

Memorandum 76-59

Subject: Study 77.400 - Nonprofit Corporations (Tentative Draft--General Nonprofit Corporation Law)

This memorandum presents a review of the entire binder of the nonprofit corporation law. The objective of the memorandum is to obtain tentative approval of those provisions not yet tentatively approved so that a tentative recommendation may be distributed promptly for comment. In this connection, the staff requests authority to make any necessary technical, conforming, and editorial changes after approval of the binder but before it is distributed for comment; there is not sufficient time to bring such matters before the Commission. The provisions of the draft statute will be subject to further review after comments are received on the tentative recommendation.

The staff plans to raise at the meeting the matters listed below. The Commission should plan to raise any other matters concerning the statute at that time.

§ 5000. Short title

The short title of the existing law is "General Nonprofit Corporation Law." The staff recommends that the word "general" be deleted for the following reasons:

- (1) To help distinguish references to the new statute from references to the old statute.
- (2) For a shorter and easier reference.
- (3) With the repeal of the remainder of Division 2, the special statutes relating to nonprofit corporations will be cleaned out, so there is no need to characterize the statute as "general."

§ 5102. Scope of division

This provision may require further refinement as decisions are made with respect to foreign corporations, transitional provisions, and conforming changes in other statutes.

§ 5103. Rules of practice in this division

Exhibit I (pink) contains a provision relating to the rules of practice to be utilized in actions and proceedings under the nonprofit corporation law. This section codifies existing practice in the courts. See, e.g., Columbia Engineering Co. v. Joiner, 231 Cal. App.2d 837, 42 Cal. Rptr. 241 (1965) (utilization of motion for judgment under Code of Civil Procedure Section 631.8 in action to determine validity of election of directors); Simpson v. Nielson, 77 Cal. App. 297, 246 P. 342 (1926) (power to issue temporary restraining order in similar action); Homestake Mining Co. v. Superior Court of City & County of San Francisco, 11 Cal. App.2d 488, 54 P.2d 535 (1936) (writ of mandate compelling corporation to allow shareholder inspection of corporate records).

The Commission has suggested that the staff consider enactment of rules for a special summary proceeding to be utilized to enforce rights granted to members. The staff has reviewed this issue and recommends against enactment of such special procedures. The courts have been able to protect shareholders' and members' rights under existing law without need of special procedures, utilizing provisions for extraordinary writs, temporary relief, and equitable remedies where appropriate. Concern that the provision of certain specific procedures or remedies in the General Nonprofit Corporation Law may imply general preemption of the usual rules governing actions and special proceedings will be alleviated by the enactment of Section 5103.

The staff also plans to add to the Comment of each section involving enforcement of such rights a reference to the procedure to be followed.

§ 5104. Bylaws may not alter provisions of division

The Commission at the April meeting tentatively adopted a proposal that the bylaws may not limit the rights provided by statute absent express permission to do so in the statute. Section 5104 (Exhibit II--yellow) embodies the Commission's decision.

§ 5113. Mailing

Section 8 of the Corporations Code (provisions of general application to the whole code) provides that any reference to registered mail includes certified mail. With this information, the staff proposes the following amendment to Section 5113.

5113. (a) Any reference in this division to mailing means first-class mail, postage prepaid, unless ~~registered-mail-is~~ otherwise specified.

~~(b)--Registered-mail-includes-certified-mail.~~

The staff plans to place this section among the definitions.

§ 5114. Financial statements

The staff plans to remove this section to the definitions or another more appropriate spot in the division.

§ 5115. Independent accountant

The business corporation law clean-up bill revises this section to read, in essence:

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who is engaged ~~by-the-nonprofit-corporation~~ to audit ~~its~~ financial statements of the nonprofit corporation or perform other accounting services.

The staff plans to make this revision and to place Section 5115 among the definitions.

§ 5149. Acknowledged

At the April 1976 meeting, the Commission queried use of the phrase "certificate of acknowledgment" in subdivision (b). Certificate of acknowledgment is the phrase properly used in California in the Civil Code; the staff assumes that, regardless whether a different phrase is used in another jurisdiction, the acknowledgment would have to conform to the basic contents and execution of a California certificate of acknowledgment. The staff recommends no change in the section.

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

The staff proposes the deletion of this provision which was previously tentatively approved. We have now completed the provisions relating to actions by the board and by committees, and the section is superfluous in light of Sections 5337 (acts of board) and 5353 (authority of committees).

§ 5154. Articles

The question has been raised whether the definition of articles should include agreements of merger and consolidation in light of a comparable provision in the business corporation law. The staff notes that the clean-up bill eliminates the reference to agreements of merger; the staff recommends no change in Section 5154 as tentatively approved.

§ 5155. Board

The staff recommends the definition of "board" as approved at the May meeting be revised to read as follows, in order to implement the Commission's decision to permit multiple boards:

§ 5155. Board

5155. "Board" means the :

(a) The board of directors of the nonprofit corporation.

(b) If the nonprofit corporation has multiple boards of directors, the appropriate board of directors.

Comment. Subdivision (a) of Section 5155 is the same in substance as Section 155 (General Corporation Law). Subdivision (b) is new; a nonprofit corporation may provide for multiple boards with differing authority. See Section 5315.

§ 5156. Business corporation

The Commission has previously requested that the staff give consideration to expanding the definition of "business corporation" to include such other corporations as cooperatives, and so on. The staff believes that such a broadened definition is warranted, as the phrase is used in the nonprofit corporation law. The staff recommends the following definition.

5156. "Business corporation" means a corporation organized under the laws of this state, other than a nonprofit corporation.

Comment. Section 5156 is new. A reference in this division to a business corporation includes corporations sole, cooperative corporations, banks, credit unions, and the like. The term "nonprofit corporation" is defined in Section 5172.5.

§ 5158. Class

The staff proposes to use the following definition for ease of drafting throughout the statute:

§ 5158. Class

5158. "Class" means class of membership.

Comment. Section 5158 is new. A nonprofit corporation may have such classes of membership as the bylaws provide, and, in the absence of a classification, there is deemed to be one class. Section 5411.

§ 5164. Directors

The definition of directors was tentatively approved at the May 1976 meeting. The staff recommends that it be revised to conform with language of the clean-up bill and to enable the formation of multiple boards of directors:

§ 5164. Director

5164. (a) "Director" ~~includes the~~ or "directors" means a member or members of the board .

(b) The following persons and their successors are directors :

~~(a)~~ (1) Persons Natural persons named in the articles to act in the capacity of initial directors.

~~(b)~~ (2) Persons Natural persons designated, elected, or appointed as directors or by any other name or title to act in the capacity of directors.

Comment. Subdivision (a) of Section 5164 is new. For the definition of "board," see Section 5155.

Subdivision (b) is the same in substance as Section 164 (General Corporation Law). It continues former Section 110 which was applicable to nonprofit corporations through former Section 9002.

§ 5169. Filed

The introductory proviso of this section is unnecessary since the nonprofit corporation law does not refer to filing other than in the office of the Secretary of State. Moreover, even if the law should refer to filing elsewhere, Section 5101 (definitions govern unless the provision or the context otherwise requires) should take care of the problem. The staff proposes to delete the proviso.

§ 5172.5. Nonprofit corporation

The staff recommends the adoption of the following definition of nonprofit corporation:

§ 5172.5. Nonprofit corporation

5172.5. "Nonprofit corporation" means a corporation organized under this division or under a predecessor general nonprofit corporation law, and any other corporation subject to this division.

Comment. Section 5172.5 is new. For the scope of this division, see Section 5102. Corporations subject to this division include: [to be supplied]

This definition may require further refinement as the scope of the division is defined and as decisions with respect to foreign corporations and conforming changes are made.

§ 5172.7. Notice

The business corporation clean-up bill would add a provision relating to the time a notice is given or sent (deposit in the mail, etc.). The staff proposes to adopt this provision for the nonprofit corporation law. See Exhibit III (green).

§ 5175. Parent

In order to fill a gap in the statute, the staff recommends adoption of the following definition:

§ 5175. Parent

5175. "Parent" of a nonprofit corporation means a business corporation or nonprofit corporation which owns directly or indirectly through one or more intermediaries, memberships possessing more than 50 percent of the voting power of the nonprofit corporation.

Comment. Section 5175 is comparable to Section 1175 (General Corporation Law). The term defined in this section is used in the following provisions:

- § 5372 (loans to officers and directors)
- § 6523 (additional required information)

§ 5193. Verified

The staff believes that the reference in subdivision (a) of this section to verification of statements in a "certificate or other document" is adequate since the requirement of verification is made only with regard to certificates. The staff recommends no change in this section.

§ 5194. Vote

The staff proposed revision of this section is attached to Memorandum 76-60 (Voting of Memberships).

§ 5211. Medical services corporation

This is a special provision that the staff believes is inappropriate in a nonprofit corporation law of general character. The staff recommends it be removed to the Business and Professions Code.

§ 5212. Legal services corporation

This is a special provision that the staff believes is inappropriate in a nonprofit corporation law of a general character. The staff recommends it be removed to the Business and Professions Code.

§ 5213. Incorporation of unincorporated association

Some time ago, the Commission requested that the staff draft an appraisal remedy for dissenting members when an unincorporated association incorporates. The staff has not drafted the remedy in light of the Commission's policy decision not to provide dissenters' rights for other corporate actions.

§ 5214. Incorporation of subordinate body

The staff recommends the deletion of subdivision (c) relating to corporate seals. Since a corporate seal is no longer given any legal effect by statute, a provision enabling an incorporated subordinate body to retain its unincorporated seal, if any, is unnecessary.

The Commission directed the staff to collect cases involving subdivision (d)(dissolution of subordinate body) for placement in the Comment. Research has not disclosed any such cases.

§ 5223. Evidence of corporate formation and existence

The Commission requested the staff to research the interrelationship of this section and the doctrine of alter ego. The staff recommends that the following language be added to the Comment:

Section 5223 does not in any way affect the equitable doctrine in which the corporate entity is "disregarded" in order to fasten responsibility upon the owners who are found to be the alter ego of the corporation. In applying the alter ego doctrine, the courts do not in fact disregard a corporation's otherwise legal existence, as may be established under this section, but instead treat the corporation and its owners as "procedurally synonymous" and not as "separate juristic entities." People v. Clauson, 231 Cal. App.2d 374, 379, 41 Cal. Rptr. 691 (1964); see also Cavin Memorial Corp. v. Requa, 5 Cal. App.3d 345, 85 Cal. Rptr. 107 (1970).

§ 5222. Filing of articles

The staff recommends a clarifying amendment to this provision:

5222. The corporate existence begins upon the filing of the articles and continues perpetually unless otherwise expressly provided in the articles or until terminated in the manner provided by law .

Comment. . . .

Section 5222 also makes clear that the corporate existence is subject to termination in the manner provided by law. See, e.g., Chapters 18, 19, 20 (dissolution).

§ 5224. Additional requirement for charitable corporations

This section, which requires a charitable corporation to send a copy of its articles to the Attorney General, embodies a Commission decision at the February 1976 meeting. The Commission has not previously reviewed the language of this section.

§ 5230. Powers of nonprofit corporation

The Commission made a number of suggestions for revision of this provision at the February 1976 meeting. The staff draft, attached as Exhibit IV (buff), incorporates the Commission's suggestions.

§ 5231. Defense of ultra vires

In order to increase clarity, this section has been split up and revised. Subdivision (a) of Section 208 combines the provisions of subdivisions (a) and (b) of existing Section 803. The revised draft of Section 5231 follows Section 803 in this regard. See Exhibit V (blue).

Subdivision (b) of the former draft of this section is now Section 5241.

The staff recommends that the phrase "a proceeding by . . . the state" be retained. There are situations in which parties other than the Attorney General are authorized to bring actions on behalf of the state, generally with the consent of the Attorney General.

The phrase "in cases where third parties have not acquired rights thereby" refers to situations before contracts have been executed. The result is to limit the injunctive remedy to cases of future unauthorized contracts, protecting the rights of parties to existing contracts (whether or not executory). 1 H. Ballantine & G. Sterling, California Corporation Laws § 65, at 116.21 n.44 (4th ed. 1976).

§ 5236. Distributions to members prohibited

The staff has added paragraph (4) to this section to make clear that payments to members may be made, e.g., by way of repayment of debts owed to members, and other payments authorized to be made by the finance chapter.

The staff would also add to Section 5236 a new paragraph (5):

(5) Purchase memberships as provided in Article 2 (commencing with Section 7020) of Chapter 20.

Comment. . . .

Paragraph (5) implements the authority of the nonprofit corporation to avoid dissolution by repurchase of memberships pursuant to Section 7020 et seq.

§ 5237. Special derivative action against members

The business corporation law contains a provision for recovery of illegal distributions to shareholders. The staff has adapted this provision to nonprofit corporations in Exhibit VI (gold). The staff recommends that the section be adopted for the time being; however, it is quite similar to Sections 5374 (special derivative action against directors) and 7058 (recovery of improper distribution to members on dissolution), and the three probably ultimately should be combined.

§§ 5250, 5251. Contents of articles

The substance of these provisions has been tentatively approved at previous meetings. The Commission has not before tentatively approved the precise language.

§ 5252. Provisions effective only if stated in the articles

This section has been drafted in accordance with the Commission's instructions at the March 1976 meeting. The staff recommends the deletion of subdivision (c) and its placement among the bylaw provisions. See Memorandum 76-60 (Voting of Memberships).

The business corporation law has a provision that reads in substance:

Nothing in this section affects the enforceability, as between the parties thereto, of a lawful agreement not otherwise contrary to public policy.

The staff is unable to discern a reason for this provision, at least in the context of our proposed Section 5252; we recommend that it not be included in the nonprofit corporation statute.

§ 5261. Bylaws relating to members

The staff has revised the introductory portion of this section so that it is consistent with the other bylaw provisions. The staff recommends the addition of the following subdivision to this section:

(e) Penalties for violations of the bylaws by the members.

Comment. . . .

.. Subdivision (e). This subdivision makes applicable to all nonprofit corporations a provision formerly applicable to a limited number of corporations. See former Sections 12004 (chambers of commerce) and 13242(e) (fish marketing corporations) and Food and Agricultural Code Section 54117 (agricultural cooperatives).

§ 5262. Additional bylaws relating to members

The staff revision of this section adds subdivision (d), which is a continuance of existing law. There is a typographical error in the subdivision, which should read:

(d) The making of annual reports and financial statements to the members.

§ 5263. Bylaws relating to voting rights

The staff proposes a revision of this section in connection with Memorandum 76-60 (Voting of Memberships).

§ 5312. Term of directors

The Commission requested the opportunity for further review of this section. Subdivision (b) has been added at the direction of the Commission at the May 1976 meeting.

§ 5315. Multiple boards

This section implements a May Commission decision to permit nonprofit corporations to have more than one independent board.

§ 5316. Advisory and other committees

This section implements a May Commission decision to permit nonprofit corporations to have committees without corporate authority which are not necessarily composed of or appointed by the directors.

§ 5337. Acts of the board

The voting requirement for directors found in the new business corporation law may be outlined as follows:

(1) The general rule is a majority of a quorum at a meeting. § 307(a)(8).

(2) A greater or a unanimous vote may be required, but only in the articles. § 204(a)(5). This rule is subject to the limited exception that the bylaws may require a vote of a majority of the authorized directors. § 204(a).

(3) A lesser vote may not be permitted by the bylaws. § 307(a)(8). Whether a lesser vote may be permitted by the articles is not clear. Compare Section 204(a) with Section 204(d).

Existing law governing nonprofit corporations provides the general rule that a majority of a quorum at a meeting is necessary, but that the articles or bylaws may require a greater vote. § 817. The staff sees no reason to depart from this scheme and proposes that Section 5337(a) be revised as set out in Exhibit VII (white).

§ 5361. Chief executive officer

As tentatively approved, this section followed the comparable language of Section 312(a) of the business corporation law: The president or chairman of the board is "the general manager" and chief executive officer. The staff has deleted the reference to "general manager" in Section 5361 because staff research indicates that the phrase "general manager" appears in the provisions relating to service of process where it has a meaning quite different from that of this section. For purposes of the inherent agency authority of the president or chairman of the board, the reference to "chief executive officer" is sufficient.

§ 5362. Selection of officers

The clean-up bill makes what amounts to the following changes in Section 5362:

5362. Except as otherwise provided by the bylaws ~~or a resolution of the board~~ :

(a) Officers are chosen by the board and serve at the pleasure of the board , subject to the rights, if any, of an officer under a contract of employment .

(b) Any number of offices may be held by the same person.

The staff sees no reason why not to conform to the business corporation law here.

§ 5374. Special derivative action against directors

The Commission at the March 1976 meeting tentatively approved this section subject to deletion of some procedural provisions. The staff has deleted the procedural provisions accordingly.

§ 5380. Indemnification (definitions)

The business corporations clean-up bill makes clear that a person serving as an agent of a foreign corporation at the request of a domestic corporation is covered by the indemnification provisions. A comparable change in Section 5380 would require amendment of (a)(2) to read:

(2) Another foreign or domestic nonprofit corporation, a foreign or domestic business corporation, a partnership, a joint venture, a trust, or other enterprise at the request of the nonprofit corporation or a predecessor nonprofit corporation.

§ 5389. Application of article to fiduciary of employee benefit plan

The business corporations clean-up bill makes clear that the indemnification provisions do not limit employee benefit plans. The Commission has previously determined that this should be clarified for nonprofit corporations. A provision along the lines of the clean-up bill would read:

(b) Nothing in this article ~~affects or~~ limits a right to indemnification to which a person described in subdivision (a) may be entitled by contract or otherwise , which shall be enforceable to the extent permitted by applicable law other than this article .

§ 5391. Validity of corporate instruments signed by officers

This section has been revised and renumbered and grouped with related provisions. See Sections 5240-5243 (Exhibit VIII--pink). Section 5241 is similar to Section 208(b). The exclusion regarding limitations on the board's authority in that provision has been placed in subdivision (b) of Section 5241 and the wording revised in order to clarify its effect; it excludes illegal contracts from the operation of the section.

§ 5612. Failure to hold annual meeting

This section has been revised in accordance with the Commission's instructions at the April 1976 meeting to apply only where an annual meeting is required by law or the bylaws. With respect to the procedure in an action under this section, the writ of mandate procedure should be adequate. The staff plans to add a Comment to this effect with a cross-reference to the provision incorporating the general rules of civil actions and proceedings.

§ 5615. Vote required

This section will be replaced by a provision in Chapter 7 (Voting of Memberships).

§ 5617. Vote required absent a quorum

This section is defective in apparently permitting approval of corporate actions by a majority of votes required to constitute a quorum even where the law or bylaws require a larger vote for approval of the action. The staff recommends that the words "or such other vote as is required by this division or the bylaws" be added to the end of this section.

§ 5620. When notice required

Subdivision (b) has been added to this section pursuant to the Commission's direction at the April 1976 meeting.

§ 5624. Persons to whom notice given

This section fills a gap in the statute.

§ 5625. Notice of special meeting

This section has been revised to be consistent with other Commission decisions relating to special meetings. The reference to Section 305(c) should be deleted and a reference made in the Comment to the writ of mandate procedure and the provision incorporating the general rules of civil actions and proceedings.

§ 5627. Validation of defectively noticed meeting

The clean-up bill would amend the provision comparable to subdivision (b)(2) to read:

(2) The person expressly objects at the meeting to the consideration of the matters required by this division to be but not included in the notice.

The staff believes this is a useful clarification.

§ 5628. Notice required for approval of specific proposals

The statutory references in this section should be to Sections 5371, 5372, 5922, 6001, 6121, 6910, and 7056.

§ 5631. Notice required for consent

The statutory references in this section should be to Sections 5371, 5372, 5385, 6121, and 7056.

§ 5633. Consents required to elect directors

The staff has now determined that this section is inappropriate for non-profit corporations where cumulative voting is not required. The staff recommends that it be amended to read:

5633. Notwithstanding Section 5630, directors may not be elected by written consent except by ~~unanimous~~ written consent of all members ~~entitled-to-vote-for-the-election-of-directors~~ holding a majority of the voting power .

Comment. Section 5633 is comparable to Section 603(d) (General Corporation Law) except that a majority rather than unanimous consent is required. This provision is new to nonprofit corporation law.

§ 5640. Form of proxy or written consent

Pursuant to the Commission's instructions at the April 1976 meeting, this section has been split in two. The provisions relating to proxies are found in Section 5732 (Voting of Memberships). The provisions relating to written consent should be revised to read:

§ 5634. Form of written consent

5634. (a) A written consent shall afford an opportunity on the form to specify as to each matter or group of related matters intended to be acted upon by the written consent, a choice among approval, disapproval, or abstention.

(b) Failure to comply with this section does not invalidate any corporate action taken but may be the basis for challenging a written consent. The superior court may compel compliance with this section on action by a member.

Comment. Section 5634 is comparable to a portion of Section 604 (General Corporation Law) except that it applies to all nonprofit corporations. It is new to nonprofit corporation law. For a comparable provision relating to proxies, see Section 5732 (form of proxy).

§ 5810. Right of member to bring derivative action

The note under this section raises the question whether the right to bring derivative actions should be afforded members of foreign nonprofit corporations. The staff recommends that this be permitted. This would be consistent with the General Corporation Law. See Section 800.

§ 5830. Motion for security for defendant's expenses

The bracketed language in subdivision (a) should be retained and should refer to the indemnification provisions of Article 8 (commencing with Section 5380) of Chapter 3.

§ 5832. Hearing and determination of motion; amount of security

The bracketed language in subdivision (b) should be retained, and the reference inserted in Section 5830 should be inserted here.

§ 5839. Exception to security for defendant's expenses

At the March meeting, the Commission was evenly divided on whether to recommend Section 5839, permitting 50 members or 10 percent of the members, whichever is smaller, to bring a derivative action without being subject to any undertaking requirements. It was noted that New York does not provide for an undertaking and that Pennsylvania has a bifurcated procedure similar to that provided in Chapter 8. The objection to this section is that it may permit some strike suits to be brought. However, it should be recognized that both the undertaking provision and the 50-member or 10-percent provision are designed to prevent or deter suits, and that both provisions may be ineffective for that purpose in certain cases. The staff recommends that Section 5839 be approved.

§ 5911. Amendment to delete initial director

The staff has revised this section to conform to the contents of the articles. The reference to Section 6531 should now be to Section 14602.

§ 5913. Amendment of articles of charitable corporation

The Commission has previously reviewed but not approved this section. The Commission has received a letter from Mr. Robert Sullivan questioning whether this provision is necessary or desirable. Mr. Sullivan makes these points:

(1) The notice sent to the Attorney General will tell him little and will only require further inquiry on his part.

(2) The effect of violating the section is unclear.

(3) As a practical matter, the notice will not reach the Attorney General until the amendments are an accomplished fact. Mr. Sullivan concludes:

I would not object to this provision if I thought that it would really accomplish any significant regulatory purpose, but I believe it will just end up as another duplicate reporting requirement, the benefits of which will not outweigh the costs in time and effort in complying with the requirement. The Attorney General should monitor this information in the annual report filed with him and revise the form to require a brief statement of the purpose of amendment affecting the provisions listed in 5913.

The staff is most strongly influenced by the last point and, on the strength of this argument, recommends that Section 5913 not be adopted.

§ 5920. Vote required in articles

This section has previously been tentatively approved. It duplicates provisions of general application that are now found in the provisions relating to voting of memberships and voting by directors; consequently, the staff suggests it be deleted.

The clean-up bill has in its place the substance of the following provision:

Unless the articles provide otherwise, if the articles require for corporate action the vote of a larger proportion or all of the members or a class, or of a larger proportion or all of the directors, than is otherwise required by this division, the provision in the articles requiring the greater vote shall not be amended or repealed except by the greater vote.

The staff sees no problems with this provision and recommends its adoption. A similar section would be appropriate among the provisions relating to adoption, amendment, and repeal of bylaws.

§ 5921. Adoption of amendments before members admitted

At the March 1976 meeting, the Commission queried the necessity for this provision. In light of the general provision to the same effect now located in the voting rights chapter, the staff recommends the deletion of this section.

§ 5922. Adoption of amendments by board and members

This section has not been previously approved. The staff has revised it in conformance with decisions made by the Commission at the March 1976 meeting.

§ 5923. Adoption of amendments by board alone

The staff has revised this section to conform with other Commission decisions relating to the contents of the articles. The staff communication with the State Bar relating to amendment of articles of corporations organized prior to August 14, 1929 has yielded no response. Absent a showing that such a provision is necessary for nonprofit corporations, the staff recommends that it not be adopted.

§ 5925. When class vote required

This section has been broadened and appears in the voting of memberships chapter.

§ 5931. Contents of certificate of amendment

The provisions relating to amendment of articles in a merger are not subject to the provisions relating to certificates of amendment since, in a merger, there is no certificate of amendment but only an agreement of merger. The staff proposes to add the following sentence to the Comment to Section 5930 (certificate of amendment):

The provisions of this article are not applicable to amendments made pursuant to an agreement of merger except to the extent expressly provided by statute. See, e.g., Section 6112 (amendment of articles by agreement of merger).

§ 5941. Contents of restated articles

The staff has revised this section to conform with the Commission's decisions relating to the contents of articles. With respect to agreements of merger or consolidation, in order to conform to the business corporation law, subdivision (a) should be revised to read:

(a) The certificate shall omit any provisions of an agreement of merger or consolidation (other than amendments to the articles of the surviving or consolidated nonprofit corporation), the signatures of the initial directors and, after the nonprofit corporation has filed a statement under Section ~~6531~~ 14602, the names and addresses of the initial directors. Such omissions are not alterations or amendments of the articles.

§ 5930. Certificate of amendment

The Commission has asked that cases be included in the Comment to this section relating to the effect of delay or failure to file a certificate of amendment. The staff suggests addition of the following sentence to the Comment:

An amendment of the articles is not effective until filed by the Secretary of State. See Section 5933 (effect of filing certificate of amendment); Pasadena Hospital Ass'n v. Los Angeles County, 35 Cal.2d 779, 221 P.2d 62 (1950)(amendment not effective until date of filing).

§ 5943. Effect of restated articles

The meaning of the phrase "for all purposes" in this section is unclear; it is not found in existing law. It is of obvious importance that the date of filing of original articles or amended articles not be deemed superseded for many purposes. The staff suggests that the phrase "for all purposes" be deleted; this will preserve the basic intent of the provision without unwanted side effects.

§ 6111. Contents of agreement of merger or consolidation

Subdivision (c) should be revised to read:

(c) The name and place of incorporation of each constituent nonprofit corporation and which of the constituent nonprofit corporations is the surviving nonprofit corporation.

This change removes material concerning the name of the consolidated nonprofit corporation which will be stated in the articles of the consolidated nonprofit corporation pursuant to Section 6113.

A sentence should be added to the Comment to this section reading as follows:

The name of the nonprofit corporation which is to be the surviving nonprofit corporation may be changed by an amendment included in the agreement of merger.

[§ 6115. Equal treatment of members]

At the May meeting, the Commission decided that draft Section 6115, providing for equal treatment of memberships of the same class in respect to distribution of property or rights unless all members of the class consent to an unequal distribution was unnecessary in light of the decision to eliminate the right to receive compensation for a membership upon a merger or consolidation. However, the principle should be retained insofar as it covers the conversion of memberships. Under the draft statute as it now stands, there is no provision preventing a majority from approving a merger or consolidation that is unfair to a minority. Accordingly, the staff recommends the addition of Section 6115, to read:

6115. Each membership of the same class shall be treated equally with respect to the manner of converting the membership into a membership in the surviving or consolidated nonprofit corporation.

Comment. Section 6115 is based on a portion of Section 1101 of the General Corporation Law.

§ 6122. Additional approval; prohibition against merger or consolidation forbidden

Subdivisions (a) and (b) providing for additional approval of an agreement of merger or consolidation should be deleted if the general section to this effect is approved. Subdivision (c), which prohibits a provision in the bylaws preventing a merger or consolidation, should be retained.

§ 6143. Effect of merger

A subdivision (d) should be added to this section providing as follows:

(d) The provisions of the agreement of merger, including any amendment of the articles of the surviving nonprofit corporation, are effective according to their terms.

This implements the statements made in the agreement of merger pursuant to subdivisions (b) and (e) of Section 6111.

§ 6144. Effect of consolidation

Similar to the addition proposed to be made to Section 6143, a subdivision (d) should be added to Section 6144 providing as follows:

(d) The provisions of the agreement of consolidation, including the articles of the consolidated nonprofit corporation, are effective according to their terms.

§ 6160. Limitation on action to test validity of merger or consolidation

This provision was not considered when Chapters 11, 12, and 13 were considered at the May meeting. It continues a principle stated in existing law.

§ 6161. Action to enjoin or rescind merger or consolidation

This section should be examined to see that it carries out the Commission's intent with regard to the limited sort of action that may be brought to challenge a merger or consolidation.

§ 6162. Limitation on action

This section was in the materials considered at the May meeting but was not discussed. Is a 60-day period too short?

... ..

§ 6523. Additional required information

The staff recommends the addition of this section which is comparable to subdivision (b) of Section 1501 (General Corporation Law). The text of the section is set out in Exhibit IX (yellow).

§ 6526. Members' right to obtain fiscal information

This section was tentatively approved. The staff raises the question whether the office referred to in subdivision (h) should be the "principal executive office" or the "principal office in this state." We recommend that

"principal executive office" be inserted in subdivision (k) in place of "principal office." If the principal executive office is outside California, the member can obtain a copy of the statements by paying the reasonable charge, if any, imposed to cover the cost of reproducing the copy and mailing the copy to the member. The present language of the subdivision is unclear.

§ 6529. Application of article

This section is comparable to a provision of the new General Corporation Law and to a provision of former Section 3011. It should be noted, however, that the special financial statement provisions did not apply to nonprofit corporations. See former Section 3011. Also, the former provisions providing for annual reports were limited to stock corporations. See former Section 3006. The policy issue is: To what extent, if at all, should the requirement of the annual report (which may be dispensed with by adoption of a bylaw) and the requirement of providing financial statements (which may be avoided by making the books and records available for inspection in this state) be made applicable to foreign nonprofit corporations. On balance, the staff recommends that Section 6529 be deleted so that the article will not apply to foreign nonprofit corporations. This would not change existing law for foreign nonprofit corporations since--like domestic nonprofit corporations--**they are not presently subject** to the requirements of this article. On the other hand, since the Commission has rejected application of the pseudo-foreign corporation concept to nonprofit corporations, the Commission might wish to make the article applicable to a foreign nonprofit corporation having its principal executive office in this state. The nonprofit corporation has control over what constitutes its principal executive office since such office is designated by the nonprofit corporation in the statement filed every five years with the Secretary of State.

§ 6610 et seq. Rights of inspection

The staff believes that the rights provided by this chapter are important protections to the directors and members of nonprofit corporations. In the case of a foreign nonprofit corporation, we believe that it is desirable to make the chapter applicable with respect to such books, records, documents, and properties as are actually or customarily located in this state. The convenience of enforcement of the rights of inspection by order of a California court with respect to such records justifies application of the chapter to such records. Also, it is reasonable, we believe, to apply the chapter to a foreign corporation that has its principal executive office in this state. By way of contrast, the new General Corporation Law applies this chapter to psuedo-foreign corporations and to a foreign corporation having its principal executive office in this state or customarily holding meetings of its board in this state except that the provision relating to inspection of financial records and minutes of the new General Corporation Law applies to a foreign corporation having its principal executive office in this state and to any other foreign corporation with respect to books or records actually or customarily located in this state (omitting the customarily holding meetings of its board in this state provision).

The staff recommends the addition of the following section, to apply to the entire chapter, and the deletion of Sections 6623, 6631, and 6641 of the tentative draft:

§ 6612. Application to foreign corporations

6612. The application of this chapter extends to a foreign nonprofit corporation having its principal executive office in this state and to any other foreign nonprofit corporation with respect to books and records actually or customarily located in this state and, in the case of an inspection under Section 6640, to such other documents and properties as are actually or customarily located in this state.

Comment. Section 6612 is based on the last sentence of subdivision (d) of Section 1600, a portion of subdivision (a) of Section 1601, and the second sentence of Section 1602 (General Corporation Law). However, Section 6612 does not extend, as do some provisions of the General Corporation Law to a foreign corporation customarily holding meetings of its board in this state. On the other hand, Section 6612 applies with respect to books, records, documents, and properties as are actually or customarily located in this state whereas some of the provisions of the General Corporation Law are not made applicable on this basis. Where the foreign nonprofit corporation has its principal executive office in this state, it should be noted that the right of inspection is not limited to books and records in this state.

§ 6622. Right to inspect and obtain membership record

Mr. Robert H. Nida (Exhibit X--green) has pointed out that paragraph (2) of subdivision (a) of Section 6622 is incomplete in that it does not cover a court ordered procedure that protects the membership records but does not make specific reference to Section 6622. The staff suggests that subdivision (a)(2) be revised to read:

(2) A court has ordered a procedure for the nomination and election of directors, as authorized by Section 6624, and the court order ~~includes a provision~~ provides that this section shall not apply to the nonprofit corporation or provides in substance that the nonprofit corporation need not open its membership record to inspection and need not provide a list of members entitled to vote for directors .

To conform to a technical correction made by the corrective bill on the General Corporation Law, subdivision (d)(2) of Section 6622 should be revised to read:

(2) Obtain from the nonprofit corporation, upon ~~five-business-days'~~ ~~prior~~ written demand, a list of the members entitled to vote for directors, showing the name and address of each such member, the class of membership held by the member if there are classes of members entitled to vote for director, and the number of memberships held by the member, as of the most recent record date for which such a list has been compiled or as of a date specified by the authorized member subsequent to the date of the demand. The list shall be made available on or before the later of five business days after the demand is received or the date specified in the demand as the date as of which the list is to be compiled. [No change in remainder of subdivision.]

For another comment on this area of the statute, see the letter of Mr. Wells A. Hutchins (Exhibit XI--buff).

§ 6650. Enforcement of right of inspection; appointment of inspectors or accountants

The corrective bill on the General Corporation Law would delete "or of the county in which any of the books, records, documents, or property is located" from the first sentence of the comparable provision to Section 6650. However, the comparable provision was limited to "in the case of a foreign corporation," and thus had the effect of limiting inspection of books and records of a foreign corporation to those located in California. The change made by the corrective bill does not require the deletion of the language from Section 6650 providing an alternative venue which may be more appropriate since the court of the county where the books and records are actually located may be best able to enforce the rights of inspection. The staff recommends no change in Section 6650.

2010-10-10

§ 6810. Persons who may commence proceedings

Section 6810, as tentatively approved, authorizes a proceeding for involuntary dissolution to be commenced by any person "expressly authorized to do so in the articles." Should this be permitted by the bylaws as well?

§ 6820. Grounds for proceedings [by Attorney General]

Under the General Corporation Law, it is a ground for involuntary dissolution initiated by directors or shareholders that the "period for which the corporation was formed has terminated without extension of such period." Corp. Code § 1800(b)(6). However, this is not a ground for involuntary dissolution initiated by the Attorney General or for voluntary dissolution initiated by the board. See Corp. Code §§ 1801(a), 1900(b). The staff has included such a provision in subdivision (e) of Section 6820, authorizing the Attorney General to bring an action for involuntary dissolution if the

"nonprofit corporation was formed for a limited period and its term of existence has expired without extension of such period." Should this provision be approved?

§ 6831. Filing of copy of decree of dissolution

Section 6831 provides that, whenever a nonprofit corporation is dissolved by court decree, such decree shall be filed in the office of the Secretary of State. The section now appears, however, in the chapter on involuntary dissolution even though it applies as well to voluntary proceedings subject to court supervision. See Corp. Code §§ 1809, 1904. Thus, either the section should be put in Chapter 20 (General Provisions Relating to Dissolution), or a separate and similar section should be put in Chapter 19 (Voluntary Dissolution).

§ 6910. Voluntary dissolution by members

Section 6910 authorized voluntary dissolution by "the vote of members holding 50 percent or more of the voting power or such greater percent of the voting power as the bylaws may provide." Under proposed Section 5713 (staff draft in the binder), the articles or bylaws may require an extraordinary majority for approval by the members for any corporate action. If Section 5713 is approved, the language of Section 6910, "or such greater percent of the voting power as the bylaws may provide," will be unnecessary and should be deleted.

§ 6911. Voluntary dissolution by board

Under the General Corporation Law, it is not a ground for voluntary dissolution by the board that the corporate term of existence has expired, nor is it a ground for such dissolution that the charter of a subordinate body has been revoked by the head or national body granting it. See Corp. Code § 1900(b).

Thus it appears that, in either of these situations, winding up may be conducted only through court proceedings. The staff recommends inclusion of these two additional grounds as bases for voluntary dissolution by the board (see proposed subdivisions (d) and (e) of Section 6911, in the binder).

§ 7010. Powers of the court in proceeding for winding up

As tentatively approved, Section 7010 authorized the court to "[a]ppoint a commissioner to hear and determine any or all matters with such power or authority as the court deems proper." Section 7010, however, makes no mention of any power of the court to appoint a referee. This omission occurs also in the General Corporation Law. See Corp. Code § 1806.

Unlike a referee, who derives his powers from the order of appointment, a court commissioner has only his statutory powers. 1 B. Witkin, California Procedure, Courts § 229, at 486 (2d ed. 1970). The statutory powers of a court commissioner are enumerated in Section 259 of the Code of Civil Procedure. It may be preferable in some situations for the court to appoint a referee instead of a commissioner to hear and determine certain matters because of the referee's broader power. See 1 B. Witkin, supra. The staff recommends that subdivision (b) of Section 7010 be revised, and that a new subdivision (c) be added, as follows:

(b) ~~Appoint a commissioner to hear and determine any or all matters with such power or authority as the court deems proper~~ with the powers provided in Chapter 2 (commencing with Section 259) of Title 3 of Part 1 of the Code of Civil Procedure .

(c) Appoint a referee in the manner and with the powers provided in Chapter 6 (commencing with Section 638) of Title 8 of Part 2 of the Code of Civil Procedure.

§ 7021. Avoidance of dissolution by purchase

At the May 1976 meeting, the Commission requested that the staff give consideration to how the rights of creditors may best be protected when corporate

assets are used for the purchase of memberships of the members initiating a dissolution. Proposed Section 5551 (Memorandum 76-42--Corporate Finance) limits the power of the nonprofit corporation to make payments to members to purchase or redeem memberships so that it shall maintain a positive net worth after such payments. The requirements of Section 5551, if approved, may be expressly applied to the statutory buy-out procedure for avoidance of dissolution. Should Section 5551 be thus applied?

§ 7032. Notice of winding up

§ 7040. Time to present claims; notice to creditors and claimants

Under General Corporation Law, notice of the commencement of a voluntary or involuntary dissolution proceeding must be given by mail to all shareholders, creditors, and claimants. See Corp. Code §§ 1805(c), 1903(c). When there are judicial proceedings, a separate notice is later given to creditors and claimants by publication, specifying the time and place for the presentation of claims.

At the May 1976 meeting, the Commission decided to eliminate the requirement of notice by publication and to provide that both the notice of commencement of proceedings and the notice to present claims be given by mail unless the court provides otherwise.

The staff has drafted provisions in subdivision (b) of Section 7032 and in subdivision (b) of Section 7040 to allow the notice of commencement of proceedings to include the notice to present claims and, if the notice to present claims is not so included, it shall be given separately. Should these provisions be approved?

Under Section 7032, the Commission has raised but has not resolved the question of whether notice of the commencement of proceedings should be limited to those members entitled to vote or to share in the assets on distribution. Should Section 7032 be so limited?

Respectfully submitted,

Nathaniel Sterling
Assistant Executive Secretary

EXHIBIT I

045/195

§ 5103

§ 5103. Rules of practice in this division

5103. (a) Except as otherwise provided in this division, the rules of practice that govern civil actions and proceedings generally are the rules of practice for actions and proceedings under this division.

(b) This section is declaratory of existing law.

Comment. Section 5103 is new. The rules of practice incorporated by Section 5103 are those in Parts 2 (Civil Actions) and 3 (Special Proceedings of a Civil Nature) of the Code of Civil Procedure as well as additional provisions in other portions of the Code of Civil Procedure and many nonstatutory rules of procedure which apply to civil actions and proceedings generally. California courts have long utilized these rules in enforcing rights granted by the Corporations Code. See, e.g., Columbia Engineering Co. v. Joiner, 231 Cal. App.2d 837, 42 Cal. Rptr. 241 (1965); Romantake Mining Co. v. Superior Court of City & County of San Francisco, 11 Cal. App.2d 488, 54 P.2d 535 (1936).

EXHIBIT II

045/210

§ 5104

Substance Tentatively Approved
April 1976

§ 5104. Bylaws may not limit rights in division

5104. Except as otherwise expressly authorized by statute, the bylaws may not limit the rights provided in this division.

Comment. Section 5104 is new. See also Sections 5251 (permitted contents of articles) and 5260.5 (permitted contents of bylaws). As used in this section, the term "bylaws" means articles or bylaws. Section 5157.

Section 5104 makes clear that a provision of this division giving a right to a member, director, or any other person may not be limited by the nonprofit corporation unless the provision or some other statute expressly permits the right to be so limited. Nothing in Section 5104 precludes the nonprofit corporation from adopting a provision that implements a provision of this division, provided the implementing provision does not limit the right granted in this division. See Sections 5251 (permitted contents of articles) and 5260.5 (permitted contents of bylaws).

It should be noted that many of the provisions of this division are intended to provide rules that apply only in the absence of a provision in the articles or bylaws covering the particular subject matter of the provision. In these cases, the articles or bylaws may dispense with the statutory requirement entirely or may provide a different requirement applicable to the particular nonprofit corporation.

EXHIBIT III

100/875

§ 5172.7

§ 5172.7. Notice

5172.7. Any reference in this division to the time a notice is given or sent means, unless otherwise expressly provided:

(a) The time a written notice by mail is deposited in the United States mails, postage prepaid.

(b) The time any other written notice is personally delivered to the recipient or is delivered to a common carrier for transmission, or actually transmitted by the person giving the notice by electronic means, to the recipient.

(c) The time an oral notice is communicated, in person or by telephone or wireless, to the recipient or to a person at the office of the recipient who the person giving the notice has reason to believe will promptly communicate it to the recipient.

Comment. Section 5172.7 is the same in substance as Section 113 (General Corporation Law). It is new to nonprofit corporation law.

EXHIBIT IV

100/876

§ 5230

Staff Draft June 1976

§ 5230. Powers of nonprofit corporation

5230. Subject to any limitations contained in the articles or provided by statute, a nonprofit corporation in carrying out its activities:

(a) Has all of the powers of a natural person.

(b) May, without limitation on the generality of subdivision (a), do all of the following:

(1) Adopt, use, and at will alter a corporate seal.

(2) Adopt, amend, and repeal bylaws.

(3) Qualify to do business in any other state, territory, dependency, or foreign country.

(4) Issue, acquire, own, dispose of, pledge, and otherwise use memberships and other securities of the nonprofit corporation.

(5) Make donations, regardless of specific corporate benefit, for the public welfare or other charitable purposes.

(6) Pay pensions; establish and carry out pension, savings, thrift, and other retirement, incentive, and benefit plans, trusts, and provisions for any or all of the directors, officers, and employees of the nonprofit corporation or any of its subsidiary or affiliated corporations.

(7) Assume obligations; enter into contracts (including contracts of guaranty or suretyship); incur liabilities; borrow and lend money and

otherwise use its credit; secure any of its obligations, contracts, or liabilities by mortgage, pledge, or other encumbrance of all or part of its property, franchises, and income.

(3) Participate with others in a partnership, joint venture, or other association, transaction, or arrangement, whether or not such participation involves sharing or delegation of control with or to others.

(2) Act as trustee under a trust pursuant to or incidental to the principal purposes of the nonprofit corporation; receive, hold, administer, and expend funds and property subject to such a trust.

Comment. Subdivision (a) is derived from Section 207(a) (General Corporation Law) and is new to nonprofit corporation law. Subdivisions (a) and (b) are both subject to limitations found in other statutes or the articles.

The powers listed in subdivision (b) are specified in order to ensure the authority of a nonprofit corporation to do certain acts which may not be within the power of a natural person. This subdivision does not limit the scope of subdivision (a).

Subdivision (b)(1) is the same as the first part of Section 207(a) and former Section 801(b). Failure to affix a corporate seal does not affect the validity of a written instrument. Section 5240. Subdivision (b)(2) is the same as Section 207(b) and comparable to former Section 801(c). Subdivision (b)(3) is the same as Section 207(c) and a portion of former Section 801(e).

Subdivision (b)(4) is comparable to Section 207(d) and former Section 302(e). A nonprofit corporation may also acquire and own memberships and shares in other corporations pursuant to subdivision (a). Subdivision (b)(5) is comparable to Section 207(e) and former Section 302(g).

Subdivision (b)(6) is comparable to Section 207(f), which is derived from Section 122 of the Delaware General Corporation Law and is new to California. Subdivision (b)(7) is the same in substance as

Section 207(g) and comparable to former Section 9501. It is subject to Section 5373 (loans to officers).

Subdivision (b)(9) is comparable to Section 207(h), which is derived from Section 122 of the Delaware General Corporation Law. This subdivision, new to California nonprofit corporation law, does not permit the participation in an arrangement or venture of a type which the nonprofit corporation does not itself have the power to conduct. See subdivision (a)(corporate powers subject to limitation in the articles or statutes).

Subdivision (b)(9) is the same in substance as former Section 9501(d).

The omission from Section 5230 of several of the specific powers of nonprofit corporations set out in former Section 9501 does not effect any substantive change in the law. These powers are those of a natural person and are thus granted by subdivision (a). They include the power to sue and be sued (see Section 14802), acquire and own shares in a corporation, make contracts, receive property by devise or bequest (see Section 27 of the Probate Code), and convey or otherwise dispose of real or personal property.

EXHIBIT V

405/797

§ 5231

Substance Tentatively Approved
February 1976
Staff Revision June 1976

§ 5231. Defense of ultra vires

5231. (a) A limitation upon the activities, purposes, or powers of the nonprofit corporation or upon the powers of the members, officers, or directors, or the manner of exercise thereof, contained in or implied by the articles may be asserted in a proceeding:

(1) By a member or the state to enjoin the doing or continuation of unauthorized activities by the nonprofit corporation or its officers, or both, in cases where third parties have not acquired rights thereby.

(2) To dissolve the nonprofit corporation.

(3) By the nonprofit corporation, or by a member suing in a representative suit, against the officers or directors of the nonprofit corporation for violation of their authority.

(b) A limitation upon the activities, purposes, or powers of the nonprofit corporation or upon the powers of the members, officers, or directors, or the manner of exercise thereof, contained in or implied by the articles or by Chapters 18, 19, and 20 shall not be asserted as between the nonprofit corporation or any member and any third person.

Comment. Section 5231 is the same in substance as subdivisions (a) and (c) of Section 208 (General Corporation Law) and subdivisions (a), (b), and (d) of former Section 803, applicable to nonprofit corporations through former Section 9002. See, e.g., Osteopathic Physicians & Sur-

geons v. California Medical Ass'n, 224 Cal. App.2d 378, 36 Cal. Rptr. 641 (1964).

For related provisions, see Sections 5232 (enjoining ultra vires act of charitable corporation), 5241 (validity of contracts), and 5242 (execution of contracts).

EXHIBIT VI

405/810

§ 5237

§ 5237. Special derivative action against members

5237. (a) A member who receives a distribution prohibited by Section 5236 with knowledge of facts indicating the impropriety thereof is liable to the nonprofit corporation for the benefit of all creditors or members entitled to institute an action under subdivision (b).

(b) An action may be brought under this section in the name of the nonprofit corporation, without regard to the provisions of Chapter 8 (commencing with Section 5810), by:

(1) A creditor whose debt or claim arose prior to the time of the distribution and who has not consented thereto, whether or not the creditor's claim is reduced to judgment.

(2) A member at the time of the distribution who has not consented to the corporate action.

(c) The damages recoverable from a member under this section are the lesser of the following:

(1) The amount of the distribution received by the member with interest thereon at the legal rate on judgments until paid.

(2) The liabilities of the nonprofit corporation owed to nonconsenting creditors at the time of the violation and the injury suffered by nonconsenting members, as the case may be.

(d) A member liable under this section may compel contribution by other members liable under this section.

(e) Nothing in this section affects any liability which a member may have under Sections 3439 to 3439.12, inclusive, of the Civil Code.

Comment. Section 5237 is comparable to Section 506 (General Corporation Law). It supersedes former Section 1510, relating to payment of unauthorized dividends. The right to contribution in subdivision (e) may be enforced either in the action in which the member is held liable or in an independent action pursuant to the ordinary rules of civil procedure.

EXHIBIT VII

4451

§ 5317

§ 5317. Acts of the board

5317. (a) Except as otherwise provided in this division, or unless the bylaws require a greater number, every act or decision done or made by a majority of the directors present at a meeting duly held at which a quorum is present is the act of the board.

(b) The bylaws may require for any or all corporate actions the vote of a larger proportion or of all of the directors than is otherwise required by this division.

Comment. Subdivision (a) of Section 5317 is comparable to the first sentence of Section 307(a)(3)(General Corporation Law). It continues former Section 817, which was applicable to nonprofit corporations through former Section 9002.

Subdivision (b) is new. For a comparable provision, see Section 204(a)(5)(General Corporation Law), which requires that a greater vote be stated in the articles, with the exception of a vote of a majority of the authorized number of directors, which may be stated in the bylaws. Section 204(a).

4452

§ 5337

§ 5337. Vote required absent a quorum

5337. The directors present at a meeting at which a quorum is initially present may continue to transact business notwithstanding the withdrawal of enough directors to leave less than a quorum if any action

taken is approved by at least a majority of the required quorum or such greater number as is required by this division or the bylaws.

Comment. Section 5337 is new. It is comparable to the last sentence of Section 307(a)(5) (General Corporation Law). It is intended to preclude disruption of meetings by withdrawal of a sufficient number of directors to leave less than a quorum. It should be noted that Section 5337 is subject to Section 5330 (bylaws control).

EXHIBIT VIII

4453

§ 5240

Staff Draft June 1976

Article 4. Execution of Written Documents

§ 5240. Corporate seal

5240. Failure to affix a corporate seal does not affect the validity of a written instrument.

Comment. This section is the same in substance as a portion of Section 207(a) (General Corporation Law). Section 5240 eliminates the presumption of validity of documents bearing a seal set forth in former Section 833, which was applicable to nonprofit corporations through former Section 9002.

4454

§ 5241

Substance Tentatively Approved
February 1976
Revised June 1976

§ 5241. Validity of contracts

5241. (a) A contract or conveyance, whether executed or wholly or in part executory, made in the name of a nonprofit corporation binds the nonprofit corporation and the nonprofit corporation acquires rights thereunder if it is:

- (1) Authorized or ratified by the board;

(2) Done within the scope of authority, actual or apparent, conferred by the board; or

(3) Within the agency power of the officer executing it.

(b) This section does not apply to a contract or conveyance made or executed in violation of law other than this division.

Comment. This section is the same in substance as Section 208(b) (General Corporation Law) and former Section 803(c), which was applicable to nonprofit corporations through former Section 9002.

Subdivision (a) validates written instruments in certain circumstances even though an officer executing the instruments on behalf of the corporation was not properly authorized to do so. Subdivision (b) excludes illegal contracts from such validation.

Application of Section 5241 to contracts of foreign nonprofit corporations is governed by Section 5243.

4455

§ 5242

Staff Draft June 1976

§ 5242. Execution of written instrument

5242. (a) An instrument in writing, including an assignment or endorsement thereof, executed or entered into between a nonprofit corporation and another person and signed by the officers provided in subdivision (b), is not invalidated by any lack of authority of the signing officers unless (subject to subdivision (b) of Section 5231) the other person has actual knowledge of the lack of authority.

(b) This section applies to an instrument which is signed by both of the following officers:

- (1) The chairman of the board, the president, or any vice president.
- (2) The secretary, chief financial officer, treasurer, or any assistant secretary or assistant treasurer.

Comment. Section 5242 is new. It is similar to Section 313 (General Corporation Law) and is derived in part from Section 7506 of Pennsylvania's Corporation Not-for-profit Code.

Subdivision (a) covers all written instruments, including evidences of indebtedness, securities, agreements, contracts, mortgages, and conveyances. Outside parties are entitled to rely upon the authority of certain senior executives to execute any instrument on behalf of the nonprofit corporation, thus creating a document binding upon all parties regardless of the authority of the officer. Compare Section 5241 (validity of contracts). While this reliance is denied to a person having actual knowledge of an executing officer's lack of authority, an exception exists for specified cases in which the lack of authority is contained in or implied by the articles or certain statutes. See Section 5231 (defense of ultra vires).

Subdivision (b) specifies those officers whose execution of an instrument gives it validity, whatever their actual authority. This section does not create an inference that instruments not signed by both of the officers are invalid. For such instruments, the defense of lack of authority may be defeated by such validating concepts as apparent authority and inherent agency power, where applicable. See Section 5241 (validity of contracts).

Staff Draft June 1976

§ 5243. Application of article

5243. This article applies to instruments in writing made or to be performed by a foreign nonprofit corporation in this state and to conveyances by a foreign nonprofit corporation of real property in this state.

Comment. The scope of application directed by this section is comparable to that specified in Section 208 (General Corporation Law) and former Section 803.

EXHIBIT IX

4457

§ 6523

§ 6523. Additional required information

§ 6523. In addition to the financial statements required by Section 6522, the annual report shall also describe briefly:

(a) Any transaction during the previous fiscal year involving an amount in excess of forty thousand dollars (\$40,000) to which the nonprofit corporation or its parent or subsidiary was a party and in which a director or officer of the nonprofit corporation or of a subsidiary or (if known to the nonprofit corporation or its parent or subsidiary) a person holding more than 10 percent of the voting power in the nonprofit corporation had a direct or indirect material interest. The annual report shall name the director, officer, or person and state his or her relationship to the nonprofit corporation, interest in the transaction, and where practicable, amount of the interest. In the case of a transaction with a partnership in which the director, officer, or person is a partner, only the interest of the partnership need be stated. This subdivision does not apply to:

(1) Compensation of officers and directors.

(2) Contracts let at competitive bid or services rendered at prices regulated by law.

(3) Transactions approved by the members under Section 5371.

(b) The amount and circumstances of indemnification or advances aggregating more than ten thousand dollars (\$10,000) paid during the fiscal year to an officer or director of the nonprofit corporation under

Article 3 (commencing with Section 5380) of Chapter 3. This subdivision does not apply to indemnification approved by the members under Section 5334.

Comment. Section 6523 applies unless the bylaws provide otherwise. See Section 6520. It is the same in substance as Section 1501(b) (General Corporation Law) and is new to nonprofit corporation law.

June 8, 1976

MEMORANDUM

TO: John De Moully
FROM: Robert D. Nida
SUBJECT: Membership Records

You suggested that I outline for you what appears to be an inconsistency between the discussion about membership lists by the Commission at its meeting April 23 and the subsequently published minutes of that meeting.

Generally, Section 6621 of the Commission's draft provides a nonprofit corporation with a means of avoiding the mandatory disclosure of its membership list. Section 6622 sets forth the absolute right of an "authorized member" to obtain a copy of the list. It is my understanding that the Commission agreed that the absolute right of a member to obtain a membership list, under Section 6622, would not be applicable to a corporation which has adopted bylaws providing a satisfactory method of communicating with members during the nominating and electing process, and that such bylaws could be either (1) those set forth specifically in Section 6621, or (2) bylaws approved by a court order pursuant to Section 6624.

Section 6624 provides a court with the authority to modify the requirements of the statute relating to members obtaining records or qualifying for the right to communicate with other members.

The minutes of April 23 at page 19 indicate that the court order must state that the procedure approved by the court is in lieu of the procedure outlined in Section 6622. Obviously, this could only apply prospectively. It was my understanding of the Commission's discussion that court orders preceding adoption of the new law approving or requiring bylaws dealing with this subject would be an acceptable alternative qualifying for protection of the membership list. The manner in which the Commission's actions are reflected in the minutes and on page XVI-6 of the tentative draft would appear to require re-aligning these issues in order to qualify for protection of these trade secrets because the statute requires the court order to specify that Section 6621 does not apply to the corporation. In addition, there would now be a new statutory standard (the procedures set forth in Section 6621) which might change the court's view of the reasonableness of previously-approved procedures.

I hope the Commission will want to review this item again at a future date.

Yes Nida

EXHIBIT XI

MEMORANDUM

June 10, 1976

To: California Law Revision Commission
c/o John H. DeMouly
Executive Secretary

Re: Study 77.160

At the Commission's last meeting Mr. McLaurin suggested that I comment in writing on the question of whether the Commission's decision not to specify in the statute what is a reasonable nomination or election procedure, is potentially undermined by specifying nomination and election procedures which a non-profit corporation must adopt if it desires to protect its membership list. The concern, of course, is that specifying such procedures in Section 6621, albeit another subject area, has the potential for compromising the Commission's intent.

I heartily concur with the staff's and the Commission's conclusion that "it would be futile to attempt to specify what is a reasonable means (of nomination), given the variety of types and sizes of non-profit corporations." And, I share the expressed concern that a court may very well adopt statutory specifics, wherever they may appear in the statute, as the standard of determination of reasonableness, instead of looking at the question in the light of the nature, size, purposes, etc., of the organization.

It would seem consistent and reasonable for the Commission to delete specific procedures from Section 6621 to avoid this highly undesirable result. And, the ends sought to be obtained by 6621 can be accomplished equally well (as in other areas of the statute) by requiring in general terms that the non-profit corporation adopt bylaws providing members a reasonable means for communicating with other members to facilitate the nomination and election of directors.

I thank Mr. McLaurin for this opportunity to comment, and hope that the Commission will consider this matter again.


Wells A. Hutchins

WAH/hb