

6/3/76

Memorandum 76-58

Subject: Study 77.250 - Division 4 (Provisions Applicable to Corporations Generally)

We have sent you a redrafted version of Division 4 for insertion in your binder. We suggest you go through the entire division prior to the meeting and raise any questions you may have concerning particular sections at the meeting. The following are matters of significance we note for your attention.

§ 14401. Applicability of definitions in divisions 1 and 2

This section was drafted to avoid the need to repeal definitions in Division 4. Under the scheme adopted, a person concerned with a business corporation will need Division 1 and Division 4. A person concerned with a nonprofit corporation will need Division 2 and Division 4. Accordingly, there is no need to duplicate definitions in Division 4.

§ 14405. Transact intrastate business

As the Comment to Section 14405 notes, the term "transact intrastate business" applies to foreign nonprofit corporations as well as to foreign business corporations. See Corp. Code § 14450 (scope of division). This was true under 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).

§ 14512. Name which is likely to mislead, contains word "charitable," or which is prohibited by law

Note that we have added a new subdivision (c) to this section. If this addition is approved, the headline to the section should be expanded to conform to the headline set out above.

The staff would like to eliminate subdivision (a) of Section 201 from the General Corporation Law. We have compiled subdivisions (b) and (c) of that section in Division 4. Retaining subdivision (a) in the General Corporation Law would be misleading because there are many other limitations on names and there are other limitations on the Secretary of State filing articles without approval of the Superintendent of Banks. E.g., Fin. Code §§ 400 (proposed bank or trust company), 5506 (domestic

savings and loan association). Accordingly, we suggest that Section 400 of the Financial Code be amended to read as set out in Exhibit I attached.

§ 14530. Filing by Secretary of State

The last sentence of subdivision (c) was added by the Commission to make clear the date of filing of an instrument resubmitted for filing (one accompanied by a written opinion of a California attorney). The corrective bill adopts the date the instrument is received on resubmission as the date of filing. The staff prefers the corrective bill provision. It seems odd that something that is not filed can later be filed and affect the rights of a person who had something on file prior thereto. This problem is avoided by the corrective bill solution. Moreover, if we are going to generalize the provisions relating to the filing of instruments, there does not appear to be sufficient justification to change the rule which will be adopted by the Legislature when the corrective bill is enacted.

§ 14533. Instruments conforming to law

Note that we have limited the rule in subdivision (c) to instruments filed under Division 1, 2, or 3, but subdivision (b) is not so limited. We believe that subdivision (b) is a reasonable rule to apply to all instruments returned by the Secretary of State, whether under the Corporations Code or some other code. However, we fear that extension of subdivision (c) beyond the scope proposed by the staff could result in unintended consequences since we will not necessarily be aware of all the statutory provisions that might be involved.

§ 14861. Foreign insurers

We have discovered that the reference in subdivision (b) is incomplete. A reference to Section 12931 of the Insurance Code should be added; this section authorizes service on the insurance commissioner when service cannot be made on the agent appointed pursuant to Sections 1600-1605. Incidentally, Section 12931 has an interesting provision with respect to the use of certified or registered mail which was added by a 1972 amendment. The provision provides that notice is to be given to the defendant "by certified mail (or by registered mail if it is addressed to an area outside of the United States where certified mail service is not available)." This might be a more precise way of de-

scribing the type of mail to be used in various parts of our statute where we now authorize certified or registered mail but do not indicate which is to be used.

§ 14870. Merger of consolidation; surrender of right to transact intrastate business

The staff has added subdivision (c) to this section. Subdivision (c) is not essential since the corporation can continue to be served by serving the designated agent until it files a certificate of surrender. However, the subdivision is useful since the foreign disappearing corporation no longer exists and no longer is transacting intrastate business. The subdivision continues a requirement formerly imposed by former Section 4119. We do not know whether the omission of the substance of subdivision (c) in the new General Corporation Law was intentional. In connection with this problem, see subdivision (c) of Section 14885.

§ 14880. Additional method of service

Section 14880 is new. It is included to make clear that Article 4 (commencing with Section 14880) supplements the service of process provisions of the Code of Civil Procedure.

Additional Provisions

There are a few additional sections contained in the General Corporation Law which should apply to all corporations. The staff suggests that these be compiled in Division 4.

Two provisions concerning the evidentiary effect of certified copies should be compiled in Article 2 of Chapter 1 of Division 4 as Sections 14457 and 14458. A section relating to evidence of record ownership in case of a merger or consolidation should be compiled in the same article as Section 14459. These three sections are set out in Exhibit II attached.

Two sections relating to the enforcement powers of the Attorney General should be compiled in a new Article 3 (commencing with Section 14490) of Chapter 1 of Division 4. These sections are set out in Exhibit III attached.

References to Divisions 1 and 2 to Include Division 4

There are references in various other statutes to the General Corporation Law and to the General Nonprofit Corporation Law. If some provisions of the General Corporation Law are to be compiled in Division 4 and are to be made applicable to nonprofit corporations, it would be desirable to add a provision to Division 1 (General Corporation Law) and Division 2 (General Nonprofit Corporation Law) to make the reference include the provisions compiled in Division 4. The provisions set out in Exhibit IV are suggested.

Respectfully submitted,

John H. DeMouilly
Executive Secretary

EXHIBIT I

FINANCIAL CODE

§ 400. Filing of articles of incorporation and statement of capital and surplus

SEC. 1. Section 400 of the Financial Code is amended to read:

400. The articles of incorporation of the proposed bank or trust company shall be submitted to the superintendent for his approval before they are filed with the Secretary of State pursuant to the Corporations Code. The Secretary of State shall not file articles of incorporation setting forth a name in which "bank," "trust," "trustee," or related words appear unless the certificate of approval of the superintendent is attached thereto. After the articles have been filed with the Secretary of State the proposed bank or trust company shall:

(a) File with the superintendent a copy of its articles of incorporation, certified by the Secretary of State, and, after the organization meeting of the directors, a copy of its bylaws certified by its secretary.

(b) File with the superintendent a statement in such form and with such supporting data as he may require showing that the entire capital and surplus have been fully paid in lawful money, unconditionally, and that the funds representing such capital and surplus, less sums spent as authorized by this code for organization expense and for land, buildings, and fixtures are on deposit in a state or national bank in this state, subject to withdrawal on demand.

(c) Pay to the superintendent a fee of one hundred dollars (\$100) for each department.

Comment. Section 400 is amended to add the second sentence which continues the substance of subdivision (a) of Section 201 of the Corporations Code (General Corporation Law).

EXHIBIT II

045/196

§ 14457

Tentatively Approved
February 1976

Renumbered and Revised
May 1976

§ 14457. Evidence of corporate formation and existence

14457. For all purposes other than an action in the nature of quo warranto, a copy of the articles of a corporation duly certified by the Secretary of State is conclusive evidence of the formation of the corporation and prima facie evidence of its corporate existence.

Comment. Section 14457 is the same in substance as Section 209 (General Corporation Law). It continues former Section 313, which was applicable to nonprofit corporations through former Section 9002. See, e.g., Barber v. Irving, 226 Cal. App.2d 560, 38 Cal. Rptr. 142 (1964); see also Cavin Memorial Corp. v. Requa, 5 Cal. App.3d 345, 85 Cal. Rptr. 107 (1970). For an action in the nature of quo warranto, see Section 803 of the Code of Civil Procedure.

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

Cross-Reference:

Evidence of performance of conditions necessary to adoption of amendment to articles, §§ 908, [reference to comparable provision of nonprofit law]

Tentatively Approved
May 1976

Renumbered and Revised
May 1976

§ 14458. Evidence of bylaws, resolution, meeting, or minutes

14458. The original or a copy (if certified to be a true copy by a person purporting to be the secretary or an assistant secretary of the corporation) of:

(a) The bylaws of a corporation is prima facie evidence of the adoption of the bylaws and of the contents of the bylaws.

(b) The minutes of an incorporators', shareholders', members', directors', committee, or other meeting is prima facie evidence of the due holding of the meeting and of the matters stated in the minutes.

(c) A resolution adopted by the board, or a committee, or the shareholders or members, is prima facie evidence of the adoption of the resolution and of the contents of the resolution.

Comment. Section 14458 is the same in substance as Section 314 (General Corporation Law). It continues the former Section 832, which was applicable to nonprofit corporations through former Section 9002, but did not specifically refer to resolutions.

Tentatively Approved
May 1976

Renumbered May 1976

§ 14459. Evidence of record ownership in surviving or consolidated corporation

14459. Whenever a domestic or foreign corporation having any real property in this state merges or consolidates with another corporation pursuant to the laws of this state or of the state or place in which any constituent corporation was incorporated, and the laws of the state or place of incorporation (including this state) of any disappearing corporation provide substantially that the making and filing of the agreement of merger or consolidation vests in the surviving or consolidated corporation all the real property of any disappearing corporation, the filing for record in the office of the county recorder of any county in this state in which any of the real property of the disappearing corporation is located of either (a) a certificate prescribed by the Secretary of State, or (b) a copy of the agreement of merger or consolidation, certified by the Secretary of State or an authorized public official of the state or place pursuant to the laws of which the merger or consolidation is effected, shall evidence record ownership in the surviving or consolidated corporation of all interest of the disappearing corporation in and to the real property located in that county.

Comment. Section 14459 is the same in substance as Section 1109 (General Corporation Law) except that Section 14459 applies to nonprofit corporations as well as to business corporations. See Section 14450.

EXHIBIT III

968/721

§ 14490

Tentatively Approved
April 1976

Renumbered and Revised
May 1976

Article 3. Enforcement by Attorney General

§ 14490. Enforcement of certain statutory provisions by Attorney General

14490. The Attorney General, upon complaint that a domestic or foreign corporation is failing to comply with the provisions of Section 14455 or Chapter 6 (commencing with Section 600), Chapter 7 (commencing with Section 700), Chapter 15 (commencing with Section 1500), or Chapter 16 (commencing with Section 1600) of Division 1, or Chapter 6 (commencing with Section 5610), Chapter 7 (commencing with Section 5700), Chapter 15 (commencing with Section 6510), or Chapter 16 (commencing with Section 6610) of Division 2, or Chapter 5 (commencing with Section 14600) of this division, may in the name of the people of the State of California, send to the principal executive office of the corporation notice of the complaint. If the answer is not satisfactory, the Attorney General may institute, maintain, or intervene in such suits, actions, or proceedings of any type in any court or tribunal of competent jurisdiction or before any administrative agency for such relief by way of injunction, the dissolution of entities, the appointment of receivers, or any other temporary, preliminary, provisional, or final remedies as may be appropriate to protect the rights of shareholders or members or to undo the consequences of failure to comply with such requirements.

In any such action, suit, or proceeding, there may be joined as parties all persons and entities responsible for or affected by such activity.

Comment. Section 14490 is the same in substance as Section 1508 (General Corporation Law) but extends the scope of Section 1508 to comparable provisions of Division 2. In this respect, Section 14490 continues the requirements of former Section 2240 which applied to nonprofit corporations as well as business corporations. See former Section 119.

Cross-Reference:

Supervision of charitable trusts, § 5564, Govt. Code §§ 12580-12597

406/167

§ 14491

Tentatively Approved
May 1976

Renumbered and Revised
May 1976

§ 14491. Action by Attorney General to dissolve corporation

14491. (a) The Attorney General may bring an action against any domestic corporation or purported domestic corporation in the name of the people of this state, upon the Attorney General's own information or upon complaint of a private party, to procure a judgment dissolving the corporation and annulling, vacating, or forfeiting its corporate existence upon any of the following grounds:

(1) The corporation has seriously offended against any provision of the statutes regulating corporations.

(2) The corporation has fraudulently abused or usurped corporate privileges or powers.

(3) The corporation has violated any provision of law by any act or default which under the law is a ground for forfeiture of corporate existence.

(4) The corporation has failed to pay to the Franchise Tax Board for a period of five years any tax imposed upon it by the Bank and Corporation Tax Law.

(b) If the ground of the action is a matter or act which the corporation has done or omitted to do that can be corrected by amendment of its articles or by other corporate action, such suit shall not be maintained unless (1) the Attorney General, at least 30 days prior to the institution of suit, has given the corporation written notice of the matter or act done or omitted to be done and (2) the corporation has failed to institute proceedings to correct it within the 30-day period or thereafter fails to prosecute such proceedings.

(c) In any such action the court may order dissolution or such other or partial relief as it deems just and expedient. The court also may appoint a receiver for winding up the affairs of the corporation or may order that the corporation be wound up by its board subject to the supervision of the court.

(d) Service of process on the corporation may be made pursuant to Chapter 4 (commencing with Section 14550) or by written notice to the president or secretary of the corporation at the address indicated in the corporation's last tax return filed pursuant to the Bank and Corporation Tax Law. The Attorney General shall also publish one time in a

newspaper of general circulation in the proper county a notice to the shareholders or members of the corporation.

Comment. Section 14491 is the same in substance as Section 1801 (General Corporation Law) except that Section 14491 applies to nonprofit corporations as well as to business corporations. See Section 14450. In this respect, Section 14491 continues the substance of former Sections 4690-4693, which applied to nonprofit corporations by the application of Section 9002.

Note. Section 14491 includes the last sentence, relating to newspaper publication, since this section has been made one of general application.

EXHIBIT IV

992/950

Corp. Code § 100

§ 100. Citation of division; effect of reference to division

SEC. __. Section 100 of the Corporations Code is amended to read:

100. (a) This division shall be known and may be cited as the General Corporation Law.

~~(b) This title of the Corporations Code, and any division, part, chapter, article or section thereof, may at any time be amended or repealed.~~

(b) Any reference to the General Corporation Law or to this division shall be deemed to include Division 4 (commencing with Section 14400).

Comment. Section 100 is amended to delete former subdivision (b) and to add a new subdivision (b). Former subdivision (b) is superseded by Section 14456. New subdivision (b) has been added because some of the provisions formerly found in this division have been recompiled in Division 4.

968/725

Corp. Code § 5000

§ 5000. Citation of division; effect of references to division

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

(b) Any reference to the General Nonprofit Corporation Law or to this division shall be deemed to include Division 4 (commencing with

Section 14400).

Comment. Section 5000 is comparable to Section 100 (General Corporation Law) and continues the substance of former Section 9000.