

Memorandum 76-78

Subject: Study 77.230 - Nonprofit Corporations (Transition Provisions)

Attached to this memorandum (Exhibit I-pink) is a staff draft of the transition provisions for new Divisions 2 and 4 of Title 1 of the Corporations Code. The need for additional transition provisions may be revealed by persons commenting on the tentative recommendation from whom we have expressly requested guidance on this point. We will supplement this memorandum if any further areas requiring transition provisions are discovered.

The transition provisions delay beyond the proposed operative date of January 1, 1979 certain provisions of the new law to facilitate orderly changeover. The sections in the attached staff draft generally parallel the provisions of Chapter 23 (Transition Provisions) of the new General Corporation Law. The following table compares Chapter 23 with the staff draft:

<u>General Corporation Law</u>	<u>Staff draft (with notation of differences from General Corporation Law)</u>
§ 2300: Definitions	§ 6810: The phrase "operative date" is used in lieu of "effective date." A definition of "existing nonprofit corporation" is added.
§ 2301	
(a): Statement of general rule that new law applies on and after effective date.	§ 5210: (see discussion below)
(b): Statement of general rule that new law does not apply before effective date.	§ 6811(a)
(c): Prior law applies to vote or consent made before effective date; certificate may be filed after effective date in accordance with prior law.	§ 6811(b)

General Corporation Law

Staff draft (with notation of differences
from General Corporation Law)

§ 2302: New requirements for contents of articles do not apply until articles are amended stating that corporation so elects.

§ 6812: New requirements for contents of articles do not apply until corporation makes any amendment of articles.

§ 2303: Statement of powers in articles before corporate election under § 2302 not to be construed as a limitation unless expressly stated as such.

§ 6812: Rule of construction does not apply until corporation makes any amendment of articles.

§ 2304: New requirements for contents of bylaws do not apply until corporation makes § 2302 election by amending articles.

§ 6811(b): New requirements for contents of bylaws do not apply until corporation makes any change to bylaws or amends articles affecting statement of initial directors.

§ 2305: New provision re titles and duties of officers applies on effective date; "treasurer" deemed to be "chief financial officer."

No comparable provision. (Note: nonprofit corporation may designate its officers by such titles as it chooses. See Section 5266.)

§ 2306: New indemnification provisions apply on effective date regardless of when events occurred upon which indemnification is based; statement re indemnification in articles or bylaws on effective date not to be construed as limitation unless expressly so provided.

§ 6814.

§ 2307: Application of new law to required statements on share certificates.

No comparable provision. (Note: Section 5424 re required statement on membership certificates continues substance of former Section 9607.)

No comparable provision

§ 6815: Prior law applies to assessments if approved before operative date.

§ 2308: New law applies to distributions to shareholders made after effective date, except if contract for redemption of shares is made before effective date, shares may be redeemed if permissible under new law or prior law.

§ 6816: Refers to "payments to members."

General Corporation Law

Staff draft (with notation of differences from General Corporation Law)

§ 2309: New law restoring corporation's own shares when acquired by it to status of authorized but unissued shares applies only to shares acquired after effective date.

No comparable provision.

§ 2310: New law applies to shareholder meetings held after effective date (unless initially called and noticed for a date before effective date), to any vote cast at such a meeting, to a consent which becomes effective after effective date, and to any action by shareholders pursuant to such consent.

§ 6817: New law applies to action taken after operative date regardless of when approved.

§ 2311: New law applies to voting agreements and voting trusts made, amended, or extended after effective date. Prior law applies to such agreements and trusts made before effective date

§ 6818.

§ 2312: New law applies to shareholder derivative actions commenced after effective date. Prior law applies to such actions commenced before effective date.

§ 6819.

No comparable provision.

§ 6820: Permits board alone to adopt amendment of articles deleting reference to county where principal office is located.

§ 2313: New law applies to sales of assets, mergers, and reorganizations "consummated" after effective date, except if required shareholder approval has been given before effective date prior law applies.

§ 6821: New law applies to mergers and consolidations if agreement is filed after operative date; prior law applies if agreement is filed before operative date.

§ 2314: New law applies to action for involuntary dissolution commenced after effective date; prior law applies to such action commenced before effective date.

§ 6822.

General Corporation Law

Staff draft (with notation of differences from General Corporation Law)

§ 2315: New law applies to voluntary dissolution if certificate of election is filed after effective date; prior law applies if certificate is filed before effective date.

§ 6822(b).

§ 2316: Penalty for failure to qualify to transact intrastate business (newly applied to foreign associations) is deferred four months after effective date for such associations.

No comparable provision.

No comparable provision.

§ 14612: Preserves validity of statement of directors, officers, etc., and certificate of corporate agent for service of process, filed under prior law.

§ 2317: Corporate agent for service of process designated by corporation may be served at any office specified in agent's certificate, whether or not the location of such office is specified in the designation of the foreign corporation.

§ 14613.

§ 2318: Authorizes corporation formed before 1873 to elect to continue existence under new law.

No comparable provision, but see Sections 5104 and 5912.

§ 2319: Sections 5700-5908 of prior law continue to apply to suspended corporation until restored by Controller.

§ 6823.

Several sections of the attached staff draft are discussed below:

§ 6810. Definitions

The term "operative date" is used in Section 6810 in preference to "effective date," in conformity with the practice of the Legislative Counsel. A statute normally goes into effect on January 1 following the legislative session at which it was enacted. See Cal. Const. Art. 4, § 8(c)(1). When the operation of a statute is delayed, the date to which it is delayed is referred to as the "operative date." See 26 Op. Cal. Att'y Gen. 141 (1955).

§ 6811. Application of division to acts taken before operative date

This section continues subdivisions (b) and (c) of Section 2301. Subdivision (a) of Section 2301 merely states the basic rule that this division applies on its operative date to existing nonprofit corporations. The staff believes that this basic rule belongs among the provisions relating to the scope of the division, and proposes to revise subdivision (a) of Section 5102 to read:

(a) Except as otherwise provided in this section and in Chapter 12 (commencing with Section 6810), this division applies on the operative date to every nonprofit corporation ~~heretofore or hereafter~~ existing on the operative date or thereafter formed.

With this change, the duplicate language in Section 5104 can be deleted.

§§ 6812 and 6813. Application of provisions relating to contents of articles or bylaws

Under Sections 2302 and 2304 (General Corporation Law), the provisions of new law concerning required contents of articles and bylaws do not apply until the corporation files an amendment of its articles stating that it elects to be governed by the new law. Proposed Sections 5250 (superseding Section 9300) and 5311 of Nonprofit Corporation Law will make changes in the required contents of the articles, and will require the articles or bylaws to state the number of directors. The staff recommends a transition provision that falls short of giving nonprofit corporations complete discretion as to whether and when the new law shall apply. Rather the staff recommends that the new requirements concerning contents of articles be deferred until the nonprofit corporation makes any amendment of its articles, and that the new requirement that

the articles or bylaws state the number of directors be deferred until any change is made in the bylaws or until the articles are amended to alter or delete the statement of initial directors.

§ 6817. Application of new law to meetings, voting, and consents

Section 6817 is the same in substance as Sections 2391(c) and 2310 of General Corporation Law, with one important exception. Section 6817 is written so that, although prior law applies to a consent which becomes effective before the operative date, new law applies to the corporate action taken pursuant to such consent after the operative date. Section 2310 provides merely that new law applies to shareholder action pursuant to consent effective after the operative date, from which it may be inferred that prior law would be applied to action after the operative date pursuant to consent effective before the operative date.

Thus, under Section 6817 as drafted, if a nonprofit corporation proposed a merger to take place after the operative date pursuant to consents which became effective before the operative date, prior law would apply to the consents (e.g., requiring unanimous consent, Section 2239), and new law would apply to the merger (e.g., denying dissenters' rights, Comment to Section 6169).

§ 6820. Application of provisions relating to amendment of articles

Section 6820, which has no counterpart in the new business corporation law, enables the directors to rid the article of verbiage that has no use in the new nonprofit corporation law, without having to go to the trouble of member approval.

§ 6821. Application of provisions to sales of assets, mergers, and consolidations

Section 6818 is based on Section 2313 of General Corporation Law. Under Section 2313, the applicable law in the case of mergers, reorganizations, or sales of depends upon when the transaction is "consummated," except that if shareholder approval is required it depends upon when such approval was given. Under Section 6821, the applicable law depends, in the case of a merger or consolidation, on when the agreement of merger or consolidation is filed.

Respectfully submitted,

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EXHIBIT I

CHAPTER 19. TRANSITION PROVISIONS

Comment. This division becomes operative January 1, 1979. Section 5105. On the operative date, this division applies to existing non-profit corporations except as otherwise provided in this chapter. Section 5102. This chapter provides exceptions to blanket application of its provisions to existing nonprofit corporations in order to facilitate orderly compliance.

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§ 6810. Definitions

6810. As used in this chapter:

- (a) "Existing nonprofit corporation" means a nonprofit corporation formed prior to the operative date and existing on the operative date.
- (b) "Operative date" means the operative date of this division.
- (c) "Prior law" means the applicable law as in effect prior to the operative date.

Comment. Section 6810 is comparable to Section 2300 (General Corporation Law).

Cross-References:

Operative date, § 5105

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§ 6811. Application of division to acts taken before operative date

6811. Except as otherwise expressly provided in this chapter:

- (a) Acts, contracts, or other transactions by an existing nonprofit corporation or its directors or members, if occurring prior to the

operative date are governed by prior law, and if occurring on or after the operative date are governed by this division.

(l.) If a certificate or document that is required to be filed in a public office of this state relates to a vote by the directors or members of an existing nonprofit corporation prior to the operative date in accordance with prior law, the vote is effective and the certificate or document may be filed in the public office after the operative date in accordance with prior law.

Comment. Section 6811 is the same in substance as subdivisions (b) and (c) of Section 2301 (General Corporation Law). The succeeding sections of this chapter are express exceptions to the general rule stated in this section that actions taken by an existing nonprofit corporation, members, and directors are governed by prior law if taken prior to the operative date and are governed by this division if taken after the operative date.

Defined Terms.

Director, § 5140
 Existing nonprofit corporation, § 6810
 Operative date, § 6810
 Prior law, § 6810
 Vote, § 5152

31/516

§ 6812. Application of provisions relating to contents of articles

6812. (a) Article 5 (commencing with Section 5250) of Chapter 2 relating to contents of articles does not apply to an existing nonprofit corporation, and a statement in the articles relating to the purposes or powers shall not be construed (unless it is expressly so stated) as a limitation on the purposes or powers of an existing nonprofit corpora-

tion unless and until a certificate of amendment of the articles is filed on or after the operative date.

(b) Upon the filing of a certificate of amendment of the articles of an existing nonprofit corporation on or after the operative date, Article 5 (commencing with Section 5250) of Chapter 2 relating to contents of articles applies to an existing nonprofit corporation, and a statement in the articles relating to the purposes or powers shall be construed as a limitation on the purposes or powers of an existing nonprofit corporation.

Comment. Section 6812, unlike Sections 2302 and 2303 (General Corporation Law), defers the operative date of provisions relating to the contents of articles only until such time as the articles are amended. Thereupon, the provisions apply to an existing nonprofit corporation; there is no election to be made by the nonprofit corporation under Section 6812.

Defined Terms:

- Articles, § 5126
- Existing nonprofit corporation, § 6810
- Filed, § 5148
- Operative date, § 6810

31/517

§ 6813. Application of provisions relating to number of directors

6813. (a) Subdivision (a) of Section 5311 requiring that the number of directors be stated in the bylaws does not apply to an existing nonprofit corporation, which shall continue to be governed by prior law, unless and until bylaws are adopted, amended, or repealed or a certificate of amendment of articles is filed to alter or delete the names and addresses of initial directors on or after the operative date.

(b) Upon the adoption, amendment, or repeal of bylaws or the filing of a certificate of amendment of articles to alter or delete the names and addresses of initial directors on or after the operative date, subdivision (a) of Section 5311 requiring that the number of directors be stated in the bylaws applies to an existing nonprofit corporation.

Comment. Section 6813, unlike Section 2304 (General Corporation Law), defers the operative date of the provision requiring the bylaws to specify the number of directors only until such time as bylaws are adopted, amended, or repealed, or the articles are amended to alter or delete the names and addresses of initial directors, on or after the operative date. Thereupon, the provision applies to an existing nonprofit corporation; there is no election to be made by the nonprofit corporation under Section 6813.

Defined Terms:

Articles, § 5126
 Director, § 5140
 Existing nonprofit corporation, § 6810
 Filed, § 5148
 Operative date, § 6810
 Prior law, § 6810

§ 6814. Application of provisions relating to indemnification

6814. (a) Article 8 (commencing with Section 5380) of Chapter 3 applies to any proposed indemnification by an existing nonprofit corporation on or after the operative date, regardless of when the events upon which the indemnification is based occurred.

(b) A statement relating to indemnification contained in the bylaws of an existing nonprofit corporation on the operative date shall not be

construed as limiting the indemnification permitted by Article 8 (commencing with Section 5380) of Chapter 3 unless it is expressly stated as so intended.

Comment. Section 6814 is the same in substance as Section 2306 (General Corporation Law).

Defined Terms:

Bylaws, § 5132
Existing nonprofit corporation, § 6810
Operative date, § 6810

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§ 6815. Application of provisions relating to capital improvement assessments

6815. Subdivision (c) of Section 5512 does not apply to a capital improvement assessment levied by an existing nonprofit corporation prior to the operative date.

Comment. Section 6815 makes clear that a member may not exercise the withdrawal right to avoid a capital improvement assessment under Section 5512(c) after the operative date in the case of an assessment levied before the operative date.

Defined Terms:

Existing nonprofit corporation, § 6810
Operative date, § 6810

§ 6816. Application of provisions relating to payments to members

6816. (a) Article 5 (commencing with Section 5550) of Chapter 5 applies to a payment to members made after the operative date by an existing nonprofit corporation.

(b) A payment to members made by an existing nonprofit corporation after the operative date pursuant to a contract for the purchase or redemption of memberships entered into by the existing nonprofit corporation prior to the operative date may be made if permissible under Article 5 (commencing with Section 5560) of Chapter 5 or under prior law at the time the contract was entered into.

Comment. Section 6816 is the same in substance as Section 2303 (General Corporation Law).

Defined Terms:

Existing nonprofit corporation, § 6810
Operative date, § 6810
Prior law, § 6810

§ 6817. Application of provisions relating to members' meetings, consents, and voting rights

6817. Chapters 6 (commencing Section 5610) and 7 (commencing with Section 5710), other than Article 4 (commencing with Section 5740), apply to:

(a) A meeting of members of an existing nonprofit corporation held after the operative date and any vote cast at the meeting, whether or not a proxy was executed prior to the operative date, except that prior law applies if the meeting was initially called for a date prior to the

operative date and notice of the meeting was given to persons entitled to vote at the meeting.

(b) A written consent given by members of an existing nonprofit corporation that becomes effective on or after the operative date, whether or not the consent was executed prior to the operative date.

Comment. Section 6817 is the same in substance as Section 2310 (General Corporation Law) except that it does not apply to actions taken pursuant to written consent, which are governed by Section 6811.

Defined Terms:

Existing nonprofit corporation, § 6810
Operative date, § 6810
Prior law, § 6810
Proxy, § 5168
Vote, § 5182

§ 6818. Application of provisions relating to voting agreements

6818. Prior law applies to a voting agreement or voting trust in an existing nonprofit corporation entered into prior to the operative date except that Article 4 (commencing with Section 5740) applies to such an agreement or trust amended or extended on or after the operative date.

Comment. Section 6818 is the same in substance as Section 2311 (General Corporation Law).

Defined Terms:

Existing nonprofit corporation, § 6810
Operative date, § 6810
Prior law, § 6810

§ 6819. Application of provisions relating to derivative actions

6819. Chapter 8 (commencing with Section 5810) applies to an action by a member in the right of an existing nonprofit corporation commenced on or after the operative date, and prior law governs such an action commenced prior to the operative date.

Comment. Section 6819 is the same in substance as Section 2312 (General Corporation Law).

Defined Terms:

Existing nonprofit corporation, § 6810
 Operative date, § 6810
 Prior law, § 6810

§ 6820. Application of provisions relating to amendment of articles

6820. Notwithstanding Section 5920, an amendment of the articles of an existing nonprofit corporation may be adopted by approval of the board alone to delete the reference to the county in this state where the principal office for the transaction of the business of the existing nonprofit corporation is located.

Comment. Section 6820 is intended to enable the board alone to remove from the articles unnecessary verbiage that was included pursuant to former Section 9300(d).

Defined Terms:

Approval of the board, § 5122
 Articles, § 5126
 Existing nonprofit corporation, § 6810

§ 6821. Application of provisions relating to sales of assets,
mergers, and consolidations

6821. (a) Except as provided in subdivision (b):

(1) Chapter 10 (commencing with Section 6010) applies to a transaction by an existing nonprofit corporation consummated on or after the operative date.

(2) Chapter 11 (commencing with Section 6110) applies to a merger or consolidation of an existing nonprofit corporation if a copy of the agreement of merger or consolidation is filed on or after the operative date.

(b) Prior law applies to a transaction, merger, or consolidation described in subdivision (a) if a required approval of the members has been given either prior to the operative date or on or after the operative date but at a meeting of members initially called for a date prior to the operative date.

Comment. Section 6821 is the same in substance as Section 2313 (General Corporation Law) except that the time of "consummation" of a merger or consolidation is specified as the time of filing of a copy of the agreement.

Defined Terms:

Approval of the members, § 5124

Existing nonprofit corporation, § 6810

Filed, § 5143

Operative date, § 6810

Prior law, § 6810

§ 6822. Application of provisions relating to dissolution

6822. (a) Chapter 17 (commencing with Section 6719) applies to an action for involuntary dissolution of an existing nonprofit corporation commenced on or after the operative date, and prior law applies to such an action commenced prior to the operative date.

(b) Chapter 17 (commencing with Section 6710) applies to voluntary dissolution of an existing nonprofit corporation if the certificate evidencing the election to wind up and dissolve is filed on or after the operative date, and prior law applies to such a dissolution if the certificate is filed prior to the operative date.

Comment. Subdivision (a) of Section 6822 is the same in substance as Section 2314 (General Corporation Law). Subdivision (b) is the same in substance as Section 2315 (General Corporation Law).

Defined Terms:

Existing nonprofit corporation, § 6810

Filed, § 5148

Operative date, § 6810

Prior law, § 6810

§ 6823. Application of provisions relating to revivor of suspended rights

6823. If the corporate rights, privileges, and powers of an existing nonprofit corporation have been suspended and are still suspended immediately prior to the operative date pursuant to Sections 5700 to 5903, inclusive, of the prior law and statutes there referred to, the

prior law and statutes continue to apply to the existing nonprofit corporation until restoration by the Controller pursuant to prior law.

Comment. Section 6823 is the same in substance as Section 2319 (General Corporation Law).

Defined Terms:

Existing nonprofit corporation, § 6810

Operative date, § 6810

Prior law, § 6810

DIVISION 4§ 14612. Validity of statement or certificate filed under prior law

14612. (a) A corporation which prior to January 1, 1979, has filed in proper form the most recent statement required by former Section 1502 as enacted in Chapter 682 of the Statutes of 1975 or as subsequently amended, or required by former Section 3301 as enacted in Chapter 1038 of the Statutes of 1947 or as subsequently amended, has thereby satisfied the requirements of Sections 14601 to 14603, inclusive, until another statement is required to be filed pursuant thereto.

(b) A domestic or foreign corporation which prior to January 1, 1979, has filed in proper form the certificate required by former Section 1505 as enacted in Chapter 682 of the Statutes of 1975, or required by former Section 3301.5 as enacted in Chapter 628 of the Statutes of 1951 or as subsequently amended, has thereby satisfied the requirements of subdivision (a) of Section 14611.

Comment. Section 14612 is new; it ensures that the enactment of new Division 4 of Title 1 of the Corporations Code does not invalidate specified statements or certificates valid under prior law.

§ 14613. Place for service of process on corporate agent

14613. When a corporate agent for service of process has been designated by a domestic or foreign corporation prior to January 1, 1979, and the designation of agent included the name of a city, town, or

village wherein the corporate agent maintained an office, service on the agent may be made at any office of the agent set forth in the certificate of the corporate agent filed pursuant to Section 14611, former Section 1505 as enacted in Chapter 682 of the Statutes of 1975, or former Section 3301.5, 3301.6, 6403.5, or 6403.6 as enacted in Chapter 628 of the Statutes of 1951 or as subsequently amended, whether or not such office is in the city, town, or village.

Comment. Section 14613 is the same in substance as former Section 2317 (new General Corporation Law). "January 1, 1979" is substituted for "effective date" and appropriate adjustments are made to statutory references.

Defined Terms:

Domestic corporation, § 14403
Foreign corporation, § 14403