

CENTER FOR NONPROFIT LAW, PC

PRESENTATION FOR NAO:

CHANGES TO THE OREGON NONPROFIT CORPORATION ACT

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PRESENTED BY DAVID ATKIN

I. BOARD OF DIRECTORS

A. The Selection, Election, Appointment or Designation of the Board of Directors.

The amendment to ORS Chapter 65 includes an important clarification of the ways in which members of the Board of Directors can be selected and how they can be removed from office. There are five (5) ways in which directors on the Board can be selected – 1) they can be elected by voting members (if any), 2) they can be elected by the Board, 3) directors can be appointed by some other nonprofit, agency or official, 4) they can be selected automatically as “ex-officio” directors on the Board, and 5) they can be named in the Articles or Bylaws as “Designated Directors.” An organization can choose to have a combination of some or even all of these methods for selecting the directors on their Board of Directors. If the Board elects a director, then the Board has the power to remove that director. If there are member who elect a director they have the authority to remove that director, and if some other organization or agency or official appoint a director that organization or official has the power to remove that director.

B. Voting

A new provision of ORS Chapter 65 has been added which allows nonprofit board of directors to vote and take action by email with the affirmative vote of a majority of directors in office. Under the old law, any action taken without a meeting required a unanimous consent resolution which required all directors in office to participate and vote affirmatively for the board to take action. While this standard still applies to actions taken without a meeting when using means other than email (such as regular mail or facsimile), the new email standard should make it easier to take an action of the board without a meeting. In order to take advantage of the new email voting rules, the corporation must maintain a list of all directors’ emails. If a single director has not provided an email

“Helping the People Who Change the World”

Director: David E. Atkin, Attorney at Law
590 W. 13th Avenue, Eugene, Oregon 97401
MAIL: P.O. Box 10008, Eugene, Oregon 97440
Phone (541)342-6336 Fax (541)484-3926

address to the corporation, the board may not take action by email. Additionally, the corporation must maintain records of the “Announcement” and all directors’ votes in the corporate minutes. The following bylaw provision sets forth the requirements for email voting:

Voting by E-mail may be authorized by the Board of Directors. Unless prohibited or limited by the Articles of Incorporation or these Bylaws, any action which may be taken at any annual, regular, or special meeting of the Board of Directors may be taken without a meeting by E-mail if: (1) The Corporation has a record of all Directors E-mail addresses; and (2) The Corporation maintains a copy of the announcement and record of the Director’s votes in the corporate minutes.

The announcement shall be sent to each Director at the E-mail address stored in the corporate records and shall include: (1) A description of the action to be taken; (2) A deadline to respond with a vote which may not be less than forty-eight (48) hours; (3) A statement that a Director may change their vote any time prior to the deadline; and (4) An effective date if the action is intended to be effective at a date which is later than the deadline date.

The affirmative vote of a majority of all Directors is an act of the Board of Directors if the action is taken pursuant to this section, unless a greater number of affirmative votes for the proposed action is required by law, the Articles of Incorporation, or these Bylaws.

If the email voting procedures set forth above are followed, the board’s action has the effect of a meeting vote and can be described as such in any document.

In addition to the new email voting, ORS 65.351(3) has been amended to include a requirement that each director only has one vote and may not vote by proxy when reaching a decision or action of the board. Lastly, the minimum quorum requirements have been clarified to state that the articles and bylaws cannot provide for a quorum that is less than one-third (1/3) of the directors in office immediately before a meeting begins.

C. Removal of Directors

Removal of directors remains substantially the same as before with one minor exception. As has always been the rule, only persons entitled to elect directors have the right to remove the director with or without cause. Generally, this rule only really matters when the corporation has voting members entitled to elect directors or another person has the

right to appoint directors. The only exception to this rule is that even if a director was elected by the voting members (or another person entitled to appoint a director), the board could remove directors for causes stated in the bylaws. Under the new law, if provided for in the articles or bylaws, the board may remove a director for “missing a specified number of meetings” or for causes stated in the bylaws.

Additionally, the number of votes required to remove directors, unless otherwise stated in the bylaws, is now: (1) a majority of votes cast by voting members; or (2) a majority of directors in office or by a greater number stated in the articles or bylaws.

D. Regular Meetings

The definition and notice requirements for a regular meeting of the board of directors in ORS 65.337 has been clarified. A regular meeting must be fixed by the bylaws or scheduled by the board of directors in a manner that informs all directors of the time and place without additional notice being necessary for all directors to be able to attend.

E. Committees

Long standing rules regarding board committees have been clarified. ORS 65.354 now explicitly sets forth the legal difference between board level committees and non-board level committees.

Board Level Committees. The Board may establish committees delegated with the power of the Board of Directors to accomplish specific tasks, including but not limited to: (a) making Board decisions, (b) authorizing expenditures, (c) adopting budgets, (d) setting policies, or (e) establishing programs. These types of committees are “Board Level Committees.” Board Level Committees must consist of two (2) or more Directors of the Board of Directors and shall not have any members who are not simultaneously Directors of the Board of Directors. Such committees shall be established by resolution adopted by the Board at a properly called meeting, and such resolution shall specifically state the authority of the Board being delegated to the committee.

Non-Board Level Committees. The Board may establish any other working or advisory committee it deems appropriate. These are all “Non-Board Level Committees” which do not have the power to make Board level decisions, authorize expenditures, adopt budgets, set policy, or establish programs. Such committees shall be established by a resolution adopted by the Directors present at a properly called meeting. Any person may be a member of such a committee, whether or not that person is a Director of the Board of Directors.

It should be noted that regardless of whether a committee is board level or non-board level committee, no committee may take any of the following actions: (a) elect, appoint, or remove any Officer, any Director of the Board of Directors, or member of the Executive Committee; (b) authorize the sale, lease, exchange, or mortgage of all or substantially all of the property and assets of the Corporation; (c) authorize the dissolution of the Corporation or revoke proceedings therefore; (d) amend, alter, or repeal the Articles of Incorporation, Bylaws, or any resolution of the Board of Directors; or (e) authorize the payment of a dividend or any part of the income or profit of the Corporation to its Directors, Officers, or any other person or entity.

F. Conflicts of Interest

ORS 65.361 relating to conflicts of interest transactions with directors has been amended in two clarifying respects. The first clarification simply states that following the process set forth in the statute creates a presumption of fairness to the corporation and it does not create a safe harbor. The other clarification states that a director has an indirect interest if a transaction with the nonprofit involves a person related to the director or a business associate of the director.

G. Inspection of Records

A new subsection has been added to ORS 65.771 clarifying that directors have the right to inspect the following records of the nonprofit:

- (1) Permanent records of minutes of all meetings of the voting members, board of directors, and committees as well as all actions taken without a meeting.
- (2) Appropriate accounting records;
- (3) List of voting members, contact information of voting members, and the voting rights of each member if by class;
- (4) Articles of incorporation and bylaws currently in effect;
- (5) Written communications required by ORS Chapter 65 and all communications regarding general membership matters made to the members within the past three years;
- (6) A list of the names and contact information of the directors on the board of directors and its officers;
- (7) The last three annual financial statements and any accountant reports during that time; and
- (8) The most recent annual report delivered to the Secretary of State.

H. Amendments to Articles and Bylaws

For nonprofits without voting members, the voting threshold for the board of directors to amend the articles of incorporation has been reduced from a majority of directors in office to a majority of directors voting on the amendment. Thus, rather than a majority of all directors, the articles of incorporation may be amended by a majority of a quorum of the board of directors under ORS 65.437.

II. OFFICERS

A. Required Officers

Under the old law a nonprofit corporation was only required to have a President and Secretary or officers with equivalent responsibilities. Nonprofit corporations are now also required to have a Treasurer. Additionally, the same person may not be the President, Secretary, and Treasurer.

III. VOTING MEMBERS

A. Definition of Voting Members

The definitions of who is a voting member has been clarified in ORS 65.001(30). A “member” is a person who is entitled under the articles of incorporation or bylaws to exercise any of the rights described in ORS 65.144 without regard to the title given the person in the articles or bylaws. ORS 65.001(30)(a). A “member” does not include anyone who does not have the rights described in ORS 65.144 or that only has one or more of the following rights: (i) rights granted to a delegate; (ii) a right to designate or appoint directors; (iii) rights that directors have; (iv) a right to vote only once to elect directors; or (v) rights that a person has as a consequence of holding evidence of indebtedness the corporation has or will issue.

Basically, a person is a voting member if they have one or more rights listed in ORS 65.144:

- (1) Elect directors;
- (2) Remove directors;
- (3) Vote on any change to the number of directors;
- (4) Vote to dispose of, through sale or otherwise, the corporation’s assets or to merge with another entity;
- (5) Vote to dissolve the corporation; and
- (6) If a mutual benefit corporation, approve a conflict of interest transaction.

The foregoing list are the default rights of voting members which may be changed or modified by the corporation's articles or bylaws. Notwithstanding the foregoing, all voting members have the two following rights which cannot be eliminated or limited by the corporation's articles or bylaws:

- (1) The right to vote on any action that would reduce or eliminate the member's right to vote; and
- (2) The right to inspect and copy the corporation's records as provided in ORS 65.774.

Thus, the rights of voting members may now be crafted however the organization sees fit to meet their needs. As long as the two rights which cannot be eliminated are present, and the members have two or more rights set forth in ORS 65.144, the corporation may craft the rights of members by adding or eliminating rights. However, if an existing corporation desires to modify its members rights, they can do so only by a vote of its current voting members.

B. Termination of Voting Membership

The process for removing a voting member has been clarified in two respects: (1) Automatic termination for failure to pay dues; and (2) Presumption of fair and reasonable removal process. As an initial matter, ORS 65.154 has been amended to explicitly state that a nonprofit corporation may suspend or terminate voting membership without a hearing for nonpayment of dues. Secondly, ORS 65.167(2) has been amended to clarify the procedure used to remove voting members must be fair and reasonable given all of the facts and circumstances.

Lastly, the procedure that creates a presumption of fair and reasonable has been cleaned up but remains the same: "[If the articles of incorporation or bylaws provide for a] procedure that: (a) gives the member notice in accordance with ORS 65.034 not less than 15 days before the expulsion, suspension or termination; and (b) provides an opportunity not less than 5 days before the effective date of expulsion, suspension, or termination for the member to be heard, orally or in writing by a person or person authorized to withdraw the proposed expulsion, termination or suspension."

C. Voting Thresholds

ORS Chapter 65 has been amended in a number of areas to differentiate the voting member minimum voting thresholds for mutual benefit nonprofits and public benefit/religious nonprofits. Under previous law, all of the following actions required a minimum voting threshold of two-thirds (2/3) of the member votes cast for: (1) Amending the Articles of Incorporation; (2) approving a merger; (3) selling substantially

all of the corporation's assets; or (4) approving dissolution of the corporation. The new law now sets these thresholds at:

Mutual Benefit Nonprofit – two-thirds (2/3) of the member votes cast; and
Public Benefit/Religious – majority (51%) of the member votes cast.

Of course, the rule that a greater percentage may be required by the Articles of Incorporation or Bylaws is still applicable.

D. Action Without Meeting

Voting members may also use the new email voting rules set forth above for the Board of Directors. As such, voting members may now take action in four different ways: (1) in a meeting; (2) unanimous consent resolution; (3) by e-mail voting; and (4) by ballot.

However, since the definition of “written” in ORS Chapter 65 now explicitly includes electronic mediums, the voting by ballot rules are likely still the preferred option over e-mail voting. This is because voting by ballot: (1) does not require the ballot to be open for a minimum of 48 hours, and instead only requires a reasonable time (which can take into account the facts and circumstances of the vote); (2) does not allow persons to change their votes prior to the deadline. The only change in the new law to the written ballot requirements is a clarification that a quorum for approval by written ballot must at least equal the quorum requirement in a meeting.

IV. MISCELLANEOUS

A. Notice

The provisions regarding effective notice have been modernized in ORS 65.034. Electronic notice has been inserted in place of telegraph and teletype notice, and as such, now allows for: (1) in person, (2) telephone, (3) mail or private courier, and (4) electronic notice. Additionally, the new provision now clarifies that all notices are effective only if communicated in a comprehensible form.

The following notice periods now apply: (1) in person and telephone notice is effective when communicated; (2) mail or private courier notice is effective five (5) days after deposit in the US Mail or on the date shown on the return receipt if sent by registered or certified mail; and (3) electronic notice is effective when received or two (2) days after the notice is sent. Notice is only effective if addressed to the address reflected in the corporate records (see Contact Information).

Lastly, the rules regarding notice for voting member meetings has been modified to account for the speed of electronic notice. Under prior law, the corporation was required to give notice to all members of each membership meeting no fewer than thirty (30) days and no less than sixty (60) days. ORS 65.214 has now been modified to allow for no fewer than seven (7) days' notice before the meeting if the requirements of ORS 65.034 are satisfied.

B. Definition of Written, Document, and Signing

The definitions of written, document, and signing for all of ORS Chapter 65 has been modernized to include electronic forms. As such, all documents, notices, and writings required by statute may now be embodied in electronic form.

C. Contact Information

ORS 65.771 regarding Corporate Records has been changed such that the nonprofit must maintain lists of directors, officers, and voting members names and "contact information." "Contact Information" is defined as any of the following: (1) a street address; (2) a mailing address; or (3) an electronic address, at which the [person] elects to receive notice and communications. ORS 65.001(9). Additionally, these lists are no longer required to be in alphabetical order.

The list of voting members maintained by the corporation must also include membership dates and the voting rights of each member if the corporation has multiple classes. ORS 65.224(1), ORS 65.771(3).

The nonprofit's bylaws should contain a provision substantially similar to the following:

Records of Members. The Secretary shall ensure that the Corporation maintains a current formal record of the names, contact information, and status of Voting Members and nonvoting members. The contact information of Voting Members must be in the form of a street address, mailing address, or electronic address at which the Voting Member elects to receive notices and other messages from the Corporation.

Records of Directors. The Secretary shall ensure that the Corporation maintains a current formal record of the names, contact information, and status of Directors. The contact information of Directors must be in the form of a street address, mailing address, or electronic address at which the Director elects to receive notices and other messages from the Corporation.