in writing by members holding not less than five percent of the voting power may obtain a financial statement without the necessity of showing the purpose of obtaining the financial statement.

Note. The staff has not yet collected the cases construing the requirement that the purpose be "reasonably related to such member's interests as a member." The Comment will be revised to include the results of this research.

405/342

§ 6631

Not Approved April 1976

§ 6631. Application of article

6631. This article applies to a domestic nonprofit corporation, to a foreign nonprofit corporation having its principal executive office in this state, and to any other foreign nonprofit corporation with respect to books or records actually or customarily located in this state.

Comment. Section 6631 is based on a portion of subdivision (a) of Section 1601 (General Corporation Law). The application of this article is not limited to foreign nonprofit corporations described in Section 6631. See Section [provision comparable to Section 2115].

Policy Issue:

Should this section be phrased like Section 6641?

Note. This section will be considered when the provisions relating to pseudo-foreign corporations have been considered.

405/843

6640

Tentatively Approved April 1976

Article 4. Director's Rights of Inspection

§ 6640. Director's right to inspect and copy

6640. Every director of a nonprofit corporation has the absolute right at any reasonable time to inspect all books, records, and documents of every kind and to inspect the physical properties of the nonprofit corporation.

Comment. Section 6640 is the same in substance as the first sentence of Section 1602 (General Corporation Law). The right to inspect includes the right to copy. See Section 6610.

405/924

§ 6641

Not Approved April 1976

§ 6641. Application of article

6641. This article applies to all of the following:

- (a) A domestic nonprofit corporation.
- (b) A foreign nonprofit corporation having its principal executive office in this state.
- (c) A foreign nonprofit corporation subject to Section [provision comparable to Section 2115].
- (d) Any other foreign nonprofit corporation with respect to such books, records, documents, and properties as are actually or customarily located in this state.

Comment. Section 6641 is similar to the second sentence of Section 1602 (General Corporation Law) except that Section 6641 gives the director a broader right of inspection with respect to foreign nonprofit corporations than Section 1602. Unlike Section 1602, in the case of a foreign corporation described in subdivision (b) or (c) of Section 6041, the director may inspect books, records, documents, and properties wherever they may be located. Compare Section 1602.

Note. This section will be considered after the provisions relating to pseudo-foreign corporations have been considered.

Substance Tentatively Approved
April 1976

Article 5. Judicial Enforcement

§ 6650. Enforcement of right of inspection; appointment of inspectors or accountants

6650. (a) Upon refusal of, or noncompliance with, a proper demand for inspection, the superior court of the proper county or of the county in which any of the books, records, documents, or property is located may enforce the right of inspection provided in this chapter with just and proper conditions. When inspection is sought by a member pursuant to subdivision (c) of Section 6622 or Section 6630, the member has the burden of establishing that the inspection is for a proper purpose.

(b) The court may, for good cause shown, appoint one or more competent inspectors or accountants to audit the books and records and to investigate the property, funds, and affairs of the nonprofit corporation if such books, records, property, funds, and affairs are subject to inspection under this chapter. The court may direct such inspectors or accountants to report thereon in such manner as the court may direct.

(c) All officers and agents of the nonprofit corporation shall produce to the inspectors or accountants so appointed all books and documents subject to inspection which are in their custody or under their control under penalty of punishment for contempt of court for willful noncompliance.

(d) All expenses of the investigation or audit shall be defrayed by the applicant unless the court orders them to be paid or shared by the nonprofit corporation.

Comment. Section 6650 is based on Section 1603 (General Corporation Law). Section 6650 expands the venue of Section 1603 to include the county where "any of the" documents sought are located whether the nonprofit corporation is domestic or foreign. When inspection is sought by a member, the member has the burden of establishing the right to such inspection.

Under subdivision (b), the court's power to appoint inspectors or accountants is in addition to its other powers.

Subdivisions (c) and (d) are the same in substance as subdivisions (b) and (c), respectively, of Section 1603.

Note. The staff has not yet researched the case law concerning the burden of establishing "proper purpose," but any relevant cases will be referred to in the Comment. The staff has not yet considered the effect, if any, subdivision (c) might have on the attorney-client privilege or other privileges.

406/230

§ 6651

Substance Tentatively Approved
April 1976

§ 6651. Enforcement of bylaw providing procedure for communicating to members

6651. Subject to Section 6624, the superior court of the proper county shall, by appropriate orders, enforce the provisions of any bylaw adopted pursuant to Section 6621.

Comment. Section 6651, which is new, is designed to provide a clear means of enforcing the provisions of a bylaw adopted pursuant to Section 6621.

Tentatively Approved April 1976
Renumbered April 1976

§ 6652. Recovery of reasonable expenses by member or director

6652. In any action or proceeding under this chapter, if the court finds the failure of the nonprofit corporation to comply with a proper demand thereunder was arbitrary and completely without justification, the court may award an amount sufficient to reimburse the member or director for the reasonable expenses, including reasonable attorney's fees, incurred in connection with such action or proceeding.

Comment. Section 6652 is based on Section 1604 (General Corporation Law). Section 6652 requires that the noncompliance by the nonprofit corporation be "arbitrary" and "completely" without justification but extends the right to recover reasonable expenses to directors who seek to enforce rights of inspection pursuant to Section 6640.

Tentatively Approved
April 1976

CHAPTER 17. ENFORCEMENT BY ATTORNEY GENERAL

§ 6700. Enforcement by Attorney General

6700. The Attorney General, upon complaint that a nonprofit corporation is failing to comply with the provisions of Chapter 6 (commencing with Section 5610), Chapter 7 (commencing with Section 5700), 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 the 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 persons and entities responsible for or affected by such activity.

Comment. Section 6700 is the same in substance as Section 1508.

CHAPTER 13. INVOLUNTARY DISSOLUTION

[Not included--See Memorandum 76-28, May 1976 Meeting]

CHAPTER 10. VOLUNTARY DISSOLUTION

[Not included--See Memorandum 76-28, May 1976 Meeting]

CHAPTER 20. GENERAL PROVISIONS RELATING TO DISSOLUTION

[Major portion not included--See Memorandum 76-39, May 1976 Meeting]

Tentatively Approved
February 1976

Article 3. Distribution of Assets

§ 7030. When distribution may be made

7030. (a) After determining that all the known debts and liabilities of a nonprofit corporation in the process of winding up have been paid or adequately provided for, the board shall distribute all the remaining corporate assets in the manner provided in this article.

(b) If the winding up is by court proceeding or subject to court supervision, the distribution shall not be made until after the expiration of any period for the presentation of claims which has been prescribed by order of the court.

Comment. Subdivision (a) of Section 7030 is the same in substance as the first sentence of Section 2004 (General Corporation Law). It continues the portion of the first paragraph of former Section 9501 that related to payment or adequate provision for debts and obligations of the nonprofit corporation. Payment of a debt or liability has been adequately provided for if the conditions of Section 7031 are satisfied. For recovery of assets distributed to members without compliance with this section, see Section 7037.

Subdivision (b) is the same in substance as the second sentence of Section 2004 (General Corporation Law).

Distribution of assets of a nonprofit corporation on dissolution may be made only after the requirements of Section 7030 are satisfied. Distribution of assets generally is provided for in Section 7032 (distribution among members or in accordance with articles). There are special rules for assets held on condition requiring return (Section 7033), assets held on trust or by a charitable corporation (Section 7034), and assets held by a subordinate body (Section 5214).

Tentatively Approved
February 1976

§ 7031. Adequate provision for payment of debts and liabilities

7031. (a) The payment of a debt or liability, whether the whereabouts of the creditor is known or unknown, has been adequately provided for if the payment has been provided for by either of the following means:

(1) Payment thereof has been assumed or guaranteed in good faith by one or more financially responsible persons or by the United States government or any agency thereof, and the provision (including the financial responsibility of such persons) was determined in good faith and with reasonable care by the board to be adequate at the time of any distribution of the assets by the board pursuant to this article.

(2) The amount of the debt or liability has been deposited as provided in Section 7036.

(b) This section does not prescribe the exclusive means of making adequate provision for debts and liabilities.

Comment. Section 7031 is the same in substance as Section 2005 (General Corporation Law). It continues provisions applicable to non-profit corporations by former Section 5001 through former Section 9800. "Financially responsible persons" includes financially responsible corporations. See Section 18 ("person" includes "corporation").

Tentatively Approved
February 1976

§ 7032. Distribution among members or in accordance with bylaws

7032. Unless otherwise provided in this division, assets held by a nonprofit corporation shall be distributed on dissolution among the members in accordance with their respective rights therein or disposed of in such other manner as may be provided in the bylaws.

Comment. Section 7032 continues the substance of that portion of the first paragraph of former Section 9801 that related to distribution of assets to members or as otherwise provided in the articles, with the addition of a provision permitting provision otherwise in the bylaws. See Sections 5155.5 ("bylaws" includes articles) and 5251 (articles may contain provisions permitted in bylaws). For a comparable provision, see Section 2004 (General Corporation Law) (distribution of remaining corporate assets among shareholders according to their respective rights and preferences). Section 7032 governs distribution of the remaining assets of a nonprofit corporation on dissolution unless the assets fall within the terms of Section 7033 (return of assets held on condition), 7034 (disposition of assets held on trust or by charitable corporation), or 5214 (delivery of assets held by subordinate body).

The respective rights of the members are determined by reference to the bylaws. Absent relevant classifications, the property rights of members are equal. See Section 5401. The bylaws may, however, provide a disposition of assets other than distribution to members.

It should be noted that, if assets of a nonprofit corporation are distributable to members on dissolution, the nonprofit corporation will not qualify for income tax exemption under Revenue and Taxation Code Section 23701d or Internal Revenue Code Section 501(c)(3). Moreover, the memberships will be "securities" within the meaning of the Corporate Securities Law of 1968 and may not be exempt from the qualification requirements of that law. See Sections 25019 and 25100(j); see also California Corporations Commissioner, Release 15-C (May 15, 1970).

Tentatively Approved
January 1976

§ 7033. Return of assets held on condition

7033. Assets held by a nonprofit corporation upon condition requiring return, transfer, or conveyance, which condition occurs by reason of the dissolution, shall be returned, transferred, or conveyed in accordance with such requirements.

Comment. Section 7033 is new. It is comparable to Section 46 of the ALI-ABA Model Nonprofit Corporation Act. Section 7033 is consistent with the common law in California. See In re Los Angeles County Pioneer Society, 40 Cal.2d 852, 866, 257 P.2d 1, 9 (1953), cert. denied, 346 U.S. 838 (1953).

Substance Tentatively
Approved February 1976

§ 7034. Disposition of assets held on trust or by charitable corporation

7034. (a) Those assets held by a nonprofit corporation on a charitable trust and all of the assets held by a nonprofit corporation organized for charitable purposes shall be disposed of on dissolution in conformity with the purposes of the charitable trust or the charitable purposes for which the nonprofit corporation was organized.

(b) Except as provided in subdivision (c), the disposition required in subdivision (a) shall be made by decree of the superior court of the

proper county in proceedings to which the Attorney General is a party. The decree shall be made upon petition therefor by the Attorney General or, upon thirty days' notice to the Attorney General, by any person concerned in the dissolution.

(c) The disposition required in subdivision (a) may be made without the decree of the superior court, subject to the rights of persons concerned in the dissolution, if the Attorney General makes a written waiver of objections to the disposition.

Comment. Section 7034 continues the substance of the second paragraph of former Section 9801. The disposition of assets provided in Section 7034 applies only where the assets are not held on condition requiring return, transfer, or conveyance. See Section 7033.

Subdivision (a) applies both to assets received on express trust for charitable purposes and to assets received by a charitable corporation whether or not on trust. A nonprofit corporation organized exclusively for charitable purposes holds its assets in trust for the purposes enumerated in its articles of incorporation even though they were not otherwise expressly earmarked for charitable trust purposes when acquired by the corporation. See, e.g., Pacific Home v. County of Los Angeles, 41 Cal.2d 844, 257 P.2d 1 (1953). Whether a nonprofit corporation is deemed to be a charitable corporation for the purposes of subdivision (a) is a question of fact to be determined by reference not only to its articles of incorporation but also to the manner of conducting its activities. See, e.g., Lynch v. Spilman, 67 Cal.2d 251, 62 Cal. Rptr. 12, 431 P.2d 636 (1967). In re Los Angeles County Pioneer Society, 40 Cal.2d 852, 257 P.2d 1, cert. denied, 346 U.S. 888 (1953). Charitable purposes are not defined by statute but left to judicial development.

Subdivision (a) also has the effect of preserving the doctrine of cy pres. Former Section 9801 was silent as to this point, but case law required application of the cy pres doctrine. See, e.g., In re Veterans'

Industries, Inc., 3 Cal. App.3d 902, 88 Cal. Rptr. 303 (1970); Metropolitan Baptist Church of Richmond, Inc. v. Younger, 48 Cal. App.3d 850, 121 Cal. Rptr. 399 (1975).

Subdivision (b) continues the provision of former Section 9301 that required a court decree of distribution. The decree is made upon petition therefor by the Attorney General or by an interested party after 30 days' notice to the Attorney General. It should be noted that, although the Attorney General is a party to the court proceeding, the ultimate responsibility for the proper application of the standard of subdivision (a) rests with the court. In re Veterans' Industries, Inc., supra.

Subdivision (c) is new. It permits disposition of charitable assets without court decree upon waiver of objections by the Attorney General. A nonprofit corporation may seek a court decree even though the Attorney General has waived objections, and the waiver of objections binds only the Attorney General and not other interested parties, such as the donor or other potential distributees.

Note. The question whether provisions governing corporations sole should be integrated with this section is deferred.

The question whether a scheme such as that provided in this section should be applied to mergers and sales of assets is deferred until consideration of those subjects.

404/359

§ 7035

Tentatively Approved
February 1976

§ 7035. Manner of distribution

7035. (a) Unless the bylaws otherwise provide, distribution of assets may be made either in money or in property or securities and either in installments from time to time or as a whole, if this can be done fairly and ratably and in conformity with the rights of the distributees.

(b) Distribution of assets shall be made as soon as reasonably consistent with the beneficial liquidation of corporate assets.

Comment. Section 7035 is the same in substance as Section 2006 (General Corporation Law). It continues provisions applicable to non-profit corporations by former Sections 5002 and 5003 through former Section 9800. Section 7035 applies only to distributions among members or other distributees where there are no contrary requirements in the bylaws. Where the bylaws provide otherwise, the distribution is not made pursuant to Section 7035 but is made in accordance with the requirements of the articles or bylaws.

Note. Provisions relating to a plan of distribution, if any, have not yet been drafted.

404/934

§ 7035.5

§ 7035.5. Plan of distribution

[NOT YET DRAFTED]

404/358

§ 7036

Tentatively Approved
February 1976

§ 7036. Deposit of distribution to creditors, members, and other persons

7036. (a) This section applies to a creditor, member, or other person entitled to assets of a nonprofit corporation in all of the following cases:

(1) The person is unknown or fails to accept a payment or distribution.

(2) The person cannot be found after diligent inquiry.

(3) The existence or amount of the person's claim is contingent, contested, or not determined.

(4) The ownership of the person's membership is in dispute.

(b) In cases described in subdivision (a), the nonprofit corporation may deposit the payment or distribution or the maximum amount of the claim with the State Treasurer or with a bank or trust company in this state in trust for the benefit of the person lawfully entitled thereto. The payment or distribution shall be paid over by the deposi- tary to the lawful owner, the owner's representative, or assigns upon satisfactory proof of title.

(c) For the purpose of providing for the transmittal, receipt, accounting for, claiming, management, and investment of all amounts deposited in the State Treasury under the provisions of subdivision (b), the deposit shall be deemed to be paid or delivered for deposit in the State Treasury under the provisions of Chapter 7 (commencing with Sec- tion 1500) of Title 10 of Part 3 of the Code of Civil Procedure and may be recovered in the manner prescribed therein.

Comment. Section 7036 is the same in substance as Section 2008 (General Corporation Law). Subdivisions (a) and (b) continue provisions applicable to nonprofit corporations by former Sections 5009 and 5010 through former Section 9800. Subdivision (c) continues provisions applicable to nonprofit corporations by former Section 5011 through former Section 9800.

Not Approved; See Minutes
February 1976

§ 7037. Recovery of improper distribution to members

7037. (a) Whenever in the process of winding up a nonprofit corporation a distribution of assets has been made, otherwise than under an order of court, without prior payment or adequate provision for payment of any of the debts and liabilities of the nonprofit corporation, the amount so improperly distributed to any member may be recovered by the nonprofit corporation. Any of such members may be joined as defendants in the same action or brought in on the motion of any other defendant.

(b) Suit may be brought in the name of the nonprofit corporation by one or more creditors of the nonprofit corporation, whether or not they have reduced their claims to judgment, to enforce the liability under subdivision (a) against any or all members receiving the distribution.

(c) A member who satisfies a liability under this section has the right of ratable contribution from other members similarly liable. A member who has been compelled to return to the nonprofit corporation more than the member's ratable share of the amount needed to pay the debts and liabilities of the nonprofit corporation may require that the nonprofit corporation recover from any or all of the other members such proportion of the amounts received by them upon the improper distribution as to give contribution to those held liable under this section and make the distribution of assets fair and ratable, according to the respective rights of the members, after payment or adequate provision

for payment of all the debts and liabilities of the nonprofit corporation.

(d) As used in this section, "process of winding up" includes proceedings under Chapters 18 and 19 and also any other distribution of assets to members made in contemplation of termination or abandonment of the corporate activities.

Comment. Section 7037 is the same in substance as Section 2009 (General Corporation Law). It continues provisions applicable to nonprofit corporations by former Section 5012 through former Section 9800. Although a nonprofit corporation may make distributions to persons or groups other than members (see Sections 7032-7034), Section 7037 is limited to recovery of distributions made to members. The directors may be liable for improper distributions to members or other distributees pursuant to Section 5374. For the obligation to pay or adequately provide for debts and liabilities, prior to distribution, see Section 7030. Adequate provision for debts and liabilities is defined in Section 7031.

Note. The staff has not yet drafted provisions relating to the liability of directors.

CHAPTER 21. FOREIGN NONPROFIT CORPORATIONS

[Not included--See Memorandum 76-45; Memorandum 76-55, May 1976 Meeting]

CHAPTER 22. CRIMES AND PENALTIES

[Not included--See Memorandum 76-57. May 1976 Meeting]

CHAPTER 23. TRANSITIONAL PROVISIONS

[Not included--To be considered at June 1976 Meeting]

NEW DIVISION 4--PROVISIONS APPLICABLE
TO CORPORATIONS GENERALLY

The reason for the tentative decision to recommend the enactment of a new Division 4 (Provisions Applicable to Corporations Generally) is given in the following extract from the Minutes of the April 22-24, 1976, Meeting of the Law Revision Commission.

The Commission discussed the effect of limiting the application of Division 1 (the General Corporation Law) to certain corporations only. It was noted that Section 119 of the former General Corporation Law made Division 1 of the Corporations Code applicable to every private corporation, profit or nonprofit, now existing or hereafter formed, unless the corporation was expressly excepted from the operation thereof if there was a special provision applicable to the corporation inconsistent with some provision of the division, in which case the special provision prevailed. By way of contrast, Section 102 of the new General Corporation Law limits the application of Division 1 to corporations organized under the division and to certain other corporations. However, it appears that the effect of Assembly Bill 284, as amended March 8, will be to make Division 1 not apply to nonprofit corporations, chambers of commerce, boards of trade, mechanics' institutes, cooperative corporations, fish marketing corporations, California Job Creation Corporations, business and industrial corporations organized under Corporations Code Section 14200 et seq., or to corporations organized under codes other than the Corporations Code or to corporations organized under special statutes.

The problem created when the application of Division 1 is limited is that some of the provisions in Division 1 should apply to all corporations without regard to the statute under which they are formed. For example, some of the following sections of Division 1 probably should have general application to all corporations (some would have to be redrafted to give them general application):

- § 101(b) - reservation of right to amend or repeal
- § 103 - capital stock owned by United States or federal agency
- § 105 - right to sue corporation

- § 106 - right to attach corporate property
- § 107 - issuing money
- § 108 - fees of Secretary of State
- § 109 - certification of corporation
- § 110 - duty of Secretary of State to file instrument
- § 201 - misleading or deceptive case
- § 1506 - furnishing information to assessor
- § 1507 - false reports, statements, etc.
- § 1700 - service on domestic corporations
- § 1701 - service on domestic corporation
- § 1702 - service on domestic corporations
- § 2204 - failure to file annual statement; notice by Secretary of State
- § 2204 - false reports, statements, etc.

This does not purport to be a complete listing; it is merely illustrative of the problem.

The Commission discussed what was the best method of dealing with the problem. One method would be to merely codify comparable provisions in the nonprofit corporation law and leave the problem to be solved in the conforming legislation to clean up on the General Corporation Law. However, the Commission concluded that a better solution would be to add a new division--Division 4--to Title 1 of the Corporations Code to apply to corporations generally and to include in this division those provisions that are not integral parts of the business corporation law or the nonprofit corporation law. This would provide provisions of general application to all corporations (as was the case formerly by application of former Section 113), would avoid the need to duplicate the provisions in the nonprofit corporation law, and would (if the State Bar Committee on Corporations decides that is appropriate) permit the repeal of the provisions in Division 1.

The staff was directed to prepare a draft of a new Division 4 which should include those provisions the staff believes are of general application and are not an integral part of the business or nonprofit corporation law.

SEC. ____ . Division 4 (commencing with Section 14800) is added to Title 1 of the Corporations Code, to read:

DIVISION 4. PROVISIONS APPLICABLE TO
CORPORATIONS GENERALLY

CHAPTER 1. GENERAL PROVISIONS

§ 14800. Corporation defined

14800. Unless otherwise expressly provided, as used in this division, "corporation" means a corporation formed under the laws of this state.

Comment: Section 14800 adopts the substance of the definition of corporation provided in former Section 106.

Policy Issue:

Should the Division, as was former Division 1, be limited to "domestic corporations?" Staff recommendation: No (unless particular provision should be so limited).

§ 14801. Scope of division

14801. The provisions of this division apply to every private corporation, profit or nonprofit, stock or nonstock, now existing or hereafter formed, unless:

(a) The corporation is expressly excepted from the operation thereof;

or

(b) There is a special provision applicable to the corporation inconsistent with some provision of this division, in which case the special provision prevails.

Comment. Section 14801 adopts the substance of the first paragraph of former Section 119. The second paragraph of Section 119 has been omitted as unnecessary.

Note. The provisions of the new General Corporation Law that duplicate provisions of this division would be preserved by subdivision (b) of Section 14801 if it is desired to retain those provisions in the General Corporation Law. However, the duplicating provisions of the new General Corporation Law could be repealed and the duplication thus avoided. Also, it should be noted that the enactment of this division makes it unnecessary to save the comparable provisions of the former General Corporation Law to cover a corporation that (1) is not a nonprofit corporation and (2) is not covered by Section 102 of the new General Corporation Law. The views of the State Bar Committee on Corporations will be solicited to determine whether the duplicating provisions in the new General Corporation Law should be repealed. If those provisions are not repealed, the provisions in new Division 4 would apply to all nonprofit corporations and also to any other corporation that is not covered by the new General Corporation Law unless the provision otherwise provides. See Section 102 (application of new General Corporation Law) as proposed to be amended in Assembly Bill 2849. If the duplicating provisions of the new General Corporation Law are repealed, new Division 4 would apply to all corporations unless the provision otherwise provides.

404/996

§ 14802

Staff Draft April 1976

§ 14802. Suit against corporation or association

14802. A corporation or association may be sued as provided in the Code of Civil Procedure.

Comment. Section 14802 continues the substance of former Section 128.

Note. Enactment of this section would permit the repeal of Section 105.

§ 14803. Subjection of corporate property to attachment

14803. A corporation shall, as a condition of its existence as a corporation, be subject to the provisions of the Code of Civil Procedure authorizing the attachment of property.

Comment. Section 14803 is based on former Section 126.1, but Section 126.1 was limited in its application to corporations formed under Division 1 of the Corporations Code (General Corporation Law) while Section 14803 is not so limited. This expansion of the scope of application of Section 126.1 is consistent with the scope of the applicability of the Attachment Law itself. See Code Civ. Proc. § 483.010, as amended by [AB 2864, 1976 Regular Session], which permits attachment of property of nonprofit corporations. See the Comment to Section 483.010, printed in Senate Journal for April 22, 1976, discussing scope attachment of property of nonprofit corporations.

Note. The enactment of this section permits the repeal of Section 106.

§ 14804. Money; issuance and circulation

14804. No corporation, association, or individual shall issue or put in circulation, as money, anything but the lawful money of the United States.

Comment. Section 14804 is the same as former Section 129.

Note. Section 129 was added to the Corporations Code as a result of the work of the Constitution Revision Commission. The section would appear to be more appropriately compiled in the Financial Code, but there is no appropriate place in that code for the section. We have not investigated the need for the provisions although we suspect that the matter might be covered by federal law.

Note. The enactment of this section permits the repeal of Section 107.

§ 14805. Federal corporations

14805. Every corporation organized under the laws of this state, any other state of the United States or the District of Columbia or under an act of the Congress of the United States, all of the capital stock of which is beneficially owned by the United States, an agency or instrumentality of the United States or any corporation the whole of the capital stock of which is owned by the United States or by an agency or instrumentality of the United States, is conclusively presumed to be an agency and instrumentality of the United States and is entitled to all privileges and immunities to which the holders of all of its stock are entitled as agencies of the United States.

Comment. Section 14805 is the same as former Section 123.

Note. The staff is unclear as to the purpose of Section 123, but the section would appear to be one of general application that should not be limited as provided in Section 102.

Note. The enactment of this section permits the repeal of Section 103.

§ 14806. Information to assessor

14806. Upon request of an assessor, a domestic or foreign corporation owning, claiming, possessing, or controlling property in this state subject to local assessment shall make available at the corporation's principal office in California or at a place mutually acceptable to the

assessor and the corporation a true copy of the records relevant to the amount, cost, and value of all property that it owns, claims, possesses, or controls within the country.

Comment. Section 14806 is the same in substance as Section 1506, which extended the scope of application of former Section 3001.1 to include foreign corporations.

Note. The enactment of this section permits the repeal of Section 1506.

405/932

§ 14807

Staff Draft April 1976

§ 14807. Amendment or repeal; reservation of power; savings clause

14807. (a) This title of the Corporations Code, and any division, part, chapter, article, or section thereof, may at any time be amended or repealed.

(b) Neither the enactment of this title, nor the amendment, repeal, or reenactment of this title or any portion thereof, nor of any other statute affecting corporations, shall take away or impair any existing liability or cause of action existing or incurred against any corporation, its shareholders, members, directors, or officers incurred prior to the time of such enactment, amendment, repeal, or reenactment.

Comment. Section 14807 continues the substance of former Section 126, but the language of Section 14807 has been rephrased to adopt language used in subdivision (c) of Section 102.

Note. The enactment of this section would permit repeal of subdivision (b) of Section 100. Subdivision (c) of Section 102 should be retained.

Policy Issue:

Should subdivision (a) be expanded to include "or any other statute affecting corporations?" Staff recommendation: Yes.

043/186

§ 14820

Tentatively Approved February 1976
Staff Revision and Renumbering April 1976

CHAPTER 2. CORPORATE NAME

§ 14820. Reservation of corporate name

14820. (a) Any applicant may, upon payment of the fee prescribed therefor in the Government Code, obtain from the Secretary of State a certificate of reservation of corporate name for any name not prohibited by this chapter and, upon the issuance of the certificate, the name stated therein shall be reserved for a period of 60 days.

(b) The Secretary of State shall not issue certificates reserving the same name for two or more consecutive 60-day periods to the same applicant or for the use or benefit of the same corporation; nor shall consecutive reservations be made by or for the use or benefit of the same corporation of names so similar as to fall within the prohibitions of Section 14821.

Comment. Section 14820 is the same in substance as Section 201(c) (General Corporation Law). It continues provisions of former Section 310. The fee for a certificate of reservation of corporate name is now four dollars. Govt. Code § 12199.

Note. The staff has not yet resolved the problem that may occur where a corporate name reservation expires during a period of dispute over whether the Secretary of State will file corporate articles.

Note. The enactment of this chapter would permit the repeal of subdivisions (b) and (c) of Section 201.

043/185

§ 14821

Tentatively Approved February 1976
Staff Revision and Renumbering April 1976

§ 14821. Name which tends to deceive

14821. A corporation shall not adopt a name which is the same as, or resembles so closely as to tend to deceive, any of the following:

- (a) The name of a domestic corporation.
- (b) The name of a foreign corporation which is authorized to transact intrastate business or has registered its name pursuant to Section 2101 or 7101.
- (c) A name which a foreign corporation has assumed under subdivision (B) of Section 2106 or 7106.
- (d) A name which will become the record name of a domestic or foreign corporation upon the effective date of a filed corporate instrument where there is a delayed effective date pursuant to Section 14831.
- (e) A name which is under reservation for another corporation.

Comment. Section 14821 is the same in substance as a portion of Section 201(b)(General Corporation Law). It continues provisions of former Section 310.

In addition to the prohibitions contained in Section 14821, there may be other applicable name limitations in other statutes. See, e.g., Sections 14823 (names likely to mislead), 12950 (use of word "cooperative"); Fin. Code § 5501 (building and loan and savings and loan associations); 36 U.S.C. § 379 (use of words "Olympic" or "Olympiad").

Note. The staff has not yet considered whether any of these provisions may be extended to associations which have registered with the Secretary of State. The Comment will be expanded to list other applicable name limitations in other statutes if any are discovered.

043/184

§ 14822

Tentatively Approved February 1976

Staff Revision and Renumbering April 1976

§ 14822. Agreement to use name that is substantially the same

14822. (a) Notwithstanding Section 14821, a corporation may adopt a name that is substantially the same as the name of either of the following:

- (1) An existing domestic corporation.

(2) A foreign corporation which is authorized to transact intrastate business or has registered its name pursuant to Section 2101 or 7101.

(b) A corporation may adopt a name pursuant to subdivision (a) only if both of the following conditions are satisfied:

(1) The corporation proves the consent by the affected domestic or foreign corporation.

(2) The Secretary of State finds that, under the circumstances, the public is not likely to be misled.

Comment. Section 14822 is the same in substance as a portion of Section 201(b)(General Corporation Law). This provision is new for nonprofit corporations.

404/937

§ 14823

Substance Tentatively Approved February 1976
Staff Revision and Renumbering April 1976

§ 14823. Name which is likely to mislead or contains the word "charitable"

14823. A corporation shall not adopt either of the following:

(a) A name which is likely to mislead the public.

(b) A name in which the word "charitable" or its equivalent appears unless the corporation is a nonprofit corporation organized for charitable purposes.

Comment. Subdivision (a) of Section 14823 is the same in substance as a portion of Section 201(b)(General Corporation Law). It continues a provision of former Section 310.

Subdivision (b) of Section 14823 is new. It is a specific application of the general rule stated in subdivision (a). A nonprofit corporation that is organized for charitable purposes must so state in its articles (Section 5250) and is subject to Article 7 (commencing with Section 12580) of Chapter 6 of Part 2 of Division 3 of Title 2 of the Government Code (Uniform Supervision of Trustees for Charitable Purposes Act).

Note. The staff has not yet investigated the advisability of a grandfather clause for those corporations now existing which might violate subdivision (b) upon its enactment.

043/180

§ 14824

Tentatively Approved February 1976

Staff Revision and Renumbering April 1976

§ 14824. Sanctions for name violations

14824. (a) The Secretary of State shall not file articles which violate the provisions of this chapter.

(b) The use by a corporation of a name in violation of this chapter may be enjoined notwithstanding the filing of its articles by the Secretary of State.

Comment. Section 14824 is comparable to portions of Section 201(b) (General Corporation Law). It continues portions of former Section 310. It should be noted that a nonprofit corporation may not use a name that is deceptively similar to that of a domestic nonprofit association. Law v. Crist, 41 Cal. App.2d 862, 107 P.2d 953 (1941).

405/933

§ 14825

Staff Draft April 1976

CHAPTER 3. FILING OF INSTRUMENTS;
CERTIFICATES OF CORRECTION

Article 1. Application of Chapter

§ 14825. Application of chapter

14825. Unless the particular provision otherwise provides, the provisions of this chapter apply to instruments required or permitted to be filed with the Secretary of State with respect to domestic and foreign corporations, whether or not filed pursuant to this title.

Comment. Section 14830 makes the provisions of this chapter (unless the particular provision otherwise provides) applicable to all instruments required or permitted to be filed with the Secretary of State. This may broaden the applicability of the provisions of former law.

Note. If it is determined that a definition of "instrument" is necessary or other definitions are necessary, those definitions can be included in this article.

Policy Issue:

Should the policy reflected in this section be adopted? Note that some sections included in this chapter are limited in their application. See Section 14833(c). Staff recommendation: Yes.

404/373

§ 14830

Substance Tentatively Approved January 1976
Staff Revision and Renumbering April 1976

Article 2. Filing of Instruments

§ 14830. Filing by Secretary of State

14830. (a) Upon receipt of any instrument for filing, the Secretary of State shall, if it conforms to law, file the instrument in the office of the Secretary of State and endorse the date of filing thereon.

(b) The Secretary of State shall file a document as of any requested future date, not more than 180 days after its receipt, including a Saturday, Sunday, or legal holiday, if the document is received in the Secretary of State's office at least one business day prior to the requested date of filing.

(c) The date of filing is the date the instrument is received by the Secretary of State unless withheld from filing for a period of time pursuant to a request by the party submitting it for filing or unless in

the judgment of the Secretary of State the filing is intended to be coordinated with the filing of some other corporate document which cannot be filed. In the case of an instrument resubmitted for filing pursuant to Section 14833, the date of filing is the date the instrument was first received by the Secretary of State.

Comment. Section 14830 is the same in substance as Section 110(a) (General Corporation Law). The last sentence is new.

Note. The staff has not yet developed a definition of "instrument" or distinguished between "instruments" (subdivisions (a) and (c)) and "documents" (subdivisions (b) and (c)).

The staff will follow the proposed amendment to Section 110(a) in Assembly Bill 2849. These amendments have been included in Section 14830.

Note. The enactment of this article permits the repeal of Sections 108 and 110.

043/199

§ 14831

Tentatively Approved January 1976

Staff Revision and Renumbering April 1976

§ 14831. Delayed effective date of instruments

14831. (a) Any instrument filed with respect to a corporation (other than original articles) may specify that the instrument is to become effective on a date not later than 90 days after the filing date.

(b) If no revocation certificate is filed, the instrument becomes effective on the date specified.

Comment. Section 14831 is the same in substance as portions of Section 110(c) (General Corporation Law).

404/933

§ 14832

Not Approved; See Minutes January 1976
Staff Revision and Renumbering April 1976

§ 14832. Revocation certificates

14832. (a) An instrument filed with a delayed effective date may be prevented from becoming effective by a revocation certificate filed on or before the specified effective date.

(b) The revocation certificate shall state that, by appropriate corporate action, the instrument has been revoked and is null and void.

(c) The revocation certificate shall be executed in the same manner as the original instrument except that, in the case of a merger agreement, the certificate need only be executed on behalf of one of the constituent corporations.

Comment. Section 14832 is the same in substance as portions of Section 110(c)(General Corporation Law).

Note. The staff has yet to check with the Secretary of State concerning the meaning of the phrase "by appropriate corporate action."

The Commission has not yet reviewed the provisions relating to mergers.

968/612

§ 14833

Tentatively Approved January 1976
Staff Revision and Renumbering April 1976

§ 14833. Instruments conforming to law

14833. (a) If the Secretary of State determines that an instrument submitted for filing or otherwise submitted does not conform to law, the Secretary of State may return the instrument to the person submitting it. An instrument does not fail to conform to law because it is not accompanied by the full filing fee if the unpaid portion of the fee does not exceed the limits established by the policy of the Secretary of State for extending credit in such cases.

(b) An instrument returned pursuant to subdivision (a) may be resubmitted accompanied by a written opinion of the member of the State Bar of California submitting the instrument, or representing the person submitting it, to the effect that the specific provision of the instrument objected to by the Secretary of State does conform to law and stating the points and authorities upon which the opinion is based.

(c) If the instrument is submitted pursuant to Division 1 (commencing with Section ____), Division 2 (commencing with Section ____), or Division 3 (commencing with Section ____), the Secretary of State shall rely, with respect to any disputed point of law (other than the application of Sections 201, 2101, 2106, and [other reference to sections relating to corporate names]), upon a written opinion pursuant to subdivision (b) in determining whether the instrument conforms to law.

Comment. Section 41833 is the same in substance as portions of Section 110(b), (c).

Note. The references in subdivision (c) are to corporate name provisions and will be completed when those provisions have been drafted. Note that subdivision (c) applies to Divisions 2 and 3, as well as Division 1. This will require a careful review of the provisions in Division 3 to make sure any exceptions relating to corporate name are included.

406/002

§ 14834
Staff Draft

§ 14834. Filing fees

14834. The fees of the Secretary of State for filing instruments by or on behalf of corporations are prescribed in Article 3 (commencing with Section 12180) of Chapter 3 of Part 2 of Division 3 of Title 2 of the Government Code.

Comment. Section 14834 is the same in substance as former Section 124.

Note. The staff has not yet investigated whether there will be a need for amendments to the Government Code fee provisions.

Note. The enactment of this section permits the repeal of Section 108.

Policy Issue:

Should a section like this be included in each law relating to corporations rather than being included in the new Division 4?

968/652

§ 14835

Tentatively Approved March 1976

Staff Revision and Renumbering April 1976

Article 3. Certificates of Correction

§ 14835. Correction of instruments

14835. An agreement, certificate, or other instrument relating to a corporation may be corrected with respect to a misstatement of fact contained therein; a defect in the execution thereof, or any other error or defect contained therein by filing a certificate of correction.

Comment. Article 2 (commencing with Section 14835) is the same in substance as Section 109 (General Corporation Law) but may have broader application. See Section 14825. Article 2 continues provisions of former Section 127.

Note. The enactment of this section permits the repeal of Section 109.

968/667

§ 14836

Tentatively Approved March 1976

Staff Revision and Renumbering April 1976

§ 14836. Contents of certificate of correction

14836. The certificate of correction shall be entitled "Certificate of Correction of _____ (insert here the title of

the agreement, certificate, or other instrument to be corrected and name(s) of corporation or corporations)" and shall set forth the following:

- (a) The name or names of the corporation or corporations.
- (b) The date the agreement, certificate, or other instrument being corrected was filed.
- (c) The provision in the agreement, certificate, or other instrument as corrected and, if the execution was defective, wherein it was defective.

Comment. See Comment to Section 14835.

968/668

§ 14837

Tentatively Approved March 1976

Staff Revision and Renumbering April 1976

§ 14837. Execution of certificate of correction

14837. The certificate of correction shall be signed and verified or acknowledged as provided in the applicable statute with respect to the agreement, certificate, or other instrument being corrected.

Comment. See Comment to Section 14835.

Note. This section will need to be reviewed if the scope of this article is expanded to cover instruments executed pursuant to sections in other codes by corporations incorporated under the Corporations Code provisions or incorporated under statutes compiled in other codes. This review can take place when these other statutes are reviewed to conform them to Division 1 or Division 2.

968/669

§ 14838

Tentatively Approved March 1976

Staff Revision and Renumbering April 1976

§ 14838. Limitations on certificate of correction.

§ 14838. (a) No certificate of correction shall alter the wording of any resolution which was in fact adopted by the board or the shareholders or members.

(b) No certificate of correction shall effect a corrected amendment of articles which amendment as so corrected would not in all respects have complied with the statutory requirements in effect at the time of filing of the agreement, certificate, or other instrument being corrected.

Comment. See Comment to Section 14835.

Note. Subdivision (b) is to be reviewed for need and for clarity.

968/670

§ 14839

Tentatively Approved March 1976

Renumbered April 1976

§ 14839. Effective date of corrected instrument unaffected by filing certificate of correction

14839. The filing of the certificate of correction shall not alter the effective date of the agreement, certificate, or instrument being corrected, which shall remain as its original effective date.

Comment. See Comment to Section 14835.

968/671

§ 14840

Tentatively Approved March 1976

Renumbered April 1976

§ 14840. Rights and liabilities affected by filing certificate of correction

14840. The filing of the certificate of correction does not affect any right or liability accrued or incurred before the filing except that any right or liability accrued or incurred by reason of the error or defect being corrected is extinguished by the filing if the person having the right has not detrimentally relied on the original instrument.

Comment. See Comment to Section 14835.

Note. The staff has not yet investigated the problem of notice to persons who might have relied on the incorrect instrument.

406/173

§ 14850

Tentatively Approved April 1976

Staff Revision and Renumbering April 1976

CHAPTER 4. SERVICE OF PROCESS ON DOMESTIC CORPORATIONS

Article 1. Manner of Service Generally

§ 14850. Additional method for serving domestic corporation

14850. In addition to the provisions of Chapter 4 (commencing with Section 413.10) of Title 5 of Part 2 of the Code of Civil Procedure, process may be served upon domestic corporations as provided in this chapter.

Comment. Chapter 4 (commencing with Section 14850) is the same in substance as Sections 1700-1702 of the Corporations Code. The phrase "personal delivery" has been substituted in this chapter for "delivery

by hand" to which appears in Sections 1701 and 1702 to conform the terminology to that used in the Code of Civil Procedure. See Code Civ. Proc. §§ 415.10 and 415.20. Section 1702, as proposed to be amended by Assembly Bill 2849 of the 1975-76 Regular Session, has been used in preparing this chapter. The following table shows the source of each section in this chapter.

	<u>Section</u>	<u>Source (Corp. Code Sections)</u>
	14850	1700
	14851	1701
	14852	1702(a)
	14853	1702(b)(first two sentences)
	14854	1702(c)

Note. The enactment of this Chapter would permit repeal of Sections 1700, 1701, and 1702.

405/935

§ 14851

Tentatively Approved April 1976

Staff Revision and Renumbering April 1976

Article 2. Service on Designated Agent

§ 14851. Service on designated agent for service

14851. Personal delivery of a copy of any process against the corporation (a) to any natural person designated by it as agent or (b), if a corporate agent has been designated, to any person named in the latest certificate of the corporate agent filed pursuant to Section 1505 at the office of such corporate agent shall constitute valid service on the corporation.

Comment. See the Comment to Section 14850.

405/934

§ 14852

Tentatively Approved April 1976

Staff Revision and Renumbering April 1976

Article 3. Service on Secretary of State

§ 14852. Service on Secretary of State

14852. If an agent for the purpose of service of process has resigned and has not been replaced or if the agent designated cannot

with reasonable diligence be found at the address designated for personal delivery of the process, and it is shown by affidavit to the satisfaction of the court that process against a domestic corporation cannot be served with reasonable diligence upon the designated agent by personal delivery in the manner provided in Section 415.10, subdivision (a) of Section 415.20 or subdivision (a) of Section 415.30 of the Code of Civil Procedure or upon the corporation in the manner provided in subdivision (a), (b), or (c) of Section 416.10 or subdivision (a) of Section 416.20 of the Code of Civil Procedure, the court may make an order that the service be made upon the corporation by personal delivery to the Secretary of State, or to any person employed in the Secretary of State's office in the capacity of assistant or deputy, one copy of the process for each defendant to be served, together with a copy of the order authorizing such service. Service in this manner is deemed complete on the 10th day after delivery of the process to the Secretary of State.

Comment. See the Comment to Section 14850.

406/174

§ 14853

Tentatively Approved April 1976

Staff Revision and Renumbering April 1976

§ 14853. Notice to corporation

14853. (a) Upon the receipt of any such copy of process and the fee therefor, the Secretary of State shall give notice of the service of the process to the corporation by:

(1) Forwarding to the corporation at its principal executive office by registered or certified mail, with request for return receipt, the copy of the process; or

(2) If the records of the Secretary of State do not disclose an address for the company's principal executive office, forwarding such

copy in the same manner to the last designated agent for service of process who has not resigned.

(b) If the agent for service of process has resigned and has not been replaced and the records of the Secretary of State do not disclose an address for the company's principal executive office, no action need be taken by the Secretary of State.

Comment. See the Comment to Section 14850.

Policy Issue:

Should the Secretary of State be required to send a copy of the process both to the corporation at its principal executive office and to its last designated agent for service of process? Staff recommendation: Yes.

405/936

§ 14854

Tentatively Approved April 1976

Staff Revision and Renumbering April 1976

§ 14854. Record of service; certificate of Secretary of State as evidence

14854. (a) The Secretary of State shall keep a record of all process served upon the Secretary of State under this article and shall record therein the time of service and the Secretary of State's action with reference thereto.

(b) The certificate of the Secretary of State, under the Secretary of State's official seal, certifying to the receipt of process, the giving of notice thereof to the corporation, and the forwarding of such process pursuant to this article, shall be competent and prima facie evidence of the matters stated therein.

Comment. See the Comment to Section 14850.

405/479

CHAPTER 5. [RESERVED]

CHAPTER 6. FOREIGN CORPORATIONS

Not included--See Memorandum 76-55--May 1976 Meeting

CHAPTER 7. [RESERVED]

CHAPTER 8. CRIMES AND PENALTIES

Not included--See Memorandum 76-57--May 1976 Meeting

404/184

Corp. Code § 9000

Tentatively Approved
February 1976

APPENDIX

DIVISION 2. NONPROFIT CORPORATIONS

PART 1. GENERAL NONPROFIT CORPORATION LAW

CHAPTER 1. GENERAL PROVISIONS

Corporations Code § 9000 (repealed)

9000. This part shall be known and may be cited as the General Nonprofit Corporation Law.

Comment. Former Section 9000 is continued in Section 5000.

404/796

Corp. Code § 9001

Tentatively Approved
February 1976

Corporations Code § 9001 (repealed)

9001. The provisions of this part apply to every nonprofit corporation now existing or hereafter formed, unless the corporation is expressly exempted from the operation thereof, or there is a special provision applicable to the corporation inconsistent with the provisions of this part, in which case the special provision prevails.

Comment. Former Section 9001 is continued in Section 5102.

968/720

Corp. Code § 9002

Tentatively Approved
February 1976

Corporations Code § 9002 (repealed)

9002. The provisions of the General Corporation Law, Division 1 of this title, apply to corporations formed under this part, except as to matters specifically otherwise provided for in this part.

Comment. Former Section 9002 is not continued. The new General Nonprofit Corporation Law, Division 2 (commencing with Section 5000) of Title 1, provides a complete set of rules governing nonprofit corporations and does not incorporate by reference the General Corporation Law. See Section 5102 (scope of division).

Tentatively Approved
February 1976

CHAPTER 2. FORMATION AND BYLAWS

Article 1. PurposesCorporations Code § 9200 (repealed)

9200. A nonprofit corporation may be formed by three or more persons for any lawful purposes which do not contemplate the distribution of gains, profits, or dividends to the members thereof and for which individuals lawfully may associate themselves, such as religious, charitable, social, educational, or cemetery purposes, or for rendering services, subject to laws and regulations applicable to particular classes of nonprofit corporations or lines of activity. Carrying on business at a profit as an incident to the main purposes of the corporation and the distribution of assets to members on dissolution are not forbidden to nonprofit corporations, but no corporation formed or existing under this part shall distribute any gains, profits, or dividends to any of its members as such except upon dissolution or winding up.

Comment. The portion of the first sentence of former Section 9200 relating to the purposes for which a nonprofit corporation may be formed is superseded by Section 5210; the portion relating to the number of incorporators is superseded by Section 5220.

The portion of the second sentence of former Section 9200 permitting carrying on business at a profit is superseded by Section 5235; the portion precluding distributions to members of gains, profits, or dividends as such is continued in Section 5236(a); the portion permitting distribution of assets on dissolution or winding up is continued in Section 5236(b).

Tentatively Approved
February 1976

Corporations Code § 9201 (repealed)

9201. A nonprofit corporation may be formed under this part for the purposes of defraying or assuming the cost of professional services of licentiates under any chapter of Division 2 (commencing with Section 500) of the Business and Professions Code or of rendering any such services, but it may not engage directly or indirectly in the performance of the corporate purposes or objects unless all of the following requirements are met:

(a) At least one-fourth of all licentiates of the particular profession residing in California become members.

(b) Membership in the corporation and an opportunity to render professional services upon a uniform basis are available to all licensed members of the particular profession.

(c) Voting by proxy and cumulative voting are prohibited.

(d) A certificate is issued to the corporation by the particular professional board whose licentiates have become members, finding compliance with the requirements of subdivisions (a), (b), and (c).

Any such nonprofit corporation shall be subject to supervision by the particular professional board under which its members are licensed and shall also be subject to Section 9505.

Comment. Former Section 9201 is continued in Section 5211.

968/719

Corp. Code § 9201.1

Tentatively Approved
February 1976

Corporations Code § 9201.1 (repealed)

9201.1. Any nonprofit corporation formed under Section 9201 which defrays or assumes some portion or all of the costs of refractions or eye appliances shall offer an equal opportunity to render professional services upon a uniform basis to all licentiates expressly authorized by law to render such services.

Comment. Former Section 9201.1 is continued in Section 5211.

968/718

Corp. Code § 9201.2

Tentatively Approved
February 1976

Corporations Code § 9201.2 (repealed)

9201.2. Nonprofit corporations may be formed under this part for the purposes of administering a system or systems of defraying the cost of professional services of attorneys, but any such corporation may not engage directly or indirectly in the performance of the corporate purposes or objects unless all of the following requirements are met:

(a) The attorneys furnishing professional services pursuant to such system or systems are acting in compliance with the Rules of Professional Conduct of the State Bar of California concerning such system or systems.

(b) Membership in the corporation and an opportunity to render pro-

professional services upon a uniform basis are available to all active members of the State Bar.

(c) Voting by proxy and cumulative voting are prohibited.

(d) A certificate is issued to the corporation by the State Bar of California, finding compliance with the requirements of subdivisions (a), (b) and (c).

Any such nonprofit corporation shall be subject to supervision by the State Bar of California and shall also be subject to Section 9505.

Comment. Former Section 9201.2 is continued in Section 5212.

992/935

Corp. Code § 9202

Tentatively Approved
February 1976

Corporations Code § 9202 (repealed)

9202. A nonprofit corporation may be formed for the purpose of incorporating any existing unincorporated association or organization.

As used in this part "unincorporated association" includes but is not limited to society, library, school, college, club, church, trustees of a charitable trust, and chamber of commerce.

Comment. Former Section 9202 is continued in Section 5213.

Tentatively Approved
February 1976

Corporations Code § 9203 (repealed)

9203. A nonprofit corporation may be formed for the purpose of incorporating any subordinate body instituted or created under the authority of any head or national association, lodge, order, beneficial association, fraternal or beneficial society, labor union, foundation, federation, or any other society, organization, or association. The fact that the head or national body is unincorporated does not prevent the incorporation of the subordinate body.

The rules governing the incorporation and operation of unincorporated associations govern the incorporation of any subordinate body.

The seal of the subordinate body shall be its corporate seal.

Comment. Former Section 9203 is continued in Section 5214.

Tentatively Approved
February 1976

Staff revision May 1976

Article 2. Articles of Incorporation

Corporations Code § 9300 (repealed)

9300. The articles of incorporation shall set forth:

- (a) The name of the corporation.
- (b) The specific and primary purposes for which it is formed.

This requirement shall not be deemed to preclude a statement of general purposes or powers or to restrict the right of the corporation to engage in any other lawful activity.

- (c) That the corporation is organized pursuant to the General Nonprofit Corporation Law or pursuant to Part 1 of Division 2 of Title 1 of the Corporations Code.

- (d) The county in this state where the principal office for the transaction of business of the corporation is located.

- (e) The names and addresses of three or more persons who are to act in the capacity of directors until the selection of their successors. These persons may be given such titles as are deemed appropriate, but they shall be subject to all laws of this state relating to directors except as otherwise provided in this part. The number of persons so named constitutes the number of directors of the corporation, until changed by an amendment to the articles or, unless the articles otherwise provide, by a bylaw adopted by the members. However, the articles or, unless the articles provide otherwise, a bylaw duly adopted by the members, may state that the number of directors shall be not less than a stated minimum (which in no case shall be less than five) nor more

than a stated maximum (which in no case shall exceed such stated minimum by more than three); and in the event that the articles or bylaws permit such an indefinite number of directors, the exact number of directors shall be fixed, within the limits specified in the articles or bylaws, by a bylaw or amendment thereof duly adopted by the members or by the board of directors. In the event the articles provide for an indefinite number of directors, unless the articles provide otherwise, such indefinite number may be changed, or a definite number fixed without provision for an indefinite number, by a bylaw duly adopted by the members.

(f) If an existing unincorporated association is being incorporated, the name of the existing unincorporated association.

Comment. Section 9300 is superseded by Section 5250. Subdivision (a) is continued in Section 5250(a). Subdivision (b) is superseded by Section 5250(b). Subdivision (c) is continued in Section 5252(b). Subdivision (d) is not continued. Portions of the first two sentences of subdivision (e) are continued in Section 5250 (required contents of articles); the remainder of subdivision (e) is continued in Sections 5311-5313 (directors). Subdivision (f) is continued in Section 5213.

101/144

Corp. Code § 9301

Tentatively Approved
February 1976

Corporations Code § 9301 (repealed)

9301. The authorized number and qualifications of members of the corporation, the different classes of membership, if any, the property, voting, and other rights and privileges of members, and their liability

to dues or assessments and the method of collection thereof, shall be set forth either in the articles or in the by-laws, which shall not, however, provide for the issuance of more than one membership to any member.

If the voting, property or other rights or interests, or any of them, be unequal, the articles or by-laws shall set forth the rule or rules by which the respective voting, property or other rights or interests of each member or class of members are fixed and determined.

The articles or by-laws may authorize dues or assessments or both to be levied upon all members or classes of membership alike, or in different amounts or proportions or upon a different basis upon different members or classes of membership and may exempt some members or classes of membership from either dues or assessments or both.

The articles or by-laws may fix the amount and method of collection of dues or assessments or both, or may authorize the board of directors to fix the amount thereof from time to time, and make them payable at such times or intervals, and upon such notice, and by such methods as the directors may prescribe. Dues or assessments or both may be made enforceable by action or by the sale or forfeiture of membership, or both, upon reasonable notice.

Comment. The first two sentences of former Section 9301 are continued in Section 5261 with the exception of the proviso relating to more than one membership, which is superseded by Section 5400. The third and fourth sentences are continued in Section 5510.

Corporations Code § 9302 (repealed)

9302. The articles or by-laws may provide for the number and tenure of office of the directors and may specify their powers, duties, compensation, and the manner in which they shall be chosen and removed from office.

Comment. Former Section 9302 is continued in Section 5265.

Corporations Code § 9303 (repealed)

9303. The articles of incorporation may state any desired provision for the regulation of the affairs of the corporation in a manner not in conflict with law, including any restrictions authorized by Article 2, Chapter 1, Part 8, Division 1, Title 1 of this code upon the power to amend the articles of incorporation.

Comment. Former Section 9303 is superseded by Sections 5251 and 5920.

Tentatively Approved
February 1976

Corporations Code § 9304 (repealed)

9304. (a) Except in the case of the incorporation of an unincorporated association provided for in subdivision (b) hereof, each person named in the articles to act in the capacity of a first director shall, and any other person desiring to associate with those persons in the formation of the corporation may, personally sign the articles of incorporation. All signatures thereto shall be personally acknowledged before an officer designated by the laws of this State as one before whom an acknowledgment may be made. Any certificate of acknowledgment taken without the State shall be authenticated by the certificate of an officer having the requisite official knowledge of the qualification of the officer before whom the acknowledgment was made when taken before any officer other than a notary public or a judge or clerk of a court of record having an official seal.

(b) In the case of the incorporation of an unincorporated association, the articles of incorporation shall be subscribed and execution thereof personally acknowledged before an officer authorized to take acknowledgments by the presiding officer or acting presiding officer and the secretary or clerk or similar officer of the association or by at least a majority of its governing board or body, and there shall be attached thereto the affidavit of the subscribing officers, board or body that the association has duly authorized its incorporation and has authorized said officers, board or body to execute the articles of incorporation.

Comment. The first sentence of subdivision (a) of former Section 9304 is superseded by Section 5221; the second and third sentences are not continued. Subdivision (b) is continued in Section 5213 with the exception of the acknowledgment requirement which is not continued.

992/932

Corp. Code § 9304.5

Tentatively Approved
February 1976

Corporations Code § 9304.5 (repealed)

9304.5. If the articles conform to law, the Secretary of State shall file them in his office and shall endorse the date of filing thereon. The corporate existence begins upon the filing of the articles and continues perpetually unless otherwise expressly provided by law.

A copy of the articles certified by the Secretary of State and bearing the endorsement of the date of filing in this office shall be filed in the office of the county clerk of the county in which the corporation is to have its principal office and in the office of the county clerk of each county in which the corporation acquires ownership of any real property.

Comment. The first sentence of former Section 9304.5 is continued in Section 5120. The second sentence is continued in Section 5222. The third sentence is not continued.

368/253

Corp. Code § 9305

Tentatively Approved
March 1976

Corporations Code § 9305 (repealed)

9305. Articles of incorporation of nonprofit corporations shall be amended in the same manner as provided in Title 1, Division 1, Part 8, Chapter 1 of this code.

Comment. Former Section 9305 is superseded by Chapter 9 (commencing with Section 5910) of Division 2.

368/254

Corp. Code § 9306

Tentatively Approved
March 1976

Corporations Code § 9306 (repealed)

9306. Any nonprofit cooperative corporation formed under former Title 22, Part 4, Division 1, of the Civil Code may amend its articles to provide that the voting power, property rights, and interests of its members shall be equal or unequal, and if unequal, to set forth a general rule by which the voting power and property rights and interests of each member shall be determined and fixed.

Comment. Former Section 9306 is not continued. Any nonprofit cooperative corporation formed under former Title 22, Part 4, Division 1, of the Civil Code is "deemed organized and existing under and by virtue of the general corporation law of the State of California." Cal. Stats. 1931, Ch. 869, § 1, at 1840. The General Corporation Law permits the amendments referred to. Section 900.

Article 3. BylawsCorporations Code § 9400 (repealed)

9400. Bylaws may be adopted, amended or repealed by any of the following:

(a) By the written consent of members entitled to exercise a majority of the voting power, or by the vote of a majority of a quorum at a meeting of members duly called for the purpose according to the articles or bylaws.

(b) Except as provided in subdivision (c), by the board of directors, subject to the power of the members to change or repeal the bylaws.

(c) A bylaw or bylaw amendment fixing or changing the authorized number of directors may be adopted only by the members and may not be adopted by the board of directors except where the articles or bylaws provide for an indefinite number of directors pursuant to subdivision (e) of Section 9300.

However, the articles or bylaws may require the vote or written consent of members entitled to exercise a greater fraction or percentage of the voting power for the amendment or repeal of bylaws generally, or of particular bylaws, or for the adoption of new bylaws than would otherwise be required under this section. The articles or a bylaw adopted by the members may limit or restrict the power of the directors to adopt, amend, or repeal bylaws, or may deprive them of the power.

Comment. Subdivisions (a) and (b) of former Section 9400 are continued in Section 5260(a). Subdivision (c) is continued in Section 5311(c). The last paragraph is continued in Section 5260(b).

Tentatively Approved
April 1976

Staff Revision May 1976

Corporations Code § 9401 (repealed)

9401. The by-laws of a nonprofit corporation may make provisions

for:

(a) The time, place, and manner of calling, giving notice of, and conducting regular and special meetings of members or directors, which may be held outside the State. The by-laws may dispense with notice of all regular members' and directors' meetings.

(b) The requirements of a quorum of directors or members, which may be greater or less than a majority.

(c) Subject to any provisions in the articles, the number, time and manner of choosing, qualifications, terms of office, official designations, powers, duties, and compensation of the directors and other officers.

(d) The appointment and authority of executive or other committees of the board of directors.

Comment. The portion of the first sentence of subdivision (a) of former Section 9401 that permitted the bylaws to make provisions for meetings of members and directors is continued in Section 5264(a). The portion permitting meetings to be held outside the state is continued in Sections 5610 (members' meetings) and 5336 (directors' meetings). The second sentence of subdivision (a) is continued in Sections 5620 (members' meetings) and 5332 (directors' meetings).

Subdivision (b) is continued in Section 5264(b).

Subdivision (c) is continued in Section 5265(a).

Subdivision (d) is continued in Section 5265(b).

Tentatively Approved
February 1976

Corporations Code § 9402 (repealed)

9402. The by-laws of a nonprofit corporation may make provisions for:

(a) The admission, election, appointment, withdrawal, suspension, and expulsion of members.

(b) The qualifications of members and different classes of memberships, and the property, voting, and other rights, interests, or privileges, or any of them, of members or classes of members.

(c) The transfer, forfeiture, and termination of membership, and whether the property interest of members shall cease at their death or the termination of membership, and the mode of ascertaining the property interest, if any, at death or the termination of membership.

(d) The manner of voting by members and whether cumulative voting and proxy voting shall be allowed.

(e) The making of annual reports and financial statements to the members.

Comment. Subdivision (a) of former Section 9402 is continued in Section 5262(a). Subdivision (b) is superseded by Section 5261. Subdivision (c) is continued in Section 5262(b). Subdivision (d) is continued in Section 5263(a).

Note. The staff has not yet disposed of subdivision (e).

101/146

Corp. Code § 9403

Tentatively Approved
February 1976

Corporations Code § 9403 (repealed)

9403. The by-laws of a nonprofit corporation may make provisions for fees of admission and transfer fees, and, subject to any provisions in the articles, may provide pursuant to Section 9301 for dues and assessments to be paid by members or different classes of members and the methods of collection thereof.

Comment. The portion of former Section 9403 relating to fees of admission and transfer is continued in Section 5262(c). The portion relating to dues and assessments is continued in Sections 5261(d), 5410, and 5510.

406/121

Corp. Code § 9404

Staff Draft May 1976

Corporations Code § 9404 (repealed)

9404. All by-laws shall be recorded in a book which shall be kept in the principal office of the corporation.

Comment. Former Section 9404 is superseded by Section 5266.

CHAPTER 3. DIRECTORS AND MANAGEMENT

Corporations Code § 9500 (repealed)

9500. Except as otherwise provided by the articles of incorporation or the by-laws, the powers of a nonprofit corporation shall be exercised, its property controlled, and its affairs conducted by a board of not less than three directors.

Comment. The portion of former Section 9500 vesting control of corporate affairs in the board of directors is continued in Section 5310. The portion specifying a minimum of three directors is continued in Section 5311.

Not Approved; See Minutes
February 1976

Corporations Code § 9501 (repealed)

9501. Every nonprofit corporation may:

- (a) Sue and be sued.
- (b) Make contracts.
- (c) Receive property by devise or bequest, subject to the laws regulating the transfer of property by will, and otherwise acquire and hold all property, real or personal, including shares of stock, bonds, and securities of other corporations.
- (d) Act as trustee under any trust incidental to the principal objects of the corporation, and receive, hold, administer, and expend funds and property subject to such trust.

(e) Convey, exchange, lease, mortgage, encumber, transfer upon trust, or otherwise dispose of all property, real or personal.

(f) Borrow money, contract debts, and issue bonds, notes, and debentures, and secure the payment or performance of its obligations.

(g) Pay the reasonable value of services rendered in this state to the nonprofit corporation before January 1, 1975, and not previously paid, by any person who performed such services on a full-time basis under the direction of a religious organization in connection with the religious tenets of the organization. Such person shall have relied solely on the religious organization for his or her financial support for a minimum of five years. A payment shall not be made if such person or religious organization waives the payment or receipt of compensation for such services in writing. Payment may be made to such religious organization to reimburse it for maintenance of any person who rendered such services and to assist it in providing future support and maintenance; however, payment shall not be made from any funds or assets acquired with funds donated by or traceable to gifts made to the nonprofit corporation by any person, organization or governmental agency other than the members, immediate families of members and affiliated religious organizations of the religious organization under whose direction the services were performed.

(h) Do all other acts necessary or expedient for the administration of the affairs and attainment of the purposes of the corporation.

Comment. Former Section 9501 is superseded by Section 5230. The provisions of former Section 9501 are continued in Section 5230 with the exception of subdivision (g) which has not been continued since it is special legislation having only a retroactive effect. See I. H. Ballantine & G. Sterling, California Corporation Laws 788.10 n.42 (4th ed. 1975).

Corporations Code § 9501.1 (repealed)

9501.1. Every nonprofit corporation, during any period or periods such corporation is deemed to be a "private foundation" as defined in Section 509 of the Internal Revenue Code of 1954 as amended by Section 101 of the Tax Reform Act of 1969 (all references in this section to the Internal Revenue Code shall refer to such code as amended by such act), shall distribute its income for each taxable year (and principal, if necessary) at such time and in such manner as not to subject such corporation to tax under Section 4942 of such code (as modified by paragraph (3) of subsection (1) of Section 101 of the Tax Reform Act of 1969), and such corporation shall not engage in any act of self-dealing as defined in subsection (d) of Section 4941 of such code (as modified by paragraph (2) of subsection (1) of Section 101 of the Tax Reform Act of 1969), retain any excess business holdings as defined in subsection (c) of Section 4943 of such code, make any investments in such manner as to subject such corporation to tax under Section 4944 of such code, or make any taxable expenditure as defined in subsection (d) of Section 4945 of such code (as modified by paragraph (5) of subsection (1) of Section 101 of the Tax Reform Act of 1969).

This section shall apply to any such corporation and any provision contained in its articles of incorporation or other governing instrument inconsistent with this section or to the contrary thereof shall be without effect.

Comment. Former Section 9501.1 is continued in Section 5563.

406/123

Corp. Code § 9502

Staff Draft May 1976

Corporations Code § 9502 (repealed)

9502. Unless otherwise provided in the articles or by-laws, any vacancy in the board of directors caused by death, resignation, or any disability shall be filled by a majority of the remaining members thereof, though less than a quorum.

Comment. Former Section 9502 is continued in Section 5326(a).

406/124

Corp. Code § 9503

Staff Draft May 1976

Corporations Code § 9503 (repealed)

9503. Subject to any provisions of the articles or by-laws, meetings of directors of nonprofit corporations shall be called and held as may be ordered by the directors.

Comment. Former Section 9503 is continued in Sections 5330 (bylaws control) and 5331 (call of meetings).

406/125

Corp. Code § 9503.1

Corporations Code § 9503.1 (repealed)

9503.1. If the articles of incorporation or bylaws so provide, any action required or permitted to be taken by the board of directors under any provision of this division may be taken without a meeting, if all

members of the board shall individually or collectively consent in writing to such action. Such written consent or consents shall be filed with the minutes of the proceedings of the board. Such action by written consent shall have the same force and effect as a unanimous vote of such directors. Any certificate or other document filed under any provision of this division which relates to action so taken shall state that the action was taken by unanimous written consent of the board of directors without a meeting, and that the articles of incorporation or bylaws, as the case may be, authorize the directors to so act, and such statement shall be prima facie evidence of such authority.

Comment. Former Section 9503.1 is continued in Section 5335 with the exception of the last sentence, which is not continued in order to eliminate needless complexity in the articles or bylaws.

406/126

Corp. Code § 9504

Staff Draft May 1976

Corporations Code § 9504 (repealed)

9504. Directors of a nonprofit corporation are not personally liable for the debts, liabilities, or obligations of the corporation.

Comment. Former Section 9504 is continued in Section 5314.

Not Approved; See Minutes
February 1976

Corporations Code § 9505 (repealed)

9505. A nonprofit corporation which holds property subject to any public or charitable trust is subject at all times to examination by the Attorney General, on behalf of the State, to ascertain the condition of its affairs and to what extent, if at all, it may fail to comply with trusts which it has assumed or may depart from the general purposes for which it is formed. In case of any such failure or departure the Attorney General shall institute, in the name of the State, the proceedings necessary to correct the noncompliance or departure.

Comment. Section 9505 is continued as Section 5520.

Note. This section is to be reviewed for coordination with the Uniform Supervision of Trustees for Charitable Purposes Act.

406/127

Corp. Code § 9600

Tentatively Approved
April 1976

CHAPTER 4. MEMBERS

Corporations Code § 9600 (repealed)

9600. Subject to any provisions of the articles or by-laws, meetings of members of nonprofit corporations shall be called and held as may be ordered by the directors or by members holding not less than one-tenth of the voting power of members.

Comment. Former Section 9600 is continued in Section 5613.

100/971

Corp. Code § 9601

Tentatively Approved
March 1976

Corporations Code § 9601 (repealed)

9601. Unless the articles or by-laws provide otherwise, every member of a nonprofit corporation is entitled to one vote and may vote or act by proxy. The manner of voting may be by ballot, mail, or any reasonable means provided in the articles or by-laws. No member may cumulate his votes unless the articles or by-laws so provide.

Comment. The portion of the first sentence of former Section 9601 providing one vote per member is continued in Section 5700(a); the portion authorizing proxy voting is continued in Section 5705. The second sentence is continued in Section 5700(b). The last sentence is superseded by Section 5703.

101/147

Corp. Code § 9602

Tentatively Approved
February 1976

Corporations Code § 9602 (repealed)

9602. A nonprofit corporation shall have such memberships or classes thereof as the articles or by-laws specify, but no member may hold more than one membership, and in the absence of any such classification of members there shall be deemed to be but one class. Unless the articles or by-laws set forth the rule or rules fixing the respective voting, property and other rights and interests of each member or class of members, the rights and interests of members shall be equal as to any right or interest not so fixed.

Comment. The substance of former Section 9602 is continued in Section 5401 with the exception of the prohibition of a member holding more than one membership, which is superseded by Section 5400.

101/148

Corp. Code § 9603

Tentatively Approved
February 1976

Corporations Code § 9603 (repealed)

9603. Where neither the articles nor by-laws of a nonprofit corporation provide for members thereof as such, and in any case in which any nonprofit corporation has, in fact, no members other than the persons constituting its board of directors, the persons for the time being constituting its governing body or board are, for the purpose of any

statutory provision or rule of law relating to nonprofit corporations, the members of the corporation and shall exercise all the rights and powers of members thereof.

Comment. The substance of former Section 9603 is continued in Section 5402.

992/931

Corp. Code § 9604

Tentatively Approved
February 1976

Corporations Code § 9604 (repealed)

9604. If an unincorporated association is incorporated under this part, the members of the association shall be members of the corporation so created, unless they file their dissent in writing with the secretary thereof.

Comment. Former Section 9604 is continued in Section 5213.

101/149

Corp. Code § 9605

Tentatively Approved
February 1976

Corporations Code § 9605 (repealed)

9605. If the members of a nonprofit corporation having a stated number of members are reduced below that number by death, withdrawal, or

otherwise, the corporation shall not be dissolved for that reason; but the surviving or continuing members, or member, may fill vacancies and continue the corporate existence, unless the articles or by-laws provide otherwise.

Comment. The substance of former Section 9605 is continued in Section 5403.

101/198

Corp. Code § 9606

Tentatively Approved
March 1976

Corporations Code § 9606 (repealed)

9606. Every nonprofit corporation shall keep a membership book containing the name and address of each member. Termination of any membership shall be recorded in the book, together with the date on which the membership ceased.

Comment. Section 9606 is superseded by subdivisions (c) and (d) of Sections 6510 and 6511. Section 9606 apparently contemplates a book in which entries will be entered by hand. In order that a person can examine the book and ascertain the current members, it is necessary to provide in the statute that the date of termination of memberships be entered in the book. The concept of a membership book is an obsolete one in modern times when data processing equipment or mechanical methods can be used to store and reproduce membership lists. Accordingly, the concept of the membership book is not continued in the new General Non-profit Corporation Law. Instead, Section 6511 adopts the provision of the General Corporation Law that the books and records (other than minutes) may be kept in written form or in any other form capable of

being converted into written form. Nothing in Section 6511 will prevent a nonprofit corporation from continuing to keep a membership book if it so desires. However, the book will need to contain the information required by subdivisions (c) and (d) of Section 6510.

101/134

Corp. Code § 9607

Tentatively Approved
February 1976

Corporations Code § 9607 (repealed)

9607. Membership in nonprofit corporations may be evidenced by certificates. A statement that the corporation is not one for profit shall be printed in clear type upon the face of each such certificate.

Comment. The substance of former Section 9607 is continued in Section 5405.

101/135

Corp. Code § 9608

Not Approved; See Minutes
February 1976

Corporations Code § 9608 (repealed)

9608. Memberships may be terminated in the manner provided in the articles or by-laws. Unless the articles, the by-laws, or the law under which the corporation was formed provide otherwise, all the rights of a

member in the corporation, or in its property, cease on death or other termination of his membership.

Comment. The substance of former Section 9608 is continued in Section 5406.

101/136

Corp. Code § 9609

Tentatively Approved
February 1976

Corporations Code § 9609 (repealed)

9609. No member may transfer his membership or any right arising therefrom, unless the articles or by-laws so provide.

Comment. The substance of former Section 9609 is continued in Section 5407.

101/137

Corp. Code § 9610

Tentatively Approved
February 1976

Corporations Code § 9610 (repealed)

9610. Members of a nonprofit corporation are not personally liable for the debts, liabilities, or obligations of the corporation.

Comment. The substance of former Section 9610 is continued in Section 5409.

Tentatively Approved
February 1976

Corporations Code § 9611 (repealed)

9611. Nonprofit corporations may levy dues or assessments or both upon their members pursuant to any provisions of their articles or by-laws authorizing the levy of dues or assessments.

Comment. The substance of former Section 9611 is continued in Section 5410.

CHAPTER 5. MERGER AND CONSOLIDATION

Corporations Code § 9700 (repealed)

9700. The provisions of the General Corporation Law contained in Article 1 (commencing with Section 4100) of Chapter 3 of Part 3 of Division 1 of this title, apply to mergers and consolidations of corporations formed under this part, except as to matters specifically otherwise provided for in this chapter.

Comment. Former Section 9700 is not continued. Chapter 11 (commencing with Section 6110) provides comprehensively for mergers and consolidations of nonprofit corporations. Accordingly, the General Corporation Law provisions are not incorporated by reference.

Corporations Code § 9701 (repealed)

9701. An agreement to merge or consolidate shall be approved by the members of each corporation. Where the members have equal voting rights, the agreement shall be approved by a resolution adopted by the vote of a majority of the members or be approved by the written consent of two-thirds of the members; or where the members have unequal voting rights, the agreement shall be approved by a resolution adopted by the vote of members entitled to exercise a majority of the voting power or be approved by the written consent of members entitled to exercise two-

thirds of the voting power. This section shall be applicable regardless of any limitations or restrictions on the voting power of any class or classes of membership.

Comment. Former Section 9701 is continued in Section 6121.

406/130

Corp. Code § 9702

Staff Draft May 1976

Corporations Code § 9702 (repealed)

9702. Where the members act by vote, such votes shall be cast at a meeting duly called upon notice of the time, place, and purpose thereof, duly given to each member at least 20 days prior to the date of the meeting, except that such notice may be waived as provided in Section 2209. Unless the notice is waived, there shall be mailed with such notice a statement of the general terms of the proposed agreement.

Comment. Former Section 9702 is continued by Section 6123.

405/382

Corp. Code § 9703

Staff Draft May 1976

Corporations Code § 9703 (repealed)

9703. The articles of incorporation may require the vote or written consent of a greater percentage or fraction of the members than

would otherwise be required under this chapter, in cases where the members have equal voting rights, or may require the vote or written consent of members entitled to exercise a greater percentage or fraction of the voting power than would otherwise be required under this chapter, in cases where the members have unequal voting rights. In no case may the articles prohibit any merger or consolidation authorized by this chapter or by Chapter 3 (commencing with Section 4100) of Part 8 of Division 1 of this title.

Comment. Former Section 9703 is continued by Section 6122.

Tentatively Approved
February 1976

CHAPTER 6. WINDING UP AND DISSOLUTION

Corporations Code § 9800 (repealed)

9800. A nonprofit corporation may dispose of all or substantially all of its assets, or may be wound up or dissolved, or both, in the same manner and with the same effect as a stock corporation, under the General Corporation Law, subject to the provisions of Section 9801.

Comment. Section 9800 is superseded by Chapters 10 (commencing with Section 6000)(sales of assets), 13 (commencing with Section 6810) (involuntary dissolution), 19 (commencing with Section 6910)(voluntary dissolution), and 20 (commencing with Section 7010)(general provisions relating to dissolution) of Division 2.

Tentatively Approved
February 1976

Corporations Code § 9801 (repealed)

9801. Upon the dissolution or winding up of a nonprofit corporation, after paying or adequately providing for the debts and obligations of the corporation, the directors or persons in charge of the liquidation shall divide any remaining assets among the members in accordance with their respective rights therein, or dispose of them in such other manner as may be provided in the articles, unless the corporation holds

its assets on any trust or is organized for a charitable purpose or purposes.

If the corporation holds its assets on trust, or is organized for a charitable purpose or purposes, the assets shall be disposed of in such manner as may be directed by decree of the superior court of the county in which the corporation has its principal office, upon petition therefor by the Attorney General or any person concerned in the liquidation, in proceedings to which the Attorney General is a party.

This section does not apply where the charter of an incorporated subordinate body is surrendered to, taken away, or revoked by the head or national body.

Comment. The portion of the first paragraph of former Section 9801 that related to payment or adequate provision for debts and obligations is continued in Section 7030. The portion of the first paragraph that related to distribution of assets to members or as otherwise provided in the articles is continued in Section 7032.

The second paragraph is continued in Section 7034. The last paragraph is continued in Section 5214.

404/127

Corp. Code § 9802

Tentatively Approved
February 1976

Corporations Code § 9802 (repealed)

9802. Whenever the charter of a subordinate body incorporated pursuant to this part is surrendered to, taken away, or revoked by the

head or national body granting it, the subordinate body shall dissolve. The subordinate body shall pay its debts and obligations or make adequate provision therefor. The subordinate body may collect obligations owed to it and may sell property which is not designed for the exclusive use of the organization. The subordinate body shall then deliver any remaining property or obligations owed to it and any remaining proceeds of the sale of property to the head or national body, to be disposed of in accordance with the laws of the head or national body.

Comment. Former Section 9802 is continued in Section 5214.