

## Memorandum 76-27

Subject: Study 77.90 - Nonprofit Corporations (Amendment of Articles)

Section 9305 of the nonprofit corporation law specifies that the articles of incorporation of a nonprofit corporation are to be amended in the same manner as those of a business corporation. The staff draft of the chapter relating to amendment of articles, which is attached to this memorandum, basically follows the new business corporation law. This memorandum makes selected comments about portions of the draft that the staff considers noteworthy.

§ 5251. Permitted contents of articles

Section 9303, which permits the articles of a nonprofit corporation to contain any desired provision (not in conflict with law) for the regulation of the corporation, was amended in 1949 to permit the articles to include "any restrictions authorized by Article 2, Chapter 1, Part 1, Division 1, Title 1 of this code upon the power to amend the articles of incorporation." The specific restriction on the power to amend referred to by Section 9303 is found in Section 3632:

The articles of incorporation may require the vote or written consent of the holders of any greater percentage or fraction of the outstanding shares of any one or more classes or series for the approval of any amendment of the articles or of amendments of particular kinds or for particular purposes, or may require for such approval the vote or written consent of the holders of a greater percentage or fraction of the voting power or outstanding shares, than would otherwise be required under this article, but in no case may the articles or bylaws prohibit any amendment authorized by this chapter.

The new business corporation law does not continue this provision as such, although the staff notes that the general provision relating to contents of the articles of incorporation, Section 204(a)(5), does permit the articles to require the vote of a larger proportion or all of the members or directors "for any or all corporate actions." The staff believes that the general approach of the new law is superior to the particular approach of the old law, and has adopted the

general approach for nonprofit corporations in Section 5251(a)(2). The staff does, however, believe that there should be a specific reference to the higher vote requirements among the provisions relating to amendment of the articles, and has done this in Section 5920.

§ 5910. Permissible amendments of articles

Sections 3600-3604 of the old business corporation law specify the particular amendments that might be made. Half of these provisions are inapplicable to nonprofit corporations because they deal with the share structure of business corporations. The new business corporation law simplifies these provisions by permitting any amendment of the articles that would be permitted in original articles filed at the time of the amendment; this is consistent with Section 3602(b). The staff believes that this is a good change, and has adopted it for the nonprofit corporation law. This is also the approach of ALI-ABA Model Nonprofit Corporation Act

§ 33:

33. A corporation may amend its articles of incorporation, from time to time, in any and as many respects as may be desired, so long as its articles of incorporation contain only such provisions as are lawful under this Act.

§ 5913. Amendment of articles of charitable corporation

Section 5913 has been drafted in response to a suggestion made to the Commission by the Attorney General that it would be helpful to his office to be alerted to radical alterations in the purposes clauses of nonprofit corporations over which he has supervision.

§ 5921. Adoption of amendments before members admitted

Section 3630 provides that, before any members of a "nonstock corporation other than the incorporators have been admitted," the articles may be amended by "two-thirds of the incorporators." The new business corporation law reduces

the vote requirement to a majority, for the reason that "Such a decision should be subject to control by a majority, rather than any arbitrarily selected higher percentage."

The staff has followed the pattern of the new business corporation law, but notes that, because the Commission has determined to eliminate the "incorporator" concept, the amendment will be made by the directors. The New York law (Section 802) provides for amendment by a majority of the entire board of directors, while the ALI-ABA Model Act (Section 34) requires a vote of a majority of directors in office.

#### § 5922. Adoption of amendments after members admitted

Until 1957, Section 3632 provided for amendment of the articles by resolution of the directors and majority vote of the members. This section was amended in 1957 to permit, in the case of a "nonstock corporation," adoption by two-thirds of a quorum of the members; an exception was added in 1959 to take care of cases where members have unequal voting power to require approval of members holding "not less than a majority of the voting power." Although the staff has been unable to find any information relating to the reason for adopting the "two-thirds of a quorum" provision, the staff assumes that it is to permit additional flexibility in nonprofit corporations where it may be difficult to get a majority of voting members to cast their votes. The staff draft retains this provision, along with the alternate "majority of voting power" rule in cases where there is unequal voting power. The staff notes that Illinois and the ALI-ABA Model Act permit amendment by two-thirds of the members present at a meeting, while New York and Pennsylvania require only a majority of those present.

When the Commission considered this section two years ago, it made a tentative decision to eliminate the requirement of director approval of amendments--membership approval should be sufficient to authorize amendments. The

Commission has received the following comment from Mr. Robert Sullivan concerning this proposed change:

The reason that approval of the board of directors is required to approve amendments to the articles of incorporation is to assure that all such important changes have the approval and proper study by that body which is in charge and most familiar with the day to day affairs of the corporation. Elimination of this requirement can cause havoc at meetings of the membership where important changes can be raised from the floor and perhaps passed on the spur of the moment. I see no reason to have a procedure for nonprofit corporations which differs from that required of stock corporations.

The staff draft follows existing law.

§ 5924. Adoption of amendments by policymaking committee

Section 3632.5 was added in 1969 to facilitate adoption of amendments to the articles in cases where membership approval may be extremely burdensome (as, for example, in the case of a nonprofit corporation that lists all donors as members). When the Commission considered this section two years ago, it added the requirement that the policy-making committee be representative of the members to protect the committee's independence from the board of directors. The staff also notes that, where a bylaw authorizing formation of such a committee has been adopted by the board, the members may change or repeal the bylaw. Section 9400(b).

§ 5925. When class vote required

Sections 3633-3639 contain specific vote requirements (some majority, some two-thirds) for amendments to the articles that affect the share structure of a corporation, with particular requirements for approval by affected classes of shareholders. Sections 903 and 904 of the new business corporation law consolidate these provisions and substitute a uniform majority vote requirement.

Many of these provisions are plainly inapplicable to nonprofit corporations. Others, while they could be applicable to members and classes of members, will

have minimal relevance since the membership structure of a nonprofit corporation is usually contained in the bylaws. Bylaw amendments are subject to majority vote of the members or a majority of a quorum at a meeting; there are no special provisions relating to approval by membership classes although the articles or bylaws may impose such provisions. See Section 9400.

For these reasons, the staff has not attempted to construct provisions precisely parallel to Sections 903 and 904 of the new business corporation law. However, the staff does propose to substitute a general provision requiring class approval for certain types of amendments that would affect the rights of the class.

One precedent for a specific provision of this type directed to nonprofit corporations is Section 802(b) of the New York Not-for-Profit Corporation Law:

(b) Notwithstanding any provision in the certificate of incorporation or by-laws, members of a class shall be entitled to vote and to vote as a class upon the authorization of an amendment and, in addition to the authorization of the amendment required by paragraph (a)(1), the amendment shall be authorized by majority vote of the members of the class, when the proposed amendment would exclude or limit their right to vote on any matter except as such right may be limited by voting rights given to members of an existing class or of a new class.

While this provision is limited to amendments which would restrict voting rights, there is a Canadian reform proposal that covers all membership rights, privileges, and interests that basically would apply the business corporation provisions to nonprofit corporations: (Cumming, Proposals for a new Not-for-Profit Corporations Law for Canada (1973) § 1403):

(1) Members of a class are entitled to vote separately as a class upon a proposal to amend the articles to

(a) increase or decrease any maximum number of authorized membership interests of such class;

(b) effect an exchange, reclassification or cancellation of all or part of the membership interests of such class;

(c) cancel or change prejudicially the rights, privileges, restrictions or conditions attached to the membership interests of such class, and, without limiting the generality of the foregoing, that would

(i) reduce or cancel a liquidation preference,

(ii) cancel or change prejudicially voting or transfer rights;

(d) increase the rights or privileges of any class of membership interests having rights or privileges equal or superior to the membership interests of such class;

(e) create a new class of membership interests, or make any class of membership interests having rights or privileges inferior to the membership interests of such class, equal or superior to the membership interests of such class;

(f) effect an exchange or create a right of exchange of all or part of the membership interests of another class into the membership interests of such class.

(2) Subsection (1) applies whether or not membership interests of a class otherwise carry the right to vote.

(3) A proposed amendment to the articles referred to in subsection (1) is adopted when the members of each class entitled to vote separately thereon as a class have approved such amendment by a special resolution.

The staff proposal in Section 5903 adopts a very broad requirement of class approval. While it lacks the certainty of a listing such as in the Canadian proposal, the staff believes that it is better to have the flexibility of the general language and let the court resolve the question whether a class vote is necessary in case of a dispute. There is one additional feature of the staff draft that is noteworthy: It applies to bylaw amendments as well as to amendments of the articles since the membership structure of a nonprofit corporation will frequently be contained in the bylaws rather than in the articles.

#### § 5931. Contents of certificate of amendment

Section 5931 replaces two sections of the business corporation law--Section 905, which specifies the contents of a certificate after members have been admitted; and Section 906, which specifies the contents of a certificate before

members have been admitted. The staff believes that only one provision will suffice, particularly since the Commission has decided to eliminate incorporators, and Section 906 is designed primarily for amendments by the incorporators.

In this connection, the staff notes an apparent error in the business corporation law scheme. The first paragraph of Section 906 refers to the requirement of adoption of amendments by "a majority of the board"; the second paragraph of Section 906 permits such amendments to be filed in a certificate under Section 905. Section 905, however, relates only to amendments "approved by the board," which requires only a majority of a quorum rather than a majority of the entire board.

§§ 5940-5943. Restatement of articles

The Commission should be aware of three of the changes made by the staff from the business corporation provision on which Sections 5940-5943 are based:

(1) The business corporation law requires that the restated articles omit the signatures and acknowledgments of the incorporators and the names and addresses of the first directors and the initial agent for service of process. Under present law, the deletion of the signatures and acknowledgements of the incorporators is permissive rather than mandatory. The staff has left these omissions permissive for nonprofit corporations since, in many cases, incorporators or first directors are being honored by their positions as founders, and the nonprofit corporation wishes to keep their names in the articles.

(2) The business corporation law requires the restated articles to omit names and addresses of the first directors and initial agent in Section 910, while Section 900 precludes an amendment to the articles to accomplish this unless a statement has been filed under Section 1502 (annual statement of directors and agent for service). This appears inconsistent to the staff. The staff has permitted the restated articles to omit names and addresses of the first directors and initial agent only after such a statement has been filed.

(3) The business corporation law provides that the restated articles supersede "the original articles and all amendments," but neglects to indicate that it supersedes any previously filed restated articles. The staff draft remedies this defect.

Corporations Code § 9306 (repealed)

The staff recommends that Section 9306 not be continued. The provision permits nonprofit cooperatives formed under former Civil Code Sections 653t-653zd to amend their articles to alter the voting power, property rights, and interests of members. Although the Civil Code sections were repealed in 1931, Section 9306 (or its predecessor) was not enacted until 1945; it is evidently aimed to overcome the aspect of repealed Civil Code Section 653v that prohibited amendment of the articles to alter voting power, property rights, and interests "except by the unanimous written consent or the vote of all the members."

Section 9306 is unnecessary; the persons enacting it were evidently unaware that the provision repealing Civil Code Sections 653t-653zd also provided that "all nonprofit cooperative corporations organized and existing under and by virtue of said title twenty-two are to be deemed organized and existing under and by virtue of the general corporation law of the State of California." Cal. Stats. 1931, Ch. 869, p. 1840, § 1. The General Corporation Law is sufficiently broad to permit the amendments referred to in Section 9306. See Section 900 (corporation may amend articles in any and as many respects as desired).

Respectfully submitted,

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## CHAPTER 1. GENERAL PROVISIONS AND DEFINITIONS

Article 2. Certificates of Correction§ 5050. Correction of instruments

5050. Any agreement, certificate, or other instrument relating to a domestic or foreign nonprofit corporation filed pursuant to the provisions of this division may be corrected with respect to any misstatement of fact contained therein, any defect in the execution thereof, or any other error or defect contained therein by filing a certificate of correction.

Comment. Article 2 (commencing with Section 5050) continues provisions applicable to nonprofit corporations by former Section 127 through former Section 9002. For comparable provisions, see Section 109 (General Corporation Law).

§ 5051. Contents of certificate of correction

5051. The certificate of correction shall be entitled "Certificate of Correction of \_\_\_\_\_ (insert here the title of the agreement, certificate, or other instrument to be corrected and name(s) of nonprofit corporation or nonprofit corporations)" and shall set forth the following:

(a) The name or names of the nonprofit corporation or nonprofit corporations.

(b) The date the agreement, certificate, or other instrument being corrected was filed.

(c) The provision in the agreement, certificate, or other instrument as corrected and, if the execution was defective, wherein it was defective.

Comment. See Comment to Section 5050.

§ 5052. Execution of certificate of correction

5052. The certificate of correction shall be signed and verified or acknowledged as provided in this division with respect to the agreement, certificate, or other instrument being corrected.

Comment. See Comment to Section 5050.

§ 5053. Limitations on certificate of correction

5053, (a) No certificate of correction shall alter the wording of any resolution which was in fact adopted by the board or the members.

(b) No certificate of correction shall effect a corrected amendment of articles which amendment as so corrected would not in all respects have complied with the requirements of this division at the time of filing of the certificate of amendment.

Comment. See Comment to Section 5050.

§ 5054. Effective time of corrected instrument unaffected by filing certificate of correction

5054. The filing of the certificate of correction shall not alter the effective time of the agreement, certificate, or instrument being corrected, which shall remain as its original effective time.

Comment. See Comment to Section 5050.

§ 5055. Rights and liabilities affected by filing certificate of correction

5055. The filing of the certificate of correction shall not affect any right or liability accrued or incurred before such filing except that any right or liability accrued or incurred by reason of the error or defect being corrected shall be extinguished by such filing if the person having such right has not detrimentally relied on the original instrument.

Comment. See Comment to Section 5050.

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

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

Comment. Section 5151 is new; for a comparable provision, see Section 151 (General Corporation Law). The vote required for approval of the board is a majority of the directors present at a meeting duly held at which a quorum is present. See Section [307(j)]. As used in this section, "vote" includes written consent. See Section 5194. The phrase defined in this section is used in the following provisions:

§ 5922 (adoption of amendments after members admitted)

§ 5923 (adoption of amendments deleting first directors and initial agent)

§ 5942 (approvals required for restated articles)

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

§ 5173. Officers' certificate

5173. "Officers' certificate" means a certificate signed and verified by the chairman of the board, the president or any vice president and by the secretary, the chief financial officer, the treasurer, or any assistant secretary or assistant treasurer.

Comment. Section 5173 is new; for a comparable provision, see Section 173 (General Corporation Law). The requirements for verification may be found in Section 5193. The phrase defined in this section is used in the following provisions:

§ 5931 (contents of certificate of amendment)

§ 5940 (restated articles)

§ 5193. Verified

5193. (a) "Verified" means that the statements contained in a certificate or other document are declared to be true of the own knowledge of the persons executing the same in either of the following:

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

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

(b) Any affidavit sworn to without this state before a notary public or a judge or clerk of a court of record having an official seal need not be further authenticated.

Comment. Section 5193 is new; for a comparable provision, see Section 193 (General Corporation Law). The term defined in this section is used in the following provisions:

§ 5052 (execution of certificate of correction)

§ 5173 (officers' certificate)

§ 5251. Permitted contents of articles

5251. The articles of incorporation may set forth:

(a) Any or all of the following provisions, which shall not be effective unless expressly provided in the articles:

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

(2) A provision requiring, for any or all corporate actions, the vote of a larger proportion or of all of the members or of any class of members, or of a larger proportion or of all of the directors, than is otherwise required by this division.

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

(4) A provision prescribing the disposition of assets on dissolution of the nonprofit corporation.

(b) Any other provision, not in conflict with law, for the management of the activities and for the conduct of the affairs of the nonprofit corporation, including any provision which is required or permitted by this division to be stated in the bylaws.

Comment. Section 5251 supersedes former Section 9303. The pattern of the general Nonprofit Corporation Law is to specify rules regulating the affairs of nonprofit corporations absent contrary provisions in the articles or bylaws. Some of the rules may not be varied, however. See, e.g., Section 5236 (distributions to members prohibited). Other rules may be varied only in the articles; subdivision (a) of Section 5251 relates to rules of this type.

Subdivision (a)(1) is comparable to Section 204(a)(4)(General Corporation Law). See also Section 5222 (corporate existence is perpetual unless otherwise provided in the articles). Subdivision (a)(2) is comparable to Section 204(a)(5)(General Corporation Law). It supersedes former Sections 9303 and 3632 (articles may require greater percentage of voting power for adoption of amendments to the articles). See also Section 5920 (vote required in articles). Subdivision (a)(3) is comparable to Section 204(a)(6)(General Corporation Law). See also Sections 5230 (corporate powers may be limited in articles) and 5235 (right to engage in business activity may be limited in articles). Subdivision (a)(4) relates to Section 7032 (articles may provide manner of disposition of assets on dissolution).

Subdivision (b) is comparable to Section 204(d). See also former Sections 9303 and 5261 (contents of bylaws except to the extent expressly provided in the articles).

Note. Section 5251 is comparable to Section 204 of the business corporations law. The staff has not, however, completed review of all the provisions of Section 204 to determine if any others should go into Section 5251. In particular, the staff notes that Section 5251(a)(2) might be subject to the exceptions listed in Section 204(a)(5), which preclude higher vote requirements for election and removal of directors and for voluntary dissolution; these matters will be considered independently.

The staff notes that subdivision (a)(4) of Section 5251 is dependent on whether the Commission permits the bylaws to make other disposition of assets.

## CHAPTER 9. AMENDMENT OF ARTICLES

Article 1. Purposes of Amendments§ 5910. Permissible amendments of articles

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

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

Comment. Section 5910 supersedes former Sections 3600-3602, which were applicable to nonprofit corporations through former Section 9305. For a comparable provision, see Section 900(a)(General Corporation Law).

§ 5911. Amendments to delete first directors and initial agent

5911. Notwithstanding Section 5910, a nonprofit corporation shall not amend its articles to alter the statement in the original articles of the names and addresses of the first directors or the name and address of the initial agent for service of process except to correct an error in the statement or to delete either statement after the nonprofit corporation has filed a statement under Section 6502.

Comment. Section 5911 supersedes former Section 3603, which was applicable to nonprofit corporations through former Section 9305. For a comparable provision, see Section 900(b) (General Corporation Law). A correction of an error in the articles may be made by a certificate of correction. See Article 2 (commencing with Section 5050) of Chapter 1.

§ 5912. Extension of corporate existence

5912. (a) A nonprofit corporation formed for a limited period may at any time subsequent to the expiration of the term of its corporate existence, if it has continuously acted as a nonprofit corporation and conducted activity as such, extend the term of its existence by an amendment to its articles removing any provision limiting the term of its existence and providing for perpetual existence.

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

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

(d) If the filing of the certificate of amendment providing for perpetual existence would be prohibited by the provisions of Article 4 (commencing with Section 5240) of Chapter 2 if it were original articles, the Secretary of State shall not file the certificate unless by the same or a concurrently filed certificate of amendment the articles of the nonprofit corporation are amended to adopt a new available name.

Comment. Section 5912 supersedes former Sections 3700-3703, which were applicable to nonprofit corporations through former Section 9305. For a comparable provision, see Section 909 (General Corporation Law).

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

§ 5913. Amendment of articles of charitable corporation

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

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

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

Article 2. Adoption and Approval of Amendments

§ 5920. Vote required in articles

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

Comment. Section 5920 supersedes the last paragraph of former Section 3632, which was applicable to nonprofit corporations through former Sections 9303 and 9305. See Section 5251 (permitted contents of articles).

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

§ 5921. Adoption of amendments before members admitted

5921. Before any members have been admitted or where the nonprofit corporation has, in fact, no members other than the persons constituting its board of directors, an amendment of the articles may be adopted by a writing signed by a majority of the directors.

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

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

§ 5922. Adoption of amendments after members admitted

5922. (a) After any members have been admitted, an amendment of the articles may be adopted if approved by the board and by the members, either before or after the approval of the board.

(b) Approval of the members shall be by vote of two-thirds of a quorum of the members except that, where the members have unequal voting power, the amendment shall be approved by vote of members holding not less than a majority of the voting power.

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

§ 5923. Adoption of amendments deleting first directors and initial agent

5923. Notwithstanding Section 5922, an amendment deleting the names and addresses of the first directors or the name and address of the initial agent for service of process may be adopted after any members have been admitted with approval of the board alone.

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

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

§ 5924. Adoption of amendments by policymaking committee

5924. (a) If the bylaws of a nonprofit corporation so provide, any member action required for the adoption of amendments to the articles may be taken, instead, by the vote of at least two-thirds of the members of a policymaking committee created by the members of the nonprofit corporation to represent and act for the members of the nonprofit corporation in this matter, with or without authority to represent and act for the members of the nonprofit corporation in other matters.

(b) Only members of the nonprofit corporation who are representative of the membership shall serve on the committee.

Comment. Section 5924 continues former Section 3632.5, adding the requirement that the committee members be representative. As used in this section, "vote" includes written consent. See Section 5194.

§ 5925. When class vote required

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

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

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

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

Subdivision (b) makes clear that class approval of adverse amendments is not alone sufficient for adoption of the amendments. The amendments must meet the other statutory requirements for approval. See, e.g., Sections [9400] (adoption of bylaw amendments) and 5922 (adoption of articles amendments).

Article 3. Certificates of Amendment

§ 5930. Certificate of amendment

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

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

§ 5931. Contents of certificate of amendment

5931. The certificate of amendment shall consist of an officers' certificate, which shall state the following:

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

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

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

(1) That the amendment was approved by the required number of members in accordance with Article 2 (commencing with Section 5920) and the number of members constituting a quorum or, where the members have unequal voting power, the total number of votes entitled to be voted for the amendment.

(2) That the amendment was approved by the required number of members of a representative policymaking committee in accordance with Section 5925 and the total number of committee members entitled to vote for the amendment.

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

percentage vote required of the class, and the total number of members of the class.

Comment. Section 5931 supersedes former Sections 3671 and 3672; for a comparable provision, see Section 905 (General Corporation Law). Section 5931 omits some of the requirements of the former sections for the contents of the certificate of amendment, including a statement of the time and place of the meeting at which the resolution adopting the amendment was approved and the number of members voting in favor of the resolution. As used in this section, "vote" includes written consent. Section 5194. The phrase "officers' certificate" is defined in Section 5173.

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

§ 5932. Certificate of amendment to establish wording of amendment

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

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

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

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

Comment. Section 5932 supersedes former Section 3631; for a comparable provision, see Section 907 (General Corporation Law).

§ 5933. Effect of filing certificate of amendment

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

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

Comment. Section 5933 continues former Section 3673, which was applicable to nonprofit corporations through former Section 9305. For a comparable provision, see Section 908 (General Corporation Law).

Article 4. Restatement of Articles

§ 5940. Restated articles

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

Comment. Section 5940 continues a portion of the first paragraph of former Section 3800, which was applicable to nonprofit corporations through former Section 9305. For a comparable provision, see Section 910(a) (General Corporation Law).

§ 5941. Contents of restated articles

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

(a) The certificate may omit the signatures of the first directors and, after the nonprofit corporation has filed a statement under Section 6502, the names and addresses of the first directors and of the initial agent for service of process. Such omissions are not alterations or amendments of the articles.

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

Comment. Section 5941 supersedes a portion of the first paragraph of former Section 3800, which was applicable to nonprofit corporations through former Section 9305. For a comparable provision, see Section 910(a) (General Corporation Law). Unlike the former provision, Section 5941 permits the restated articles to omit the names and addresses of the first directors and the initial agent for service of process.

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

§ 5942. Approvals required for restated articles

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

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

Comment. Section 5942 supersedes the second paragraph of former Section 3800, which was applicable to nonprofit corporations through former Section 9305. For a comparable provision, see Section 910(b) (General Corporation Law). The phrase "approved by the board" is defined in Section 5151.

§ 5943. Effect of restated articles

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

Comment. Section 5943 supersedes former Section 3802, which was applicable to nonprofit corporations through former Section 9305. For a comparable provision, see Section 910(d) (General Corporation Law).

APPENDIXCorporations Code § 9303 (repealed)

9303. The articles of incorporation may state any desired provision for the regulation of the affairs of the corporation in a manner not in conflict with law, including any restrictions authorized by Article 2, Chapter 1, Part 3, Division 1, Title 1 of this code upon the power to amend the articles of incorporation.

Comment. Former Section 9303 is superseded by Sections 5251 and 5920.

Corporations Code § 9305 (repealed)

9305. Articles of incorporation of nonprofit corporations shall be amended in the same manner as provided in Title 1, Division 1, Part 8, Chapter 1 of this code.

Comment. Section 9305 is superseded by Chapter 9 (commencing with Section 5910) of Division 2.

Corporations Code § 9306 (repealed)

9306. Any nonprofit cooperative corporation formed under former Title 22, Part 4, Division 1, of the Civil Code may amend its articles to provide that the voting power, property rights, and interests of its members shall be equal or unequal, and if unequal, to set forth a general rule by which the voting power and property rights and interests of each member shall be determined and fixed.

Comment. Section 9306 is not continued. Any nonprofit cooperative corporation formed under former Title 22, Part 4, Division 1, of the Civil Code is "deemed organized and existing under and by virtue of the general corporation law of the State of California." Cal. Stats. 1931, Ch. 869, § 1, at 1840. The General Corporation Law permits the amendments referred to. Section 900.