

First Supplement to Memorandum 76-100

Subject: Study 77.400 - Nonprofit Corporation Law (Redrafted Provisions)

Attached is an article that will be included in Chapter 2 (General Provisions) of the Nonprofit Corporation Law. The article deals with the applicability of the General Corporation Law.

The attached article carries out the Commission's decision at the last meeting not to duplicate in the Nonprofit Corporation Law the provisions that formerly were contained in Division 4 (provisions applicable to corporations generally). We plan to expand and improve the Comments when we have redrafted the remainder of the Nonprofit Corporation Law.

The attached article proved to be a very short and fairly simple article. Section 5220 makes clear that the General Corporation Law does not apply unless otherwise expressly provided in the Nonprofit Corporation Law. Any provisions of the General Corporation Law that are picked up by reference are identified and, in some instances, modified to continue policy decisions made by the Commission when Division 4 was drafted.

Most of the sections in the attached article require no explanation. However, the staff raises the following matters for consideration by the Commission.

Section 5222

The staff suggests that paragraph (2) of subdivision (b) of Section 5222 be omitted. The inclusion of this paragraph creates doubt as to whether the same rule applies under Section 201(b) of the General Corporation Law.

The staff suggests that subdivision (b) of Section 5222 be revised to read:

(b) A corporation shall not adopt a name in which the word "charitable" or its equivalent appears unless the corporation is a nonprofit corporation organized for charitable purposes.

This revision would make subdivision (b) a provision of general application like provisions prohibiting use of the word "cooperative" in the name of a corporation unless the corporation is a cooperative.

Section 5223

The staff suggests that subdivision (c) be deleted from Section 5223. This provision casts doubt on the general rule under Section 800 of the General Corporation Law and is unnecessary since it merely codifies case law. We could suggest that the State Bar Committee on Corporations consider adding a similar general provision to Section 800.

Section 5224

Subdivision (b)(5) is suggested by the staff and not previously approved by the Commission. We think the information required would be useful and not burdensome to provide; a mere checking of the appropriate box would be sufficient. Under our present scheme, existing corporations will not be required to amend their articles to state whether they are nonprofit corporations organized for charitable purposes.

Respectfully submitted,

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Executive Secretary

Article 2. Applicability of General Corporation Law

§ 5220. General Corporation Law not applicable unless expressly provided

5220. Except as otherwise expressly provided in this article, the provisions of the General Corporation Law, Division 1 (commencing with Section 100), do not apply to a nonprofit corporation.

Comment. Section 5220 makes clear that the General Corporation Law applies to nonprofit corporations under this division only to the extent specifically provided in this article. This article contains sections which make specified provisions of the General Corporation Law applicable to nonprofit corporations. See Section 6526(b) regarding application of these provisions to foreign nonprofit corporations.

29/345

§ 5221. Construction of words used in General Corporation Law

5221. For the purposes of this article:

(a) "Shareholder" as used in provisions of the General Corporation Law includes member.

(b) "Shares" as used in provisions of the General Corporation Law includes memberships.

Comment. Section 5221 provides definitions that are the same in substance as portions of the definitions provided by former Section 103 (shareholder includes a member of a nonstock corporation) and former Section 115 (shares includes membership in nonstock corporations). The portions of the definitions referred to above were not continued in the new General Corporation Law.

405/784

§ 5222. Permissible corporate name; reservation of corporate name

5222. (a) Subdivision (b) of Section 201 (permissible corporate name) applies to a nonprofit corporation.

(b) A nonprofit corporation shall not adopt any of the following:

(1) A name in which the word "charitable" or its equivalent appears unless the corporation is a nonprofit corporation organized for charitable purposes.

(2) A name the use of which is prohibited by any other statute.

(c) Subdivision (c) of Section 201 (reservation of corporate name) applies to a nonprofit corporation.

Comment. Subdivision (b)(1) of Section 5222 is a specific application of the general rule stated in subdivision (b) of Section 201. A nonprofit corporation that is organized for charitable purposes must so state in its articles (Section ____) and may be subject to Article 7 (commencing with Section 12580) of Chapter 6 of Part 2 of Division 3 of Title 2 of the Government Code (Uniform Supervision of Trustees for Charitable Purposes Act).

Subdivision (b)(2) recognizes that there may be other applicable name limitations in other statutes. See, e.g., Section 12950 (use of word "cooperative"); Fin. Code § 5501 (building and loan and savings and loan associations); 36 U.S.C. § 379 (use of words "Olympic" or "Olympiad").

968/980

§ 5223. Members' derivative action

5223. (a) Subject to subdivisions (b) and (c), the provisions of Section 800 (shareholder derivative action) are applicable in the case of a nonprofit corporation.

(b) If a members' derivative action is brought pursuant to this section by at least 50 voting members or members holding at least 10 percent of the voting power, whichever number is the smaller, the plaintiff is not required to furnish security for the defendant's expenses.

(c) A members' derivative action shall not be dismissed, discontinued, compromised, or settled without the approval of the court.

Comment. Subdivision (b) of Section 5223 permits plaintiffs who meet the stated numerical requirements to avoid having to furnish security for the defendant's expenses in a member's derivative action under this section. Subdivision (b) has no predecessor in California law but is similar to Section 7765 of the Pennsylvania Nonprofit Corporation Law of 1972, Pa. Stat. Ann. tit. 15, § 7765 (Supp. 1976). Of course, all such plaintiffs must satisfy the other requirements of Section 800. Subdivision (c) codifies the rule stated in Ensher v. Ensher, Alexander & Barsoom, Inc., 187 Cal. App.2d 407, 9 Cal. Rptr. 732 (1960).

See Sections 800(b) and 5226(b) regarding application of this section to foreign nonprofit corporations.

405/779

§ 5224. Annual statement of officers, office, and agent for service

5224. (a) Except as provided in subdivision (b), Section 1502 (annual statement of officers, office, and agent for service) applies to a nonprofit corporation.

(b) In lieu of the information required by subdivision (a) of Section 1502, the statement for a nonprofit corporation shall contain all of the following:

(1) The name and complete business or residence address of its chief executive officer.

(2) The name and complete business and residence address of either its secretary or chief financial officer.

(3) The street address of its principal executive office.

(4) If the address of its principal executive office is not in this state, the street address of its principal business office in this state, if any.

(5) A statement whether the nonprofit corporation is a nonprofit corporation organized for charitable purposes.

Comment. Subdivision (b) of Section 5224 is based in part on former Section 3301, which required a listing of the officers but not the directors of nonprofit corporations. However, unlike former Section 3301, which required the statement to list the name and address of the president, vice president, secretary, and treasurer of the nonprofit corporation, subdivision (b) requires only the name and address of the chief executive officer and one additional officer of the nonprofit corporation.

405/759

§ 5225. Service of process on domestic nonprofit corporation

5225. Chapter 17 (commencing with Section 1700) of Division 1 (service of process on domestic corporations) applies to service of process on a domestic nonprofit corporation.

Comment. Section 5225 makes clear that the provisions of the General Corporation Law relating to service of process on domestic corporations (defined in Section 167) apply to service on domestic nonprofit corporations.

405/850

§ 5226. Foreign nonprofit corporations

5226. (a) Section 191 (defining "transact intrastate business") and Chapter 21 (commencing with Section 2100) (registration of corporate name, qualification to transact intrastate business) of Division 1 (excluding Sections 2108, 2109, and 2115) apply to foreign nonprofit corporations.

(b) A provision of the General Corporation Law that is made applicable to a nonprofit corporation by any other section of this article

applies to a foreign nonprofit corporation to the same extent that the provision of the General Corporation Law applies to a foreign corporation.

Comment. Subdivision (a) of Section 5226 makes clear that the provisions of the General Corporation Law relating to registration of corporate name and qualification of foreign corporations to transact intrastate business in California apply to foreign nonprofit corporations. The requirement that a foreign corporation qualify before transacting intrastate business applied to foreign nonprofit corporations under prior law. See Mechanical Contractors Ass'n of America, Inc. v. Mechanical Contractors Ass'n of Northern California, Inc., 342 F.2d 393, 393-400 (1965).

The provisions of Chapter 21 relating to pseudo-foreign corporations (Sections 2108, 2109, and 2115) do not apply to foreign nonprofit corporations. These provisions are new to California corporation law and present difficult conflict of laws and other problems. See Halloran & Hammer, Section 2115 of the New California Corporation Law--The Application of California Corporation Law to Foreign Corporations, 23 U.C.L.A. L. Rev. 1282 (1976). Some experience with these provisions should be accumulated under the General Corporation Law before a determination is made whether similar provisions should be applied to foreign nonprofit corporations.

405/456

§ 5227. Crimes and penalties

5227. Except for Sections 2200, 2201, and 2202, the provisions of Chapter 22 (commencing with Section 2200) of Division 1 (crimes and penalties) are applicable in the case of a nonprofit corporation.

Comment. Section 5227 makes Chapter 21 of the General Corporation Law applicable to nonprofit corporations. Sections 2200-2202 are not adopted by reference because a provision comparable to Section 2200 is included in the Nonprofit Corporation Law (Section ____), and Section 2201 is not considered to be appropriate for application to a nonprofit corporation.

045/100

§ 5228. Other applicable General Corporation Law provisions

5228. The following provisions of the General Corporation Law apply to a nonprofit corporation:

- (a) Section 105 (suit against corporation).
- (b) Section 106 (subjection of corporate property to attachment).
- (c) Section 107 (issuing or putting in circulation other than lawful money).

- (d) Section 108 (fees of Secretary of State).
- (e) Section 109 (correction of instruments).
- (f) Section 110 (filing of instruments).
- (g) Section 1506 (making corporate records available to assessor).
- (h) Section 1801 and last sentence of Section 1809 (action by Attorney General).

Comment. Section 5228 makes the specified provisions of the General Corporation Law applicable to nonprofit corporations. See Section 5226(b) regarding application of these provisions to foreign nonprofit corporations.