

LETTER OF TRANSMITTAL

The California Law Revision Commission is preparing a recommendation for a new General Nonprofit Corporation Law for the Governor and the 1977 Legislature.

This tentative recommendation reflects the Commission's tentative conclusions; no final decisions have been made. Therefore, we urge you to give us the benefit of your views in writing with the assurance that they will be taken into account when the Commission determines the substance of its recommendation to the Governor and the Legislature. It is just as important to advise the Commission that you approve the tentative recommendation (or particular provisions thereof) as it is to suggest that particular provisions be added, revised, or deleted.

Your comments should be in the hands of the Commission not later than August 25, 1976. Send your comments to California Law Revision Commission, Stanford Law School, Stanford, California 94305.

The Commission is still working on the legislation included in the tentative recommendation. Additional research is being conducted concerning particular provisions and all of the provisions will be reviewed before the final recommendation is prepared.

Your comments are solicited at this time regarding all of the following:

(1) The basic approach of the tentative draft--a comprehensive nonprofit corporation law (one that is complete in itself and does not require reference over to the business corporation law) and the addition of a new Division 4 to Title 1 of the Corporations Code (which will contain provisions applicable to all corporations, profit and nonprofit).

(2) The substance and wording of the tentative draft.

(3) The need for provisions to deal with particular problems of which you are aware but which are not dealt with in this tentative draft.

In some respects, the tentative draft is incomplete. It does not include transitional provisions; these are in the process of being drafted. The Commission solicits comments concerning the need for transitional provisions to cure particular problems that may be created by the repeal of existing law and enactment of a new law. Although some of the required conforming revisions are included in the tentative draft, other conforming revisions are in the process of being drafted and are not included.

The Commission will greatly appreciate your assistance in this project. The final recommendation will be a significantly better product if you will review and comment on the tentative draft in light of your own experience.

The Commission wishes to acknowledge the substantial assistance of its two expert consultants. G. Gervais Davis III of Monterey has served as the Commission's chief consultant since November 1973 when the Commission began its work on this topic. (Commission work on the topic was suspended from July 1974 until October 1975 to await the results of legislative consideration of the new General Corporation Law which was introduced at the 1975 legislative session.) Peter A. Whitman of Palo Alto also served as a consultant.

Sincerely,

John N. McLaurin
Chairman

BACKGROUND

The Corporations Code and special provisions in a number of other codes authorize and regulate the incorporation and operation of nonprofit corporations.¹ However, the scheme has developed piecemeal and, as noted recently, "historically the orphan of corporate law, nonprofit corporations [have] suffered from undefined and poorly articulated statutes governing their organization. . . ." ² As an example, Section 9002 of the Corporations Code provides that the general business corporation law applies to nonprofit corporations, "except as to matters specifically otherwise provided for." Thus, it would appear that the general corporation law relating to the issuance and handling of shares should apply to nonprofit corporations, but the latter do not distribute profits or normally even issue stock.³ The situation is further confused by provisions that incorporate the nonprofit corporation provisions by reference,⁴ and thus requires reference first to the general nonprofit corporation law which in turn requires reference to the general business corporation law.

Such confusion and ambiguity could be excused or, at least, ignored except that:⁵

In recent decades nonprofit corporation law has taken on a new importance. . . .

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1. See generally Divisions 2 and 3 of Title 1 of the Corporations Code. Other provisions are scattered throughout the codes. See, e.g., Agri. Code § 54002 (nonprofit agricultural associations); Educ. Code §§ 29004, 29005 (private educational institutions); Ins. Code § 11496 (hospital corporation).
 2. Preface to California Nonprofit Corporations (Cal. Cont. Ed. Bar 1969).
 3. See H. Oleck, Non-Profit Corporations, Organizations, and Associations § 6 (2d ed. 1965).
 4. See Corp. Code § 12205 (provisions relating to nonprofit corporations "apply to cooperative corporations formed under this part, except where such provisions are in conflict with those of this part").
 5. Preface to California Nonprofit Corporations (Cal. Cont. Ed. Bar 1969).

Nonprofit corporations are no longer confined to the traditional category of political, religious, or social endeavor but have expanded to include community theaters, hospitals, thrift shops, conservation clubs, etc. Moreover, the tax problems, the state and local laws regulating fund-raising, the effect of various activities on the tax-exempt status, the effects of reorganization or dissolution, and many other problems are complex and difficult. Because of these reasons nonprofit corporation law has recently gained a greater vitality.

For these reasons,⁶ the California Law Revision Commission was authorized in 1970 to make a study to determine whether the law relating to nonprofit corporations should be revised.⁷ The object of the study was a comprehensive revision of the law relating to nonprofit corporations.⁸

6. See 9 Cal. L. Revision Comm'n Reports 107-108 (1969).

7. Cal. Stats. 1970, Res. Ch. 54, at 3547.

8. Such comprehensive revisions of nonprofit corporation law have been made in recent years by New York (N.Y. Not-for-Profit Corporation Law (1970)) and Pennsylvania (Pa. Nonprofit Corporation Law of 1972). See also ALI-ABA Model Nonprofit Corporation Act (1964); H. Oleck, Proposed Uniform Non-Profit Organizations Act, in Nonprofit Corporations, Organizations, and Associations 959 (3d ed. 1974); P. Cumming, Proposals for a New Not-For-Profit Corporations Law for Canada (1973). The Commission has drawn upon these sources and statutes of other jurisdictions in the course of its study.

Since 1970, when the study was authorized, the need for a new nonprofit corporation law has become acute. The enactment of a new business corporation law⁹ and the repeal of the old general corporation law¹⁰ has left nonprofit corporations governed by a repealed and obsolete body of law.¹¹

The Commission's study has generated a three-part proposal for the revision of the law relating to nonprofit corporations:

(1) A new general nonprofit corporation law.¹²

(2) A new division of the corporations title of the Corporations Code, containing provisions of a general character applicable to all corporations, business as well as nonprofit.¹³

(3) Conforming changes in existing statutes. The changes include elimination of special statutes governing nonprofit corporations except to the extent the special statute envisions a type of corporation distinct from a nonprofit corporation within the meaning of the general nonprofit corporation law.¹⁴

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9. Corp. Code §§ 100-2319, as added by Cal. Stats. 1975, Ch. 682, § 7 [hereinafter referred to as "new business corporation law"].
10. Corp. Code §§ 100-6304, as repealed by Cal. Stats. 1975, Ch. 682, § 6 [hereinafter referred to as "old general corporation law"].
11. Cal. Stats. 1975, Ch. 682, § 16, provides that the repealed General Corporation Law continues to govern statutes organized under other laws to the extent applicable.
12. The Commission's proposals for a new general nonprofit corporation law are described under "Proposed Nonprofit Corporation Law," infra; a draft statute that embodies these proposals appears on p. ____.
13. The Commission's proposal for a new division containing provisions applicable to all corporations is described under "Provisions Applicable to Corporations Generally," infra; a draft statute that embodies this proposal appears on p. ____.
14. The Commission's proposals for the elimination of special nonprofit corporation statutes are described under "Conforming Changes," infra; a draft statute that embodies these proposals appears on p. ____.

PROPOSED NONPROFIT CORPORATION LAW

GENERAL APPROACH

Nonprofit corporations generally are governed by the old general corporation law with the exception of a handful of provisions in the General Nonprofit Corporation Law¹ and with the exception of a few corporations of a special nature.² The concept of having nonprofit corporations generally governed by a law designed primarily for business corporations has not worked well in practice and should be abandoned.³ In place of this scheme, the Commission recommends the adoption of a complete and self-contained nonprofit corporation law (with the exception of a number of provisions that are plainly applicable to corporations of every sort).⁴ The new statute should follow the new business corporation law to the extent practicable⁵ but should tailor the law to the particular needs and practices of nonprofit corporations.⁶

Need for an Independent Body of Law

The General Nonprofit Corporation Law provides that the old general corporation law applies to nonprofit corporations "except as to matters specifically otherwise provided for" in the General Nonprofit Corporation Law.⁷ Likewise, the old general corporation law is applicable by its terms to nonprofit corporations unless "there is a special provision applicable to the corporation inconsistent with some provision" of the old general corporation law.⁸ The enactment of a new business corporation law has left this state of affairs undisturbed.⁹

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1. Corp. Code §§ 9000-9802.
 2. See discussion under "Conforming Changes," infra.
 3. See discussion under "Need for an Independent Body of Law," infra.
 4. See discussion under "Provisions Applicable to Corporations Generally," infra.
 5. See discussion under "Organization of New Statute," infra.
 6. See discussion under "Philosophy of Nonprofit Corporation Statute," infra.
 7. Corp. Code § 9002.
 8. Corp. Code § 119, as repealed by Cal. Stats. 1975, Ch. 682, § 6.
 9. Cal. Stats. 1975, Ch. 682, § 16.

The effect of incorporating the old general corporation law by reference in the General Nonprofit Corporation Law is that a person attempting to resolve even the most fundamental issues affecting nonprofit corporations is often confronted with an interpretive dilemma. Since the General Nonprofit Corporation Law contains only a few basic rules, the old general corporation law must be continually consulted for additional requirements affecting the particular area under consideration. Once the relevant statute is located, the question arises whether the provisions are in fact inconsistent or otherwise specifically provided for. This question is particularly troublesome where detailed requirements of the old general corporation law are handled in a general fashion by the General Nonprofit Corporation Law.

For example, various provisions of the General Nonprofit Corporation Law relate to meetings of members in a general manner but do not state whether an annual meeting is mandatory;¹⁰ the old general corporation law requires an annual meeting of shareholders.¹¹ Does the business corporations annual meeting requirement apply to nonprofit corporations, or should the absence of a specific requirement in the General Nonprofit Corporation Law be construed as "inconsistent" or "otherwise specifically provided for?" It required an appellate case to determine that an annual meeting is required;^{11a} and even this case has been interpreted by the Attorney General as applying only in the absence of a bylaw provision to the contrary.^{11b} This illustrates the basic interpretive difficulties inherent in the statutory overlap between the old general corporation law and the General Nonprofit Corporation Law.

The statutory overlap is more than merely inconvenient for practicing attorneys. It fosters uncertainty which is particularly harmful for

10. See, e.g., Corp. Code §§ 9401, 9600.

11. Corp. Code § 2200, as repealed by Cal. Stats. 1975, Ch. 682, § 6. "Shareholders" is defined by Section 103 to include members of a nonstock corporation.

11a. Burnett v. Banks, 130 Cal. App.2d 631, 279 P.2d 579 (1955).

11b. 56 Ops. Atty. Gen. 317 (1973).

nonprofit corporations because the small monetary amounts usually involved tend to preclude clarifying litigation. Lingering uncertainty encourages legitimate claims to go unanswered and rights unprotected. Such uncertainty is also inconsistent with an important advantage normally associated with corporate status--the right to be governed by a comprehensive set of legal rules that smoothly guide the administration of the nonprofit corporation's affairs and establish clearly the rights and liabilities of interested persons.

Perhaps a more serious defect in the general approach of incorporation by reference is the consequence that many of the old general corporation law provisions that clearly are applicable to nonprofit corporations are inappropriate for nonprofit corporations. The reason for the impropriety is that the old general corporation law is designed primarily for business corporations.¹² Provisions of the old law that are based, for example, on the assumption that dividends will be distributed, or that stocks will be transferable or have a market value, or that the stockholders will receive the corporate assets on dissolution, simply do not work when applied to nonprofit corporations in which the distribution of dividends is prohibited,¹³ or which ordinarily do not permit the unrestricted transfer of memberships,¹⁴ or in which the memberships have no ascertainable market value, or in which assets may go on dissolution to other nonprofit corporations.¹⁵

12. This is particularly true of the new business corporation law, which by its terms is applicable only to business corporations and makes no endeavor to bring nonprofit corporations within its scope. See Corp. Code § 102, as enacted by Cal. Stats. 1975, Ch. 682, § 7, and as amended by Cal. Stats. 1976, Ch. ____, § ____ (A.B. 2849).

13. Corp. Code § 9200.

14. Corp. Code § 9609 (the bylaws may permit transfer).

15. Corp. Code § 9801 (charitable corporations).

The Law Revision Commission recommends that the existing scheme of incorporating by reference the old general corporation law for nonprofit corporations be discontinued. In its place, a new nonprofit corporation law should be enacted which is independent and self-contained. Enactment of such a law will enable persons dealing with nonprofit corporations to have available a law that is certain in its scope and application and that deals with the problems peculiar to nonprofit corporations in a rational manner.

Organization of New Statute

The new nonprofit corporation law follows the structure and organization and, in many cases, the provisions of the new business corporation law as closely as practicable. This will enable attorneys and other persons who deal with both business corporations and nonprofit corporations to work with the law in an efficient manner. However, for ease of use and clarity, the lengthy sentences are subdivided and tabulated, the lengthy sections are split into a series of shorter sections, and the lengthy chapters are divided into articles containing related provisions.¹⁶ In some instances, the language of the new statute departs from the precise wording of the business corporation law, while following the substance of the law, in order to improve language that is awkward, ambiguous, or unduly complex.

Philosophy of Nonprofit Corporation Statute

Throughout the Commission's proposals for a new nonprofit corporation law run several major themes. These themes, some of which are related and some of which on occasion conflict, are:

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16. The new nonprofit corporation law follows a different drafting philosophy from the new business corporation law. The apparent drafting philosophy of the new business corporation law is to combine separate provisions of the old general corporation law into lengthy sentences, sections, and chapters of the new business corporation law. The policy of short, clear, and concise sections is one initiated by the California Code Commission in its preparation of the Corporations Code. The reasons for this policy have been stated as follows:

In this Code, as in other codes prepared by the commission, long sections have been divided into several short sections whenever feasible. This practice facilitates refer-

No change should be made in existing law unless there is a demonstrable need for change. This will avoid unnecessary disruption in the ongoing activities of established organizations.

As a corollary of this rule, existing practice (whether or not recognized by existing law) should be accommodated in the new statute to the extent practicable. The practices that have developed where there is a need for them should be validated wherever possible.

The substance of the new business corporation law should be followed as closely as possible within the confines of the character of nonprofit corporations. There are obvious advantages to parallelism between business and nonprofit corporation laws: Persons dealing with both types of corporations will be able to turn with facility from one law to the other; to the extent the two types of corporations are the same, they will be treated equally and with uniformity; experience and cases developed under one law will be useful in construing the meaning of the other law.

The nonprofit corporation law should be constructed with sufficient flexibility to enable the wide variety of types of nonprofit corporations to operate efficiently within its confines. This requires that the statutes recognize the many different types of nonprofit corporations so that any rules drawn will be sufficiently broad to cover their circumstances. This approach makes it unnecessary to propose provisions comparable to the close corporation provisions of the new business corporation law; there will already be adequate flexibility built into the general nonprofit corporation law.

ence to particular provisions; further, when amendments are proposed, and the entire text of the section amended must be set forth in the legislative act in compliance with the republication requirement of the Constitution [footnote omitted], the use of short sections not only minimizes the chance of unintentional change in the law through unnoticed printing errors, but also effects a substantial savings to the state in the cost of typesetting, proof-reading, etc. [1 Ballantine & Sterling, California Corporation Laws 18 (4th ed. 1976).]

There are numerous other advantages of short sections which are of a less substantial nature.

The amount of regulation imposed on nonprofit corporations should be minimized except in those cases where protection of the public or of basic member or creditor rights is of particular importance. The existing General Nonprofit Corporation Law imposes minimal regulations on nonprofit corporations. As a general rule, there is less need for strict statutory prescription of the manner of operation of internal corporate affairs of nonprofit corporations than of business corporations.

Because memberships in most nonprofit corporations are not freely transferable, members have the opportunity to be informed of their rights before joining; and, because there is less motive for domination by management in most nonprofit corporations, members normally have sufficient control of corporate affairs. Moreover, as a practical matter, many nonprofit corporations are organized for tax purposes and are adequately regulated by the tax laws. Other nonprofit corporations which attempt to depart too far from the basic purposes of the nonprofit corporation law will run afoul of the corporate securities laws. Charitable corporations are subject to the supervision of the Attorney General.

The most important regulations on nonprofit corporations proposed by the Commission concern the relation between the corporation and outsiders: Regulations on dissipation of corporate assets for the protection of creditors, and regulations on charitable corporations for the benefit of the public. As to internal affairs, proposed basic protections of members' voting rights, control of the board of directors, and rights of inspection will be sufficient to assure adequate limitations on management.

The nonprofit corporation law should provide a rule to cover the most commonly occurring internal situations that will govern absent an applicable provision in the bylaws. This will eliminate the uncertainty that occurs when a nonprofit corporation fails to adopt a rule covering a basic matter. It will provide a guideline for normal practice yet still enable the nonprofit corporation to construct in its bylaws the type of organization appropriate to it.

FORMATION

The formation of nonprofit corporations is steeped in needless formalities. Existing law requires for the formation of a nonprofit corporation three or more incorporators¹; the articles must be signed and acknowledged by the initial directors and other persons desiring to associate in the formation of the nonprofit corporation²; the articles must be filed with the clerk of the county in which the nonprofit corporation has its principal office and of each county in which it acquires real property as well as with the Secretary of State³; the articles must include the "specific and primary purposes" for which the nonprofit corporation is formed, the county where its principal office is located, and the names and addresses of three or more initial directors.⁴

Most of these formalities serve no useful function in nonprofit corporations; they provide little or no protections and merely complicate the incorporation process. The Commission recommends that a nonprofit corporation may be formed simply by one or more initial directors signing and filing articles with the Secretary of State.⁵ The articles themselves need set forth only the name of the nonprofit corporation, that it is organized under the nonprofit corporation law for any lawful purposes and may not distribute gains, profits, or dividends to members, and the name and address of at least one initial director.⁶

1. Corp. Code § 9200.

2. Corp. Code § 9304.

3. Corp. Code § 9304.5.

4. Corp. Code § 9300.

5. The new business corporation law also simplifies the execution and filing requirements. See Corp. Code § 200, as enacted by Cal. Stats. 1975, Ch. 682, § 7.

6. The new business corporation law also simplifies the contents of the articles. See Corp. Code § 202, as enacted by Cal. Stats. 1975, Ch. 682, § 7.

In order to assure that interested parties have the opportunity to discover and reach persons involved in the nonprofit corporation, the nonprofit corporation should be required, within 90 days after incorporation, to file with the Secretary of State a statement identifying its principal executive officer, street address, and agent for service of process.⁷

In the case of charitable corporations, the corporation should be required to state in the articles that it is organized for charitable purposes and, upon filing a copy of the articles, a copy of the articles should be sent to the Attorney General. This will assist the Attorney General in enforcement of its supervisory duties over charitable corporations.⁸

7. This requirement is comparable to a provision of the new business corporation law. For a more full discussion, see "Provisions Applicable to Corporations Generally," infra.

8. See Corp. Code § 9505.

CORPORATE POWERS

Unless a nonprofit corporation limits its corporate powers in its articles, it generally has full powers and authority for the administration of its affairs and the attainment of its purposes.¹ A self-imposed limitation in the articles is binding internally on the nonprofit corporation, and a member or the state may raise the limitation in a proceeding to enjoin ultra vires acts of the nonprofit corporation except where third parties have acquired rights thereby.² However, in the case of a charitable corporation, the law should be changed to permit a limitation on the corporation's powers to be raised in a proceeding to enjoin the ultra vires acts, regardless whether third parties have acquired rights thereby.³ In such a case, the performance of an ultra vires contract of a charitable corporation in which third parties have acquired rights should be enjoined only if all the parties to the contract are parties to the action and it is equitable to do so. This change in existing law is needed to protect the public against dissipation of corporate assets through ultra vires acts of a charitable corporation.

Among the statutory powers of nonprofit corporations is the power to "carry on a business at a profit as an incident to the main purposes of the corporation."⁴ Case law makes clear, however, that a nonprofit corporation may carry on a business for profit whether or not the business is "incident" to its main purposes.⁵ The case law shall be codified to make clear that a nonprofit corporation may engage in business activity subject to the limitation that any resulting gain or profit may be applied only to the corporate purposes and not be distributed as

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1. Corp. Code § 9501.
 2. Corp. Code § 803, as repealed by Cal. Stats. 1975, Ch. 682, § 6. This provision is applicable to nonprofit corporations through Section 9002. See, e.g., *Osteopathic Physicians & Surgeons v. California Medical Ass'n*, 224 Cal. App.2d 378, 36 Cal. Rptr. 641 (1964).
 3. This recommendation is comparable to ALI-ABA Model Nonprofit Corporation Act § 6(a).
 4. Corp. Code § 9200.
 5. *People ex rel. Groman v. Sinai Temple*, 20 Cal. App.3d 614, 99 Cal. Rptr. 603 (1971).

gains, profits, or dividends to members. This will assure that a non-profit corporation will have adequate means at its disposal to generate income for its legitimate purposes and will recognize existing practice of both nonprofit corporations generally and charitable corporations.

The major and most significant limitation on the powers of non-profit corporations is the prohibition on distribution of gains, profits, or dividends to members.⁶ This limitation is central to the character of nonprofit corporations and should be retained.^{6a} However, the statute should make clear that a nonprofit corporation may pay compensation to members for services rendered, pay debts and other obligations owed to members, and confer benefits on members in conformity with the purposes for which it is formed. Existing authority to distribute corporate assets (with the exception of charitable property) to members upon dissolution should also be retained.⁷

In case of an improper distribution to members, creditors and other members should be authorized to bring an action in the name of the non-profit corporation to recover the amount improperly distributed.⁸ Likewise, the directors who authorize the improper distribution should be liable to the nonprofit corporation for the amount improperly distributed upon action in the name of the nonprofit corporation by creditors or members.⁹

6. Corp. Code § 9200.

6a. [Reference to elimination of distributions to dissenting members on merger or consolidation and in other areas.]

7. Corp. Code § 9200. See discussion under "Voluntary and involuntary dissolution," infra.

8. This recommendation is comparable to a provision of the new business corporation law. See Corp. Code § 506, as enacted by Cal. Stats. 1975, Ch. 682, § 7.

9. This recommendation continues existing law. See Corp. Code §§ 823-829, as repealed by Cal. Stats. 1975, Ch. 682, § 6, applicable to nonprofit corporations through Corp. Code § 9002.

CORPORATE SEAL

Existing law establishes a presumption of valid execution for instruments to which the corporate seal has been affixed.¹ The Commission recommends that this presumption be abolished; failure to affix a corporate seal should not affect the validity of a written instrument.² More significant protection of parties dealing with a nonprofit corporation can be provided by following the provisions of the new business corporation law. That law allows reliance upon the authority of specified senior executive officers to execute any instrument on behalf of the nonprofit corporation.³ While this guarantee of valid execution requires greater involvement of the nonprofit corporation, it grants commensurately greater assurance to third parties than the rebuttable presumption now created by use of the seal.

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1. Corp. Code § 833, as repealed by Cal. Stats. 1975, Ch. 682, § 6, applicable to nonprofit corporations through Corp. Code § 9002.
 2. This is the approach of the new business corporation law. See Corp. Code § 207(a), as enacted by Cal. Stats. 1975, Ch. 682, § 7.
 3. See Corp. Code § 313, as enacted by Cal. Stats. 1975, Ch. 682, § 7.

DIRECTORS

Number and Term of Directors

Existing law requires a minimum of three directors of a nonprofit corporation.¹ This rule is sound except where the nonprofit corporation has fewer than three members; in such a case, the nonprofit corporation should be permitted to have fewer than three directors.²

Existing law permits a nonprofit corporation to have a variable number of directors, with a minimum of not less than five and a maximum that does not exceed the stated minimum by more than three.³ The permissible limits of variation should be expanded, with a lower minimum and the maximum not more than twice the minimum minus one.⁴

The term of directors may be specified in the bylaws.⁵ Absent a specification in the bylaws, it appears that the term of directors is one year.⁶ The nonprofit corporation law should make clear that the term is one year absent a contrary provision in the bylaws.

In order to assure member control over the board, a bylaw relating to the number of directors, or a bylaw affecting the term of directors, should be adopted, amended, or repealed only by the members.

Selection of Directors

In order to assure members an adequate opportunity to participate in corporate management and control, a nonprofit corporation should be required to provide a reasonable means for nominating persons for election as director of a nonprofit corporation. The Commission recommends no specific standards for what constitutes "reasonable means"; the standard may differ from organization to organization depending on its

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1. Corp. Code §§ 9300(e) and 9500.
 2. The new business corporation law makes a comparable change. See Corp. Code § 212(a), as enacted by Cal. Stats. 1975, Ch. 682, § 7.
 3. Corp. Code § 9300(e).
 4. The new business corporation law makes a comparable change. See Corp. Code § 212(a), as enacted by Cal. Stats. 1975, Ch. 682, § 7.
 5. Corp. Code §§ 9302 and 9401(c).
 6. See 56 Ops. Atty. Gen. 317 (1973).

character, size, purposes, and the like. The existence of a statutory right to a reasonable means for nominating, however, will assure to a person seeking to test the nomination procedures a right which a court may rely on without having to invoke equitable or common law inherent authority.

Although the bylaws may provide the manner of selection of directors,⁷ the nonprofit corporation law should make clear that, absent a provision in the bylaws, the selection is to be by election by the members at a meeting of the members.⁸

Cumulative voting for the election of directors of nonprofit corporations is not permitted unless the corporation provides for it.⁹ In view of the variety of types of nonprofit corporations, no change in this rule is recommended.

Multiple Boards of Directors

It is the practice of some nonprofit corporations--particularly charitable corporations--to have more than one independent board of directors, with separate corporate authority and manner of selection. This practice should be statutorily recognized by adoption of a provision permitting multiple boards if (1) the bylaws provide for them, (2) the manner of selection and authority of each board is specified, and (3) one board is designated having all residual authority of the nonprofit corporation. All rules and liabilities applicable to corporate directors generally will apply to directors on such boards.

Committees of the Board

A nonprofit corporation may provide for the appointment and authority of executive or other committees of the board.¹⁰ The new business

7. Corp. Code §§ 9302 and 9401(a).

8. This is the normal rule for business corporations. See Corp. Code § 301(a), as enacted by Cal. Stats. 1975, Ch. 682, § 7.

9. Corp. Code §§ 9402(d) and 9601.

10. Corp. Code § 9401(d).

corporation law establishes some detail concerning committees of the board:¹¹ (1) A committee consists of two or more directors designated by the board and serving at the pleasure of the board; (2) the board may designate alternate committee members; (3) the committee has all the authority of the board to the extent delegated to it, with the exception of certain fundamental actions which are reserved for the board as a whole. The Commission recommends the adoption of the business corporation procedural detail for nonprofit corporations. However, the statute should make clear that the bylaws may specify that particular directors are to be members of particular committees. This will accommodate those nonprofit corporations whose committees are filled by geographic, interest, or other particular group selection process.

The nonprofit corporation law should also recognize the practice of many nonprofit corporations to have advisory committees which may be composed of nondirectors, who may be selected by persons or organizations other than directors or members. These groups, however, should not be empowered to exercise the corporate authority.

Meetings of Directors

Generally, the bylaws of a nonprofit corporation govern the meetings of directors.¹² This basic provision should be retained, with the adoption of specific rules governing meetings of directors absent a provision in the bylaws. In the interest of uniformity, the specific rules should parallel those applicable to business corporations,¹³ with the following exceptions:

(1) Call of meetings. Under the business corporation law, meetings may be called by any of several chief corporate officers;¹⁴ the nonprofit corporation law requires that meetings are called as ordered by

11. Corp. Code § 311, as enacted by Cal. Stats. 1975, Ch. 682, § 7.

12. Corp. Code §§ 9401(a)-(b), 9503.

13. Corp. Code § 307, as enacted by Cal. Stats. 1975, Ch. 682, § 6, and amended by Cal. Stats. 1976, Ch. ____, § ____ (A.B. 2849).

14. Corp. Code § 307(a)(1), as enacted by Cal. Stats. 1975, Ch. 682, § 7.

the directors.¹⁵ The call of meetings by officers is not appropriate for nonprofit corporations; the existing nonprofit corporation law rule should be retained.

(2) Quorum of directors. The business corporation law imposes minimum quorum requirements for directors;¹⁶ the nonprofit corporation law permits any quorum set by the nonprofit corporation.¹⁷ The greater flexibility is necessary for nonprofit corporations and should be retained.

(3) Acts of the board. The business corporation law permits the corporation to require a greater than majority vote of the directors for approval of an action, but only in the articles.¹⁸ A nonprofit corporation should be permitted to prescribe a greater vote in the articles or bylaws; this is consistent with the general authority for nonprofit corporations to control voting requirements in the bylaws and continues existing law.¹⁹

Provisional Directors

Existing law permits the appointment of a provisional director of a nonprofit corporation upon petition of one-third of the members in cases where there is an even number of directors and the directors are deadlocked.²⁰ A few minor changes in existing law are appropriate for nonprofit corporations:²¹

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15. Corp. Code § 9503.
 16. Corp. Code § 307(a)(7), as enacted by Cal. Stats. 1975, Ch. 682, § 7.
 17. Corp. Code § 9401(b).
 18. Corp. Code § 204(a), as enacted by Cal. Stats. 1975, Ch. 682, § 7, and as amended by Cal. Stats. 1976, Ch. ____, § ____ (A.B. 2849).
 19. Corp. Code § 817, as repealed by Cal. Stats. 1975, Ch. 682, § 6, applicable to nonprofit corporations through Section 9002.
 20. Corp. Code § 819, as repealed by Cal. Stats. 1975, Ch. 682, § 6, applicable to nonprofit corporations through Section 9002.
 21. Cal. Stats. 1976, Ch. ____, § ____ (A.B. 2849), would add the authority to appoint a provisional director in cases where the shareholders are deadlocked. The Commission believes that this solution is inappropriate for nonprofit corporations; if the members are deadlocked, the corporation should dissolve or take other appropriate action.

(1) The appointment provisions should apply whether or not there is an even number of authorized directors. If, as a practical matter, there is no working majority, a provisional director may be appropriate.

(2) The lesser of 50 members or members holding 10 percent of the voting power should be authorized to petition for a provisional director. This is consistent with other provisions of the nonprofit corporation law requiring a given number of members to initiate actions.

Duty of Care of Directors

The new business corporation law imposes a general duty of care on directors of business corporations²² that is flexible and enables a person who meets the standard of care to be exempt from liability by reason of being or having been a director.²³ Because of the need to attract capable persons to serve as directors of nonprofit corporations, often without monetary reward, and because of the widely varying sizes and types of nonprofit corporations, it is particularly important to have a flexible duty of care which, if satisfied, immunizes the director of the nonprofit corporation from liability.

For these reasons, the Commission recommends that the duty of care for directors of nonprofit corporations be the same as that for directors of business corporations with one exception. In the case of charitable corporations or nonprofit corporations that hold assets on charitable trust, the higher duty of a fiduciary applies to management of the charitable assets.²⁴

Where the director of a nonprofit corporation has a conflict of interest in a contract or transaction of the nonprofit corporation because of a common directorship or a financial interest, existing law provides a number of independent procedures for validating the contract or transaction.²⁵ The new business corporation law makes a number of

22. Corp. Code § 309, as enacted by Cal. Stats. 1975, Ch. 682, § 7, and as amended by Cal. Stats. 1976, Ch. ____, § ____ (A.B. 2849).

23. See analysis in Report of the Assembly Select Committee on the Revision of the Corporations Code 48 (1975).

24. Civil Code § 2261.

25. Corp. Code § 820, as repealed by Cal. Stats. 1975, Ch. 682, § 6, applicable to nonprofit corporations through Corp. Code § 9002.

changes in this scheme, including a provision for validating those contracts of a director in which he has a "material" financial interest.²⁶ In the interest of uniformity, the Commission recommends that these provisions of the new business corporation law be followed for nonprofit corporations.

A nonprofit corporation cannot make loans to directors or officers without the approval of the members.²⁷ The new business corporation law makes a number of alterations in the loan provisions, including authority to make loans pursuant to an employee benefit plan approved by the members and to make travel advances without further approval of the members.²⁸ A director who approves a loan in violation of the prohibitions is liable to the nonprofit corporation in an action in the name of the nonprofit corporation brought by members or creditors.²⁹ In the interest of uniformity, the Commission recommends that these provisions of the new business corporation law be followed for nonprofit corporations.

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26. Corp. Code § 310, as enacted by Cal. Stats. 1975, Ch. 682, § 7, and as amended by Cal. Stats. 1976, Ch. ____, § ____ (A.B. 2849).
 27. Corp. Code § 823, as repealed by Cal. Stats. 1975, Ch. 682, § 6, applicable to nonprofit corporations through Corp. Code § 9002.
 28. Corp. Code § 315, as enacted by Cal. Stats. 1975, Ch. 682, § 7.
 29. Corp. Code § 316, as enacted by Cal. Stats. 1975, Ch. 682, § 7, and as amended by Cal. Stats. 1976, Ch. ____, § ____ (A.B. 2849).

OFFICERS

A nonprofit corporation must have a president, a vice president, a secretary, and a treasurer; any two or more offices may be held by the same person except those of president and secretary.¹ The new business corporation law requires either a chairman of the board or a president as chief executive officer and permits one person to be both president and secretary.² In the interest of uniformity, the Commission recommends that the scheme of the new law be followed.

The new business corporation law also specifies that an officer may resign at any time subject to the rights of the corporation under a contract.³ The Commission believes this is a useful provision for nonprofit corporations except that, to assure a nonprofit corporation an adequate opportunity to obtain an officer to replace the resigning officer, resignation should be subject to a notice period (not exceeding 30 days) provided in the bylaws.

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1. Corp. Code § 821, repealed by Cal. Stats. 1975, Ch. 682, § 6, and applicable to nonprofit corporations through Corp. Code § 9002.
 2. Corp. Code § 312(a), as enacted by Cal. Stats. 1975, Ch. 682, § 7, and as amended by Cal. Stats. 1976, Ch. ____, § ____ (A.B. 2849).
 3. Corp. Code § 312(b), as enacted by Cal. Stats. 1975, Ch. 682, § 7, and as amended by Cal. Stats. 1976, Ch. ____, § ____ (A.B. 2849).

INDEMNIFICATION OF CORPORATE AGENTS

Existing law is fairly restrictive in permitting a nonprofit corporation to indemnify a director, officer, or employee for his expenses incurred in defending an action against him in his capacity as a corporate agent.¹ The practical effect of the restrictive provisions is to force an official or employee of the nonprofit corporation who is a defendant in an action to enter into a settlement of the action regardless of the merit of the action.²

The new business corporation law substantially liberalizes the conditions under which indemnification of corporate agents may be made.³ Comparable provisions should be applied to nonprofit corporations. This will provide sufficient flexibility to afford reasonable protection for directors and officers while imposing safeguards that adequately protect the members in the granting of indemnification.

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1. Corp. Code § 830, as repealed by Cal. Stats. 1975, Ch. 682, § 6, applicable to nonprofit corporations through Section 9002.
 2. See Report of the Assembly Select Committee on the Revision of the Corporations Code 61 (1975).
 3. Corp. Code § 317, as enacted by Cal. Stats. 1975, Ch. 682, § 7, and as amended by Cal. Stats. 1976, Ch. ____, § ____ (A.B. 2849).

MEMBERS

A nonprofit corporation may have such memberships as the bylaws provide, but no person may hold more than one membership.¹ The limitation of one membership per person is an artificial one, since a nonprofit corporation may provide differing classes of membership with differing rights, privileges and interests.² As a practical matter, a nonprofit corporation may permit a person to have more than one membership by creating a class having voting rights dependent on the amount of contributions to the nonprofit corporation.³ Moreover, it may be appropriate in some nonprofit corporations to permit multiple memberships, for example, where memberships and membership rights are based on lots owned in a subdivision.

For these reasons, the right of nonprofit corporations to permit a person to hold more than one membership should be statutorily recognized. To avoid complications among the rights, interests, and privileges of members, however, the rule should be that only one membership per person is permitted unless the bylaws expressly provide otherwise. This will help to assure that the nonprofit corporation deals with the problems that will arise from multiple memberships. By the same reasoning, fractional and joint memberships, and memberships in the name of groups, corporations, and other non-natural persons should be precluded by statute unless the bylaws expressly provide therefor.

Membership in a nonprofit corporation may be evidenced by a certificate, in which case the certificate must state that the corporation is not one for profit.⁴ The apparent reason for the statement on the certificate is to avoid the possibility of confusion with a stock certificate; the Commission thus recommends that the statement be required only where the membership represented by the certificate is transferable and is a property interest in the nonprofit corporation. The Commission further recommends that the nonprofit corporation law make clear that membership certificates can be recalled and exchanged where appropriate in the same manner as stock certificates.⁵

1. Corp. Code §§ 9402(b) and 9602.

2. Ibid.

3. *Erickson v. Gospel Foundation of California*, 43 Cal.2d 581, 275 P.2d 474 (1954).

4. Corp. Code § 9607.

5. Corp. Code § 422, as enacted by Cal. Stats. 1975, Ch. 682, § 7.

The bylaws may provide that a membership is transferable.⁶ Where this is the case, the bylaws should also be authorized to provide that the nonprofit corporation is not bound by a transfer until notice is actually received in a specified manner. This will enable the nonprofit corporation to maintain accurate membership records.

California courts have long required minimal due process for expulsion of members from nonprofit organizations.⁷ The Commission recommends codification of this principal in the nonprofit corporation law.⁸ The courts have also required that nonprofit corporations provide members a reasonable procedure for withdrawal from the corporation.⁹ The Commission recommends that, absent a reasonable procedure in the bylaws, a member may surrender his membership upon 30 days' written notice to the nonprofit corporation.

By statute, death terminates all rights of a member in a nonprofit corporation or in its property.¹⁰ This rule is unduly harsh where the membership represents a substantial property interest. Death should not terminate rights in the nonprofit corporation unless the bylaws specifically so provide; members will thus have express notice of the possibility of loss of membership rights on death.

[Discussion of record date for determining membership, options, consideration, and partly paid memberships is deferred pending further Commission determinations in these areas.]

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6. Corp. Code § 9609.
 7. *Otto v. Tailors' P. & B. Union*, 75 Cal. 308 (1888); *Taboada v. Sociedad Espanola, etc.*, 191 Cal. 187 (1923).
 8. The requirement of notice and an opportunity to be heard should not be required for termination of membership because of the nonpayment of dues or other proper financial burdens of membership. Termination for such causes normally requires only reasonable notice without the opportunity of a hearing. *DeMille v. American Fed. of Radio Artists*, 31 Cal.2d 139, 187 P.2d 769 (1947).
 9. *Haynes v. Annandale Golf Club*, 4 Cal.2d 28, 47 P.2d 470 (1935).
 10. Corp. Code § 9608.

CORPORATE FINANCE

[This portion will be written after the Commission has made tentative decisions with respect to the bulk of the relevant provisions.]

MEMBERS' MEETINGS AND CONSENTS

A nonprofit corporation is required to hold an annual meeting of members unless the bylaws provide otherwise.¹ This rule should be continued. The new business corporation law permits the bylaws to set the time and place of the annual meeting and provides a procedure for the members to obtain a court order requiring the corporation to hold the annual meeting where it has failed to do so.² The Commission believes these provisions are sound and recommends they be applied to nonprofit corporations.

A special meeting of a nonprofit corporation may be called by the directors or by members holding one-tenth of the voting power.³ The new business corporation law authorizes the chairman of the board and the president to call a special meeting as well.⁴ The nonprofit corporation law should likewise be so broadened.

The bylaws may provide that a quorum at a meeting of members is greater or less than a majority.⁵ The nonprofit corporation law should make clear that, absent a provision in the bylaws, a quorum is a majority of the votes entitled to be cast at the meeting;⁶ if a quorum is initially present, the meeting should be permitted to continue, providing any action taken is by a majority of the number required to constitute a quorum.⁷

1. Corp. Code § 2200, as repealed by Cal. Stats. 1975, Ch. 682, § 6, applicable to nonprofit corporations through Corp. Code § 9002; Corp. Code § 9401(a); *Burnett v. Banks*, 130 Cal. App.2d 631, 279 P.2d 579 (1955).
2. Corp. Code § 600, as enacted by Cal. Stats. 1975, Ch. 682, § 7, and as amended by Cal. Stats. 1976, Ch. ____, § ____ (A.B. 2849).
3. Corp. Code § 9600.
4. Corp. Code § 600(d), as enacted by Cal. Stats. 1975, Ch. 682, § 7.
5. Corp. Code § 9401(b).
6. The new business corporation law quorum requirement is a majority of the shares entitled to vote except as varied in the articles. Corp. Code § 602(a), as enacted by Cal. Stats. 1975, Ch. 682, § 7.
7. This is comparable to a provision of the new business corporation law. Corp. Code § 602(b), as enacted by Cal. Stats. 1975, Ch. 682, § 7.

A nonprofit corporation may specify the manner of giving notice of meetings of members and may dispense with notice of all regular members' meetings.⁸ This rule is appropriate in view of the variety of types of nonprofit corporations; however, the Commission recommends that the broad authority to regulate notice of meetings be subject to limitations of reasonableness in order to assure adequate notice.⁹ Absent a reasonable provision by the nonprofit corporation, the time, contents, manner, and persons to whom notice is given should be the same as for business corporations.¹⁰ Existing law provides for validation of defectively noticed meetings.¹¹ The new business corporation law makes several improvements in the validation procedure,¹² which should be adopted for use by nonprofit corporations.¹³

Existing law permits an action that may be taken at a meeting to be taken by unanimous written consent of the members.¹⁴ The new business corporation law liberalizes the consent provisions, enabling action by less than unanimous written consent but requiring a written consent form to provide the option of approval, disapproval, or abstention and requiring notice to nonconsenting shareholders.¹⁵ Since a nonprofit corporation may permit member action by any reasonable means, including mail, the business corporation written consent provisions are appropriate for nonprofit corporation law.¹⁶

8. Corp. Code § 9401(a).
9. The bylaws should not be permitted, however, to waive notice of certain fundamental corporate actions to be taken at a meeting. These actions include approval of a contract or transaction in which a director has a conflict of interest, amendment of the articles, sale or other disposition of all or substantially all of the corporate assets, merger or consolidation, voluntary dissolution, approval of a plan of distribution on dissolution. This is comparable to a provision of the new business corporation law. Corp. Code § 601(f), as enacted by Cal. Stats. 1975, Ch. 682, § 7.
10. See Corp. Code § 601, as enacted by Cal. Stats. 1975, Ch. 682, § 7, and as amended by Cal. Stats. 1976, Ch. ___, § ___ (A.B. 2849).
11. Corp. Code §§ 2209 and 2210, as repealed by Cal. Stats. 1975, Ch. 682, § 6, applicable to nonprofit corporations through Corp. Code § 9002.
12. Corp. Code § 601(e), as enacted by Cal. Stats. 1975, Ch. 682, § 7, and as amended by Cal. Stats. 1976, Ch. ___, § ___ (A.B. 2849).
13. For an analysis of the changes, see Report of the Assembly Select Committee on Revision of the Corporations Code 80 (1975).
14. Corp. Code § 2239, as repealed by Cal. Stats. 1975, Ch. 682, § 6, applicable to nonprofit corporations through Corp. Code § 9002.
15. Corp. Code §§ 603 and 604, as enacted by Cal. Stats. 1975, Ch. 682, § 7.
16. See Corp. Code § 9601.

VOTING OF MEMBERSHIPS

[Discussion of these provisions is deferred until the Commission finalizes its decisions in this area.]

MEMBERS' DERIVATIVE ACTIONS

The provisions of the former General Corporation Law permitting a shareholder to bring an action in the right of the corporation¹ were applicable to nonprofit corporations.² Although derivative actions are brought only on rare occasions by members of nonprofit corporations,³ the opportunity to bring a derivative action is, in certain cases, a significant protection for important member rights. Accordingly, the Commission recommends that the right to bring derivative actions be explicitly stated in the nonprofit corporation law.⁴

The derivative action provisions applicable to nonprofit corporations should be comparable to those provided in the new business corpo-

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1. Former Corp. Code § 834.
 2. See Corp. Code § 9002.
 3. There is apparently only one reported appellate case in California involving a derivative action brought by members of a nonprofit corporation. See *Ashton v. Dashaway Ass'n*, 81 Cal. 61, 22 P. 660 (1890). See also 13 W. Fletcher, Private Corporations § 5950 (perm. ed. rev. vol. 1970) and cases cited therein.
 4. Recently enacted nonprofit corporation statutes in New York and Pennsylvania provide explicitly for derivative actions. See N.Y. Not-for-Profit Corp. Law § 623 (McKinney 1970, Supp. 1975); Pa. Stat. Ann. tit. 15, § 7765 (1976).

ration law.⁵ In order to deter "strike suits," that law provides a procedure whereby the corporation or defendant directors or officers may require the plaintiffs to furnish security in an amount not exceeding \$50,000 for the defendants' reasonable costs and attorney's fees.⁶ The Commission recommends that the security for expenses provision be continued in the General Nonprofit Corporation Law. However, in recognition of the nonpecuniary nature of many nonprofit corporations, members should be permitted to bring derivative actions without being required to furnish security where 50 members or 10 percent of the members, whichever number is smaller, join in the action. This scheme is similar to provisions of the Pennsylvania Nonprofit Corporation Law of 1972.⁷

The rule of Ensher v. Ensher, Alexander & Barsoom, Inc.,⁸ to the effect that a derivative action may not be dismissed, discontinued, compromised, or settled without the approval of the court, should be codified in the General Nonprofit Corporation Law.

5. Corp. Code § 800.

6. Corp. Code § 800(c), (d).

7. Pa. Stat. Ann. tit. 15, § 7765(c)(1976).

8. 187 Cal. App.2d 407, 9 Cal. Rptr. 732 (1960).

AMENDMENT OF ARTICLES

Existing law specifies the amendments that may be made to the articles of a nonprofit corporation.¹ The new business corporation law eliminated this specification for general authority to make any necessary amendments, provided the amendments would be proper if inserted in original articles filed at the time of the amendment.² This is a salutary provision and should be extended to nonprofit corporations.

Nonprofit corporation law permits the adoption of amendments to the articles on a vote by two-thirds of a quorum of members,³ or by a vote of two-thirds of a policymaking committee created by the members.⁴ These provisions have enabled nonprofit corporations to function efficiently, and no problems in their operation have been called to the attention of the Commission; they should be continued without change.

The new business corporation law revises and simplifies the provisions relating to certificates of amendment and restated articles.⁵ The provisions as so revised and simplified should, for uniformity, apply as well to nonprofit corporations.

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1. Corp. Code §§ 3600-3602, as repealed by Cal. Stats. 1975, Ch. 682, § 6, applicable to nonprofit corporations through Corp. Code § 9002.
 2. Corp. Code § 900(a), as enacted by Cal. Stats. 1975, Ch. 682, § 7.
 3. Corp. Code § 3632, as repealed and preserved by Cal. Stats. 1975, Ch. 682, §§ 6 and 16.
 4. Corp. Code § 3632.5, as repealed and preserved by Cal. Stats. 1975, Ch. 682, §§ 6 and 16.
 5. Corp. Code §§ 905-908 and 910, as enacted by Cal. Stats. 1975, Ch. 682, § 7, and as amended by Cal. Stats. 1976, Ch. ____, § ____ (A.B. 2849).

SALES OF ASSETS

The provisions of the new business corporation law relating to sales of assets¹ are, with a few modifications, equally suitable for nonprofit corporations. The Commission recommends that the new business corporation law be adapted to require that a sale, lease, or other disposition of all or substantially all of the corporate assets be approved by the board in every case and approved by the members if the transaction is not in the usual and regular course of corporate activities.² Notice of the general nature of the proposal should be given to members before member approval (other than unanimous approval) may be obtained at a meeting, whether the meeting is annual or special³; this will effectuate an earlier Commission recommendation.⁴

The sale of assets provisions should make clear that assets held on condition or on a charitable trust are subject to the limitations in the instrument of conveyance or in the instrument creating the trust. Where any part of the assets are subject to a charitable trust and the transaction is not in the usual and regular course of corporate activities and for less than fair and adequate consideration, the nonprofit corporation should give written notice to the Attorney General before the transaction is consummated. This will facilitate performance of the Attorney General's duty to supervise property subject to a charitable trust.⁵

1. Corp. Code §§ 1000-1002.

2. See Corp. Code § 1001(a).

3. Compare Corp. Code § 601(a)(notice of general nature of proposal must be given if meeting is special but not annual).

4. See Recommendation and Study Relating to Notice to Shareholders of Sale of Corporate Assets, 2 Cal. L. Revision Comm'n Reports G-1 (1959).

5. See Corp. Code § 9505.

MERGER AND CONSOLIDATION

Under existing law, nonprofit corporations may merge or consolidate with other nonprofit corporations.¹ The new business corporation law has eliminated consolidation for business corporations on the ground that it was an "outmoded procedure"² that was seldom used by business corporations.³ The Commission recommends that consolidation be retained for nonprofit corporations, however, since most nonprofit corporations combinations employ the consolidation procedures in order to avoid the generation of factions hostile to the new organization.⁴

The Commission recommends that the existing procedures for merger and consolidation be continued with several modifications. A merger or consolidation is accomplished by filing an agreement of merger or consolidation, approved by the boards and members of the constituent nonprofit corporations. In the case of business corporations, the agreement may provide for the compensation of shareholders by the payment of money or property⁵; this feature is inappropriate for nonprofit corporations since it would violate the basic policy against distributing gains, profits, or dividends of a nonprofit corporation except upon dissolution.⁶

Existing law provides for approval of the agreement by a majority of the members acting by vote or by two-thirds of the members acting by written consent, disregarding any limitations or restrictions on the voting power of a class of membership.⁷ The Commission recommends that

1. Corporations Code Section 9700 makes the provisions of Article 1 (commencing with Section 4100) of Chapter 3 of Part 8 of Division 1 of the former General Corporation Law applicable to nonprofit corporations.
2. See Report of the Assembly Select Committee on the Revision of the Corporations Code 13 (December 1, 1975).
3. See the working papers of the State Bar Committee on Corporations, p. 37-6 (unpublished materials on file at the office of the California Law Revision Commission).
4. See G. Davis, Reorganization and Termination, in California Non-profit Corporations § 9.18, at 325 (Cal. Cont. Ed. Bar 1969).
5. Corp. Code § 1101(d).
6. See discussion supra under "Powers."
7. Corp. Code § 9701.

the requirement of two-thirds approval where members act by written consent be changed to a majority. A higher percentage of approval may be required by the articles or the bylaws. Since many nonprofit corporations have members who are honorary or have no real interest in the organizational structure of the corporation, only those members who are entitled to vote for directors should be required by statute to approve the agreement of merger or consolidation. Again, articles or bylaws may require the approval of additional classes of members.⁸

Where a nonprofit corporation organized for charitable purposes or holding assets on charitable trust proposes to merge or consolidate, the Attorney General should be given notice of the proposed merger or consolidation before it is effective so that the Attorney General may ensure that the charitable purposes will not be violated.

Under existing law, it appears that a member who dissents from the merger or consolidation has the right to require the nonprofit corporation to purchase his membership, assuming the membership has a monetary value.⁹ The Commission recommends that dissenting members not be afforded the dissenters' appraisal right granted to dissenting shareholders. Such a right would not generally be applicable in the context of nonprofit corporations in any event, but to permit the member to require the nonprofit corporation to purchase his membership in those

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8. Corporations Code Section 9703 permits the articles of a nonprofit corporation to require the approval of a greater percentage of members. Under the Commission's recommendations, the approval of additional classes of members may also be required by statute where the rights of members of a class would be adversely affected to a greater extent than the rights of members of other classes. See discussion supra under "Voting of Memberships."
 9. Corporations Code Section 9700 makes the merger and consolidation provisions of the former General Corporation Law applicable to nonprofit corporations without excepting the provisions of former Section 4123 which provided for the compensation of dissenters.

few cases would violate the policy against distribution of gains, profits, and dividends except upon dissolution.¹⁰

The new business corporation law eliminated the requirement that the corporation give notice to each shareholder of the approval of the agreement of merger in favor of a provision that notice be sent to those shareholders who hold dissenting shares.¹¹ The General Nonprofit Corporation Law should retain the requirement that all members be given notice of approval of the agreement of merger or consolidation. The notice should be given in the same manner as the nonprofit corporation provides for giving notice of its meetings of members.

The Commission recognizes that there may infrequently be situations where valuable property rights of members may be infringed by a merger or consolidation. Such rights may be protected by the requirement that the approval of a class of members is required where the merger or consolidation would adversely affect the rights of the members of a class to a greater extent than members of other classes.¹² In addition, where a merger or consolidation would be manifestly unfair to the property rights of a member, the member should be permitted to bring an action to enjoin or rescind the merger or consolidation not later than 60 days after the effective date thereof. In every other case, except where an action is brought to test whether the proper approval was obtained, the members should have no right to bring an action to enjoin or rescind the merger or consolidation.

10. See discussion supra under "Powers."

11. See Corp. Code §§ 1300, 1301.

12. See discussion supra under "Voting of Memberships."

DE FACTO MERGER

The new business corporation law has codified the de facto merger doctrine which gives shareholders the right of approval and dissenters' rights in corporate transactions that have the effect of a merger but are not formal mergers.¹³ The Commission has not recommended the codification of the de facto merger doctrine in the law applicable to nonprofit corporations. It will be an extremely rare case in which a nonprofit corporation would be involved in the sort of transactions covered by the doctrine as it is codified in the new business corporation law. Moreover, provisions for the dissenter's right to require the corporation to purchase his membership are inconsistent with the basic philosophy of a nonprofit corporation law.¹⁴

13. See Corp. Code §§ 181, 1200, 1201; Report of the Assembly Select Committee on the Revision of the Corporations Code 93-94 (Dec. 1, 1975).

14. See discussion supra under "Merger and Consolidation."

CONVERSION OF NONPROFIT TO BUSINESS CORPORATION AND BUSINESS TO NON-
PROFIT CORPORATION

The existing California law provides no means whereby a nonprofit corporation may be converted into a business corporation or a business corporation may be converted into a nonprofit corporation. The Commission recommends the enactment of conversion provisions based on the conversion provisions of the Pennsylvania Nonprofit Corporation Law of 1972.¹

Specifically, the Commission recommends:

(1) A nonprofit corporation (other than one holding assets on charitable trust or organized for charitable purposes) should be permitted to convert into a business corporation.

(2) A business corporation should be permitted to convert into a noncharitable nonprofit corporation (which may or may not hold assets on charitable trust) or into a nonprofit corporation organized for charitable purposes.

(3) The procedure for conversion should be analogous to merger procedure. The conversion would be accomplished by filing a plan of conversion which has been approved by the board and the shareholders or members of the converting corporation in the same manner as is provided for the approval of mergers. Members of a converting nonprofit corporation should be given notice of the approval of the plan of conversion and be permitted to bring an action to enjoin or rescind the conversion if the conversion would be manifestly unfair to their property rights. Dissenting shareholders of a converting business corporation would be given the same right to require the corporation to purchase their shares as dissenting shareholders have where a merger takes place. No other action to enjoin or rescind the conversion could be brought except to test whether the proper number of memberships or shares were voted in favor of the plan of conversion.

1. Pa. Stat. Ann. tit. 15, §§ 7951-7956 (Supp. 1975).

BANKRUPTCY REORGANIZATIONS AND ARRANGEMENTS

The provisions of federal law concerning the reorganization or arrangement of bankrupt corporations¹ apply to nonprofit corporations² although their use is uncommon.³ The new business corporation law⁴ contains provisions which facilitate the implementation of these federal remedies by providing, for example, that actions taken pursuant to the plan of reorganization or arrangement have the same effect as if approved by the unanimous action of the board and shareholders and that papers relating to the structure of the corporation must be filed. The Commission recommends that substantively identical provisions be included in the nonprofit corporation law.

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1. See, e.g., Bankruptcy Act, Chapter X (Reorganization), 11 U.S.C. § 501 et seq. (1970), and Chapter XI (Arrangement), 11 U.S.C. § 701 et seq. (1970).
 2. See G. Davis, Reorganization and Termination, in California Non-profit Corporations § 9.51, at 344 (Cal. Cont. Ed. Bar 1969); H. Oleck, Non-Profit Corporations, Organizations, and Associations §§ 319-320 (3d ed. 1974).
 3. H. Oleck, Non-Profit Corporations, Organizations, and Associations §§ 319-320 (3d ed. 1974).
 4. Corp. Code §§ 1400-1403. These sections are substantively identical to former Corporations Code Sections 4400-4405.

REQUIRED BOOKS AND RECORDS

The new General Corporation Law (Section 1500) includes provisions that require that a corporation keep adequate and correct books and records of account and minutes of the proceedings of the members, board, and committees of the board. These provisions supersede the more detailed provisions of former Sections 3000 and 3001 which apply to nonprofit corporations through Section 9002. Provisions comparable to more general provisions of the new General Corporation Law should apply to nonprofit corporations.

Section 9606 requires that a nonprofit corporation keep a "membership book" containing the name and address of each member and requires that termination of any membership shall be recorded in the book, together with the date on which the membership ceased. The required content of the membership record should be specified in more detail. The membership record should include the name and address of each member, the date the member became a holder of record of the membership, and, where applicable, the number and class of memberships held by each member. A record of termination of each membership, together with the date of termination, should be required only if such a record is necessary to determine those members entitled to vote or otherwise to participate in the affairs of the nonprofit corporation.

More flexible procedures for keeping the membership and fiscal records should be authorized. The nonprofit corporation should be permitted to retain the membership record and the books and records of account either in written form or in any other form capable of being converted into written form. The minutes should be required to be kept in written form. These requirements are the same in substance as those of the new General Corporation Law (Section 1500) and provide needed flexibility in maintaining accounting and membership records. Nothing would prevent a nonprofit corporation from continuing to keep its membership record in a membership book, but the corporation also would be permitted, for example, to use electronic data processing equipment to maintain such a record so long as the record could be converted into written form.

ANNUAL REPORT; SPECIAL FINANCIAL STATEMENTS

Section 9402 provides that the bylaws of a nonprofit corporation may include provisions for the making of annual reports and financial statements to members, but there is no requirement under existing law that a nonprofit corporation make an annual report or provide financial statements to members.¹

Annual Report

Former Section 3006 required "stock corporations" to send an annual report to the shareholders unless the bylaws expressly dispensed with such report. The new General Corporation Law (Section 1501) requires that an annual report be sent to shareholders by business corporations unless the corporation has less than 100 holders of record of its shares and expressly waives the requirement in the bylaws.

The Commission recommends that the board of a nonprofit corporation be required to present an oral or written annual report (containing specified information similar to that required by the new General Corporation Law) at the annual meeting of members except to the extent the bylaws otherwise provide. Thus, for example, the bylaws could dispense entirely with the requirement of an annual report or provide for an annual report that contains different or more or less information than is required by the statute. Likewise, the bylaws could 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 the statute. The recommended provisions will provide flexibility to meet the needs of various types of nonprofit corporations but will, at the same time, require that a decision be made when the bylaws are drafted whether or not an annual report is to be made. If the bylaws dispense with the requirement of an annual report or do not require an annual report that includes the financial information specified by statute, the members of the nonprofit corporation would be authorized to obtain the specified financial information by using the procedure discussed below for obtaining special financial statements.

1. Former Section 3006 (annual reports) was limited to a "stock corporation" and Section 3011 (financial statements) specifically exempted "nonprofit corporations." Hence, these requirements did not apply to nonprofit corporations through the application of Section 9002.

Special Financial Statements

Former Section 3011 required a corporation to provide special financial statements upon demand of shareholders holding at least 10 percent of the number of outstanding shares. The section contained an express exception for nonprofit corporations. The new General Corporation Law (subdivisions (c), (d), (e), (f), (g), and (h) of Section 1501) contains a comparable requirement which requires that special financial statements be provided upon written request of holders of at least five percent of the outstanding shares of any class.

Members of a nonprofit corporation may need to obtain fiscal information. Accordingly, the Commission recommends that provisions generally comparable to the special financial statements provisions of the new General Corporation Law be included in the new General Nonprofit Corporation Law with two exceptions:

(1) The nonprofit corporation should be permitted to open its fiscal records to inspection as an alternative to providing the requested financial statement, but this option should be limited to the case where the records are located at an address in this state which is either within the county where the principal executive office of the nonprofit corporation is located or within the county where the principal business office of the nonprofit corporation in this state is located if its principal executive office is not in this state. This option should be given the nonprofit corporation in recognition of the fact that a nonprofit corporation frequently will not prepare financial statements with the regularity of business corporations and a demand for a special financial statement may impose an unreasonable cost on the nonprofit corporation. If the nonprofit corporation exercises the option to open its books and fiscal records for inspection, it would waive any right to object that the inspection is not for a proper purpose.

(2) Although an authorized member (one authorized by at least five percent of the voting power) should be provided a copy of the requested fiscal statement or statements without charge, the nonprofit corporation should be permitted to impose a reasonable charge for providing additional copies of the statement or statements.

RIGHTS OF INSPECTION

Chapter 16 (commencing with Section 1600) of the new General Corporation Law deals with rights of inspection. The chapter supersedes former Sections 3003-3005 which apparently applied to nonprofit corporations through application of Section 9002.¹

Membership Records

The new General Corporation Law expands the inspection rights provided by former law by providing an absolute right to inspect the shareholder record for shareholders who have a significant ownership interest in the corporation or who, in addition to a specified ownership interest in the corporation, have instituted a proxy contest with respect to the election of directors. The new law permits a shareholder to obtain a court order postponing any shareholders' meeting previously noticed until the corporation complies with a proper request for a shareholder list and permits the court to award the shareholder his reasonable expenses (including attorney's fees) incurred in an action to enforce compliance with the statutory inspection rights upon a finding that the corporation's refusal was not justified.

The Commission recommends that the expanded inspection rights given shareholders of business corporations by the new General Corporation Law also be given to members of nonprofit corporations with the following significant adjustments:

(1) A nonprofit corporation should be permitted to protect its membership list from disclosure by adopting a bylaw that provides a reasonable procedure whereby an authorized member (one having written authorization of at least five percent of the voting power or such lesser authorization as is specified in the bylaws) may communicate without cost with the members to seek support for the nomination of any person or persons for election as directors, to communicate a candidate's statement for persons nominated for director, or to solicit proxies. The statute should prescribe the minimum requirements for such

1. Cf. Mooney v. Bartenders Union Local No. 284, 48 C.2d 841, 313 P.2d 857 (1957).

a bylaw. This option will provide an authorized member with an effective means of communicating with other members. At the same time, it will permit a nonprofit corporation whose membership list is a valuable trade secret to protect the list from possible improper use.

(2) The court should be granted specific authority to allow the nonprofit corporation additional time (over the five days prescribed by statute) within which to provide its membership list to an authorized member. The court should be authorized to impose just and proper conditions for the exercise of the right to inspect the membership records or secure a membership list and to postpone a previously noticed meeting of the members if the nonprofit corporation fails to comply with a proper demand for inspection.

(3) An express statement should be added to the membership record inspection provision to make clear that it does not limit the authority of the court to prescribe such procedure for the nomination and election of directors as is fair and equitable in view of the circumstances, practices, and nature of the particular nonprofit corporation.

Financial Records and Minutes

The new General Corporation Law (Section 1601) continues the substance of former Section 3003 which authorized a shareholder to inspect the financial records and minutes for a purpose reasonably related to such holder's interests as a shareholder. Section 3003 applied to nonprofit corporations through application of Section 9002.

The right of a member of a nonprofit corporation to inspect the financial records and minutes for a purpose reasonably related to such member's interests as a member should be continued with several additions. The demand for inspection should be under oath and state the purpose of the demand. This requirement is taken from the Pennsylvania Nonprofit Corporation law. See Pa. Stat. Ann. tit. 15, § 7503(b). The nonprofit corporation should have five business days within which to comply with the demand. This will give the nonprofit corporation time to determine whether the demand is for a proper purpose and time to schedule the inspection so that there will be a minimum disruption of its office personnel.

Articles and Bylaws

Section 9404 of the General Nonprofit Corporation Law requires a nonprofit corporation to keep a book of bylaws at its principal office; it does not specifically grant inspection rights to members. The new business corporation law (Section 213) imposes an inspection requirement on business corporations. The Commission believes this requirements is a salutary one, which should be extended to articles as well as bylaws of a nonprofit corporation.

Director's Rights of Inspection

The director under former Section 3004, applicable to nonprofit corporations through application of Section 9002, should be continued.

Application of Inspection Provisions to Foreign Nonprofit Corporations

[This portion to be written after policy decision made on extent to which provisions apply to foreign nonprofit corporations.]

Judicial Enforcement

The new General Corporation Law (Section 1603) continues the substance of former Section 3005 (which applied to nonprofit corporations through application of Section 9002) relating to judicial enforcement of the right of inspection and adds a new section (Section 1604) authorizing the court to award a shareholder his reasonable expenses (including attorney's fees) if the court finds that the failure of the corporation to comply with a proper demand for inspection was without justification.

Comparable provisions should be made applicable to nonprofit corporations except that the award of reasonable expenses (including reasonable attorney's fees) should be extended to directors who seek to enforce rights of inspection and the award of such expenses should be limited to cases where the court finds that the failure to comply with a proper demand was "arbitrary and completely without justification." In addition, in any proceeding to enforce the right of inspection of an individual member of a nonprofit corporation, the member should have the burden of establishing that the inspection is for a proper purpose. These modifications will protect a nonprofit corporation against abuse of the rights of inspection and protect members against arbitrary refusal of the nonprofit corporation to permit inspection for a proper purpose.

VOLUNTARY AND INVOLUNTARY DISSOLUTION

General Approach

The rules governing dissolution of nonprofit corporations are generally the same as those governing business corporations¹ with the major exceptions noted below. The Commission believes this statutory scheme is sound and recommends the new business corporation law provisions be adapted for nonprofit corporations.

A number of provisions of the business corporation law that are applicable to both voluntary or involuntary dissolution proceedings should be consolidated for nonprofit corporations. Examples of such provisions are those concerning powers of the court, limitations on corporate activities, powers of the board and officers, notice, presentation of creditors' claims, and cessation of corporate existence.² This will eliminate duplication and will result in a simpler, more streamlined statute.

Disposition of Charitable Assets

Dissolution of a nonprofit corporation differs from dissolution of a business corporation principally in the special treatment accorded to assets subject to a charitable trust or held by a nonprofit corporation organized for charitable purposes. The Commission recommends the codification of existing law that such assets 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.³ This codification will embrace the judicially-developed rule that, if the dominant purpose, express or implied, of a donor cannot be carried out,

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1. See Corp. Code § 9800 (nonprofit corporations wound up and dissolved in same manner as stock corporation).
 2. See Corp. Code §§ 1801(c), 1802-1804, 1805(b), 1806, 1904 (powers of court); 1805(c), 1903(c) (corporate activities during winding up); 1805(b), 1903(b), 2001 (powers of board and officers); 1805(c), 1807(b), 1903(c) (notice); 1808(b), 1905(b), 2010 (cessation of corporate existence).
 3. See Corp. Code § 9801; *Pacific Home v. County of Los Angeles*, 41 Cal.2d 844, 851-853, 264 P.2d 539, ___-___ (1953).

the doctrine of cy pres will be applied by substituting another charitable object approaching the original purpose as nearly as possible.⁴

The present rule requiring court proceedings for distribution of charitable assets⁵ should be modified to allow distribution to be made without court proceedings if the Attorney General makes a written waiver of objections; this will recognize the existing practice and expedite those proceedings in which there is no problem and no need to go to court. The common law rule that a conditional gift be returned in accordance with the donor's intent if dissolution violates the condition,⁶ should be codified.

Grounds for Dissolution

To the grounds for voluntary dissolution by the board and for involuntary proceedings commenced by the Attorney General applicable to both business and nonprofit corporations should be added the ground that the term of existence of a nonprofit corporation formed for a limited period has expired without extension or renewal.⁷ And to the grounds for all dissolution proceedings should be added that the charter of a subordinate body has been surrendered to, taken away, or revoked by the head or national body granting it.⁸ Including these grounds for dissolution will allow such nonprofit corporations to wind up without the necessity of court proceedings and will allow the Attorney General to enforce the statutory termination of the corporation if necessary.

4. See, e.g., Metropolitan Baptist Church of Richmond, Inc., v. Younger, 48 Cal. App.3d 850, 857-858, 121 Cal. Rptr. 899, ___ (1975); In re Veterans' Industries, Inc., 3 Cal. App.3d 902, 917-919, 88 Cal. Rptr. 303, ___-___ (1970).

5. See Corp. Code § 9801.

6. See In re Los Angeles County Pioneer Society, 40 Cal.2d 852, 365-866, 257 P.2d 1, ___, cert. denied, 346 U.S. 888 (1953).

7. Under business corporation law, this is now a ground for involuntary but not voluntary dissolution. Compare Corp. Code § 1800(b)(6) with Corp. Code § 1900(b).

8. Under present law, whenever the charter of a "subordinate body" incorporated under General Nonprofit Corporation Law "is surrendered to, taken away, or revoked by the head or national body granting it, the subordinate body shall dissolve." Corp. Code § 9802.

Avoidance of Dissolution by Purchase

The remedy for avoidance of dissolution by purchase⁹ should be limited to dissolutions of nonprofit corporations not organized for charitable purposes and should be limited to proceedings initiated by members holding a majority of the voting power. This will eliminate the possibility of a minority commencing involuntary proceedings as a device to circumvent the prohibition against distribution of gains to members.¹⁰

In order to assure equity to all members: (1) If the nonprofit corporation elects to purchase the memberships, the members who opposed such election should be allowed to require the corporation to purchase their memberships. (2) If the nonprofit corporation does not elect to purchase the memberships, any member should be authorized to make the purchase.¹¹

Presentation of Claims

Under the business corporation law, notice of the commencement of proceedings for winding up is given to shareholders and creditors by mail,¹² and notice to creditors to present claims is given by publication.¹³ The requirement of publication should not be duplicated in the nonprofit corporation law.

In order to assure adequate notice of the commencement of proceedings and notice to present claims, notice ordinarily should be given by mail with authorization for the court to prescribe a different method of notice where appropriate. The notice of commencement of proceedings should be permitted to contain a statement of the time and place for presentation of creditors' claims; if it does not do so, separate later notice to present claims is necessary.

9. See Corp. Code § 2000 and former Corp. Code §§ 4658-4659.

10. See discussion under "Powers," supra.

11. Compare Corp. Code § 2000(a).

12. See Corp. Code §§ 1805(c), 1903(c).

13. See Corp. Code § 1807.

Dissolution of Regulated Nonprofit Corporation

The Commission recommends that the voluntary and involuntary dissolution provisions of the General Nonprofit Corporation Law be accommodated to the Public Utilities Act¹⁴ and to the regulatory provisions of the Insurance Code relating to insolvent or delinquent insurers.¹⁵ Under the Public Utilities Act, a public utility may not dispose of its assets without consent of the Public Utilities Commission.¹⁶ And under the Insurance Code, the Insurance Commissioner may commence a proceeding to obtain control of the assets of an insolvent or delinquent insurer and to dissolve the corporation.¹⁷ The Commission therefore recommends that, in such cases, consent of the appropriate regulatory agency be obtained before dissolution proceedings under the nonprofit corporation law may be maintained.

14. See Pub. Util. Code §§ 201-2115.

15. See Ins. Code §§ 1010-1062.

16. See Pub. Util. Code § 351; *Grover v. Sharp & Fellows Contracting Co.*, 82 Cal. App.2d 515, 518, 186 P.2d 682, ___ (1947); *Slater v. Shell Oil Co.*, 39 Cal. App.2d 535, 543, 103 P.2d 1043, ___ (1940).

17. See Ins. Code §§ 1011, 1017.

PSEUDO-FOREIGN CORPORATIONS

The new business corporation law makes various chapters and sections that law applicable to a foreign corporation--to the exclusion of the law of the jurisdiction in which the corporation is incorporated--if more than one-half of its business is conducted in California and more than one-half of its outstanding voting securities are held of record by persons residing in this state. Corporations with outstanding securities listed on a national securities exchange (NYSE and AMEX) are excepted.¹ The prior law applied only to corporations incorporated in this state subject to a few exceptions.

The Commission recommends that this concept of the new business corporation law not be applied to foreign nonprofit corporations at this time. It presents difficult conflict of laws and other problems.² Experience should be accumulated under it before a determination is made whether a similar provision should be enacted for foreign nonprofit corporations. Moreover, there appears to be much less need for a similar provision in the case of nonprofit corporations. Under the Uniform Supervision of Trustees for Charitable Purposes Act, the Attorney General has general supervisory and enforcement powers over any foreign nonprofit corporation organized for charitable or eleemosynary purposes that is doing business or holding property in this state for such purposes.³ Also, unlike the past practice in the case of business corporations, it appears to be a fairly rare practice for Californians to incorporate a nonprofit corporation in another state in an effort to avoid application of the California nonprofit corporation laws.

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1. Corp. Code § 2115, as enacted by Cal. Stats. 1975, Ch. 682, § 7.
 2. See Halloran & Hammer, Section 2115 of the New California Corporations Code--The Application of California Corporations Law to Foreign Corporations, 23 U.C.L.A. L. Rev. ____ (1976).
 3. Govt. Code §§ 12580-12597.

PROVISIONS APPLICABLE TO CORPORATIONS GENERALLY

The former General Corporation Law applied to every private corporation, profit or nonprofit, now existing or hereafter formed, unless the corporation was expressly excepted from the operation thereof or there was a special provision applicable to the corporation inconsistent with some provision of the former General Corporation Law, in which case the special provision prevailed. See former Section 119.

The new General Corporation Law is limited in its application; the new law does not apply to nonprofit corporations subject to Division 2 (commencing with Section 9000) of Title 1 of the Corporations Code, to certain corporations subject to Division 3 (commencing with Section 12000) of Title 1 of the Corporations Code--chambers of commerce, boards of trade, mechanics' institutes, cooperative corporations, fish marketing associations, California job creation corporations, or business and industrial development corporations--or to corporations organized or existing under any statute of this state other than the Corporations Code, unless expressly included in a particular provision of the new General Corporation Law. See Section 102.

Section 16 of Chapter 682 of the Statutes of 1975 saves the former General Corporation Law to the extent that that law applied to corporations not covered by the new General Corporation Law.¹

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1. Section 16, as amended by Chapter ___ of the Statutes of 1976, provides:

Sec. 16. (a) Section 119 of the Corporations Code as in effect immediately prior to the effective date of this act, to the extent that it makes applicable the General Corporation Law to private corporations organized under other laws, shall continue in effect notwithstanding its repeal by the provisions hereof; but it shall refer to the provisions of Division 1 of Title 1 of the Corporations Code as in effect immediately prior to the effective date of this act, unless and until the provisions of any other statute permitting the incorporation of private corporations shall be amended to incorporate by reference in such other statute specific sections or portions

There are a number of provisions of the former General Corporation Law that were carried forward into the new General Corporation Law that should apply generally to all corporations, profit or nonprofit, now existing or hereafter formed. The Commission recommends that these provisions be compiled in a new Division 4 of Title 1 of the Corporations Code. This new division would apply to every private corporation, profit or nonprofit, stock or nonstock, now existing or hereafter formed, unless the corporation is expressly excepted from the operation thereof or there is a special provision applicable to the corporation inconsistent with some provision of the new division, in which case the special provision would prevail. This would give the new division the same scope of application as the former General Corporation Law was given by former Corporations Code Section 119.

The inclusion of a particular provision in the new division would avoid the need to duplicate the provision in the new Nonprofit Corporation Law, would permit repeal of the comparable provision of the new General Corporation Law, and would avoid the need to save the provision in the former General Corporation Law for corporations not covered by either the new General Corporation Law or the new Nonprofit Corporation Law.

The provisions that the Commission recommends be compiled in the new Division 4 of Title 1 are discussed below.

of Division 1 of Title 1 of the Corporations Code as amended hereby. All references in any such other statute to any sections or portions of the General Corporation Law shall, until such amendment, continue to be references to Division 1 of Title 1 of the Corporations Code as in effect immediately prior to the effective date of this act. Nonprofit cooperative corporations organized pursuant to Title 22 of Part 4 of Division First of the Civil Code prior to August 14, 1931 which have not elected to be governed by Part 2 of Division 3 of Title 1 of the Corporations Code pursuant to Section 12206 of the Corporations Code, and existing as nonprofit cooperative corporations on January 1, 1977, shall be governed on and after such date by the General Nonprofit Corporation Law.

(b) Notwithstanding subdivision (a), subdivision (b) of Section 201 of the Corporations Code as in effect on January 1, 1977, and as subsequently amended, shall apply to all corporations.

General Provisions

The provisions of former Corporations Code Sections 123 (federal corporations), 126 (reservation of right to amend or repeal), 126.1 (subjection of property to attachment), 128 (corporation may be sued as provided in Code of Civil Procedure), 129 (issuance of money prohibited), 313 (evidence of corporate formation and existence), 314 (evidence of bylaws, meeting, or minutes), 2240 (enforcement of certain statutory provisions by Attorney General), 3301.1 (information to assessor), 4122 (evidence of record ownership in surviving or consolidated corporation), 4690-4693 (action by Attorney General to dissolve corporation), and 6409 (information to assessor) should be compiled in the new division with appropriate technical revisions. The comparable provisions of the new General Corporation Law should be repealed.

Corporate Name

The provisions of the new General Corporation Law relating to reservation of corporate name, permissible corporate name, and sanctions for name violations (subdivisions (b) and (c) of Section 201) should be compiled in the new division to be generally applicable to all corporations. The comparable provisions of the new General Corporation Law should be repealed.²

Filing of Instruments; Certificates of Correction

The provisions of the new General Corporation Law relating to the filing of instruments with the Secretary of State (Sections 108 and 110) and certificates of correction (Section 109) should be compiled in the new division and be made generally applicable to all corporations.³ The comparable provisions of the new General Corporation Law should be repealed.

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2. Section 201 should be repealed. Subdivision (a) of Section 201 should be added to Section 400 of the Financial Code; the remainder of Section 201 should be compiled in new Division 4. Subdivision (b) of Section 201 was made applicable to "all corporations" by a 1976 amendment which added subdivision (b) to Section 16 of Chapter 682 of the Statutes of 1975. See Cal. Stats. 1976, Ch. ____, § ____.
 3. The provision of Section 110 (to be carried forward into the new division) which requires the Secretary of State to rely, with respect to a disputed point of law, upon a written opinion of counsel in determining whether an instrument conforms to law should be limited in its application to instruments filed under Division 1, 2, or 3 of Title 1 of the Corporations Code.

Service of Process on Domestic Corporations

The provisions of the new General Corporation Law providing an additional method of serving domestic corporations (Sections 1700, 1701, and 1702) should be compiled in the new division and be made generally applicable to all domestic corporations. The comparable provisions of the new General Corporation Law should be repealed.

Statement Identifying Officers, Office, and Agent for Service

The provisions of the new General Corporation Law requiring the filing of an annual statement identifying officers, office, and agent for service (Sections 1502, 1503, 1504, and 1505) should be compiled in the new division; but the following special provisions should be included for nonprofit corporations:

(1) The provision of former Section 3301 which required a filing only once every five years for nonprofit corporations should be continued and, in the case of a nonprofit corporation, the required statement should include only the name and address of its chief executive officer, the address of its principal executive office, and, if the address of its principal executive office is not in this state, the address of its principal office in this state, if any.

(2) Nonprofit corporations, like other corporations, should be required to designate in the statement an agent for service of process. One of the changes made by the new General Corporation Law is that the designation of an agent for service for corporations under that law is now mandatory; designation of an agent for service was permissive under former Section 3301.

(3) A nonprofit corporation should be required to file a new statement within 30 days of a change of any of the information required to be included in the statement. Under former Section 3301, a nonprofit corporation was required to file a new statement every time there was any change in officers.

(4) The provision of former Section 3301 which requires that the statement of a nonprofit corporation be filed without fee should not be continued. The same fee that applies to other corporations filing a statement should apply to nonprofit corporations. There is no justification for imposing the cost of filing these statements on the taxpayers generally.

These recommendations concerning nonprofit corporations recognize that the administrative duties imposed on nonprofit corporations often must--because of the nature of the corporation--be performed by volunteers without compensation. The value of the information provided by the statement does not justify imposing the burden of annual filings when there is no change in the information.

Foreign Corporations

The Commission recommends against the adoption of the pseudo-foreign corporation concept for nonprofit corporations.⁴ However, the other provisions of the new General Corporation Law relating to foreign corporations--qualification to transact intrastate business, registration of corporate name, permissible corporate names, service of process, and related provisions (Sections 2100-2107, 2110-2114, and 2116)--should be compiled in the new division to be generally applicable to all corporations.⁵ The comparable provisions of the new General Corporation Law should be repealed.⁶

Crimes

The substance of criminal sanctions imposed by former Corporations Code Sections 1308, 1309, 1511, 3019-3022, 6800, 6803, and 6804 (carried forward in substance in the new General Corporation Law as Sections 2251-2260) should be compiled in new Division 4 and be applicable to corporations generally. The comparable provisions of the new General Corporation Law should be repealed.

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4. See discussion on page. ____.
 5. The requirement that a foreign nonprofit corporation transacting intrastate business in this state qualify to do so would continue prior law. See Mechanical Contractors Ass'n of America, Inc. v. Mechanical Contractors Ass'n of Northern California, Inc., 342 F.2d 393, 398-400 (1965).
 6. Sections 2108, 2109, and 2115 would not be repealed. These sections relate to pseudo-foreign corporations.

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1. See discussion on page ____.