

## Memorandum 76-60

Subject: Study 77.70 - Nonprofit Corporations (Voting of Memberships)

The Commission reviewed Chapter 7 (Voting of Memberships) at the March 1976 meeting, making a number of policy decisions which required further implementation. This memorandum presents the revised Chapter 7 that implements the Commission's decisions.

The staff believes that this chapter is central to the operation of the whole nonprofit corporation statute and should be gone over with great care. Whatever language and principles are finally approved to govern voting rights, there will need to be extensive conforming changes throughout the entire nonprofit corporation statute.

The draft of Chapter 7 and related provisions is discussed below.

§§ 5178, 5179, 5194, 5194.3, 5194.5. Definitions (Exhibit I)

The definitions of "proxy," "proxyholder," "vote," and "voting power" are comparable to definitions in the business corporation law. The definition of "voting members" is new and is intended simply to simplify drafting in the many instances in which the phrase "persons entitled to vote for the election of directors" is used throughout the statute.

§ 5263. Bylaws relating to voting rights (Exhibit I)

At the March 1976 meeting, the Commission determined that consideration of Section 5263 should be deferred until other decisions with regard to voting rights had been made.

With respect to subdivision (a)(1), the Commission has previously determined to make cumulative voting and proxy voting optional with the bylaws. See Sections 5321 and 5730.

Subdivision (a)(2) continues existing authority for both business and nonprofit corporations to permit creditors to have voting rights but enables the bylaws to make such provision, consistent with the general rule that nonprofit corporations may specify voting rights in the bylaws.

Subdivision (b) embodies a concept that the Commission tentatively adopted two years ago--that bylaws affecting the voting rights of members should be approved by the members. The Commission, at the March meeting, requested that the staff present for its review four variations on this theme:

- (1) That it be restricted to adverse effects on voting rights.
- (2) That it be limited to affected classes.
- (3) That the articles be permitted to adopt such a provision.
- (4) That it be omitted altogether.

The staff believes that numbers (3) and (4) are undesirable; some limitation on the power to affect members' voting rights is essential in light of the broad flexibility granted the bylaws in the nonprofit corporation statute to alter prescribed voting requirements. The staff notes that voting rights in business corporations are controlled by the articles, the amendment of which requires the approval of the members.

The staff has followed number (1) rather than number (2) because (2) could lead to an implication that member approval is required only where rights of a class are limited and not where the rights of all members are limited.

§ 5321. Election of directors (Exhibit I)

Subdivisions (a) and (c) of this section have been previously tentatively approved. The staff revision adds subdivisions (b) and (d), which are drawn from the business corporation law.

§§ 5710, 5711. Voting rights and manner of voting

These provisions have previously been tentatively approved.

§ 5712. Persons entitled to take member action

This section attempts to capture the decision made at the May 1976 meeting that, where a section requires the approval of the "members" or relates to an action that may be taken by some percentage of the "members," that approval or action may be taken only by the members entitled to vote for directors.

The staff has added to this decision the concept that the nonprofit corporation may prescribe additional persons required to take the action. The staff draft does not permit the bylaws to eliminate the members entitled to vote for directors from the basic decision-making process.

§ 5713. Vote required for member action

Adoption of this section will enable the statute to simply require approval by the members without specifying the vote required in every case. The only time a specification of vote will be necessary is when a super-majority is required.

§ 5714. Bylaws may require greater or class vote

This section makes clear that the nonprofit corporation may impose greater voting requirements. It should be noted that, in business corporations, this may be done only in the articles. Consistent with the rest of the nonprofit corporation statute, Section 5714 permits this to be done in the bylaws.

§ 5715. When class vote required

This section was tentatively approved by the Commission in March in a form requiring a class vote on article or bylaw amendments that adversely affect the rights of a class. The staff revision broadens the provision so that any corporate action for which the approval of the members is required must be approved by a class if the class is adversely affected by the action.

§ 5716. Disqualified votes

This section is comparable to a provision of the business corporation law.

§ 5717. Approval by board in lieu of approval by members

This section makes clear that the board may take member action when there are no voting members. This was a matter the Commission asked be clarified at a recent meeting.

§ 5718. Additional vote required by bylaws

This provision permits the bylaws to require approval by the members of actions which would not otherwise be required to be approved by the members. The comparable provision of the business corporation law requires the articles to impose such additional requirements for approval.

§§ 5720-5726. Exercise of voting rights

These provisions generally follow comparable provisions of the business corporation law. Sections 5720-5724 were not included in the original staff draft of this chapter but have been added at the Commission's direction at the March 1976 meeting. Section 5725 is previously approved. Section 5726 has added to it provisions relating to voting of memberships in the name of a group, pursuant to Commission direction.

§§ 5730-5736. Proxies

These provisions generally follow the comparable provisions of the new business corporation law. A proxy is limited to three-year maximum duration, however, unless coupled with an interest, and general proxies are authorized, in accordance with the Commission's decisions at the March 1976 meeting.

Proxy voting may be prohibited altogether by nonprofit corporations as provided in the existing nonprofit corporation law. In this connection, the

staff notes that the judgment in the automobile club case precludes the use of proxies in elections for directors:

9. No proxies may be used to vote in any election for the Board of Directors since a fair election or vote of the members cannot otherwise result; provided, however, proxies may be used for any lawful corporate purpose other than the election of directors or modification of election procedures.

§§ 5740-5744. Voting agreements

The provisions relating to voting agreements have been previously approved. The staff has split them into separate sections and renumbered them.

§§ 5750-5754. Inspectors of election

These provisions have been previously approved. They have been revised to be phrased in the singular and have been broken down pursuant to the Commission's direction at the March 1976 meeting.

§§ 5760-5765. Contested elections

The provisions relating to contested elections were tentatively approved by the Commission in March; they have been further broken down pursuant to the Commission's directions.

The staff calls your attention to the fact that the provisions of this article apply to foreign corporations in case of elections held or appointments made in this state as well as to domestic corporations. Existing law applies these provisions to foreign corporations as does the new business corporation law. For this reason, the staff has continued to apply the provisions to foreign nonprofit corporations. However, the staff sees no significant policy consideration which would require application of these provisions to foreign corporations while denying application to foreign corporations of other provisions designed to protect members.

Respectfully submitted,

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EXHIBIT I

404/251

§ 5178

Tentatively Approved March 1976  
Staff Reamending and Revision  
June 1976

§ 5178. Proxy

5178. "Proxy" means a written authorization by a person entitled to vote a membership giving another person power to vote the membership.

Comment. Section 5178 is comparable to the first sentence of Section 178 (General Corporation Law). For the provisions relating to the execution of a proxy, see Section 5721.

404/282

§ 5179

Staff Draft June 1976

§ 5179. Proxyholder

5179. "Proxyholder" means the person to whom a proxy is given.

Comment. Section 5179 is the same in substance as Section 179 (General Corporation Law).

Staff Draft June 1976

§ 5194. Vote

5194. "Vote" includes authorization by written consent, subject to Section 5339 and Article 3 (commencing with Section 5630) of Chapter 6.

Comment. Section 5194 is the same in substance as Section 194 (General Corporation Law); it is new to nonprofit corporation law. Section 5339 contains provisions relating to written consent by directors; Article 3 of Chapter 6 contains provisions relating to written consent by members.

Staff Draft June 1976

§ 5194.3. Voting members

5194.3. "Voting members" means persons entitled to vote for the election of directors.

Comment. Section 5194.3 is new. It should be noted that all members of a nonprofit corporation may vote for directors unless the bylaws provide otherwise. Sections 5411(b) (rights of members equal) and 5710 (voting rights). The phrase defined in this section is used in the following provisions:

- § 5321 (election of directors)
- § 5326 (filling vacancies)
- § 5327 (appointment of directors by court)
- § 5341 (deadlock among directors)
- § 5712 (persons entitled to take member action)

Staff Draft June 1976

§ 5194.5. Voting power

5194.5. (a) "Voting power" means the votes entitled to be cast for the election of directors at the time the determination of voting power is made, excluding a right to vote contingent upon the happening of a condition or event that has not occurred at the time.

(b) Where a class of membership is entitled to vote as a class for a director, the determination of voting power shall be based on the percentage of the number of directors which the class is entitled to elect out of the total number of authorized directors.

Comment. Section 5194.5 is comparable to Section 194.5 (General Corporation Law); it is new to nonprofit corporation law.

Staff Draft June 1976

§ 5263. Bylaws relating to voting rights

5263. (a) Subject to this division, the bylaws may provide for:

(1) The manner of voting by members and whether cumulative voting and proxy voting shall be allowed.

(2) Voting rights of holders of evidences of indebtedness, issued or to be issued by the nonprofit corporation. The provisions of this division applicable to voting of memberships apply to voting rights of holders of evidences of indebtedness.

(b) A bylaw that adversely affects voting rights of members shall be adopted, amended, or repealed by the members.

Comment. Subdivision (a)(1) of Section 5263 continues former Section 9402(d). For provisions relating to cumulative voting, see Section 5321; for provisions relating to proxy voting, see Sections 5730-5736.

Subdivision (a)(2) is comparable to Section 204(a)(7) (General Corporation Law) and continues provisions of former Section 306 applicable to nonprofit corporations through former Section 9002 except that subdivision (a)(2) permits the bylaws, rather than the articles alone, to provide voting rights for creditors.

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

043/168

§ 5321

Tentatively Approved May 1976  
Staff Revision June 1976

§ 5321. Election of directors

5321. Except as otherwise provided in this division or in the bylaws:

(a) Directors of a nonprofit corporation shall be elected by the members at a meeting of the members.

(b) The election need not be by ballot unless a member demands election by ballot at the meeting and before voting begins.

(c) No member may cumulate votes for directors.

(d) The nominees for election as director who receive the highest number of votes up to the number of directors to be elected are elected.

Comment. Section 5321 supersedes portions of former Sections 9302 and 9401(a), which permitted the bylaws to specify the time and manner of choosing directors. See also Section 5265 (bylaws relating to directors). Under Section 5321, the bylaws may specify a procedure for selection of directors by classes of members, by persons other than members, or by means other than election at a meeting of members. Compare former Section 10202 (Corporations for Charitable or Eleemosynary Purposes), which permitted the articles to provide for selection of trustees by specified associations or corporations, or by their officers, and by public officials. See also Sections 5633 (consents required to elect directors) and 5700 (voting rights and manner of voting).

Subdivision (a) is comparable to Section 301(a) (General Corporation Law), which provides for election of directors at the annual meeting of shareholders. A nonprofit corporation may waive the annual meeting. Section 5611(a). Election of directors may be by written consent pursuant to Section 5633. The bylaws of a nonprofit corporation may prescribe voting by mail or other reasonable means. Section 5700.

Subdivision (b) is the same in substance as Section 708(e) (General Corporation Law).

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

Subdivision (d) is comparable to Section 706(c) (General Corporation Law). Where the bylaws provide for election of directors by classes or some other means of election, they should also provide the rules governing such election.