

Date of Hearing: April 25, 2011

ASSEMBLY COMMITTEE ON BANKING AND FINANCE

Mike Eng, Chair

AB 1211 (Silva) – As Introduced: February 18, 2011

SUBJECT: Not-for-profit corporations.

SUMMARY: Seeks to make technical, clarifying and non-controversial changes to various sections of the Corporations Code pertaining to the organization and operation of nonprofit corporations and unincorporated associations. Specifically, this bill:

- 1) Provides that nonincumbency of a director excuses requiring the presence of a specified director to establish a quorum.
- 2) Revises definition of an "interested director."
- 3) Excludes common directors under specified circumstances from the directors required to consent in order to take action without a meeting.
- 4) Allows directors who have only one vote on any action at a meeting and prohibits a director from voting by proxy at a meeting to apply this standard as well with unanimous consent in lieu of a meeting.
- 5) Exempts specified public benefit corporations from obtaining a waiver from the Attorney General's office in order to file dissolution documents that are not otherwise subject to the supervisory authority of the Attorney General.
- 6) Allows a corporation to furnish to its members a copy of a report filed with the Attorney General in lieu of an annual report.
- 7) Makes other nonsubstantive and conforming changes.

EXISTING LAW establishes the Corporations Code to provide the fundamental terms and provisions for the governance of nonprofit corporations and unincorporated associations. Sections 5000 – 10841 of the Corporations Code comprise the Nonprofit Corporation Law. Sections 12220 – 120704 comprise the Consumer Cooperative Corporation Law. Sections 18000-24001.5 comprise the Unincorporated Associations Law.

FISCAL EFFECT: Unknown

COMMENTS:

The sponsor, the Business Law Section, Nonprofit and Unincorporated Organizations Committee of the California State Bar, states this bill is needed to clarify various sections of the Corporations Code so that nonprofit corporations and unincorporated associations may have more certainty in their operations.

The amendments clarify when an interested director is not required for unanimous written consent and when a specified director is no longer necessary for a quorum. It also clarifies the Attorney General's supervisory authority with respect to Ballot Measure Committees and the types of return that need to be filed on dissolution. AB 1211 provides cross-references to unincorporated associations with respect to mergers, to charitable trust provisions in the Government Code, to removal of directors by the court, to health facilities provisions in the Nonprofit Public Benefit Corporation Law, to the Civil Code in the Consumer Cooperative Corporation Law, and to the Uniform Prudent Management of Institutional Funds Act in the Probate Code to alert nonprofit corporations and unincorporated associations to applicant related code sections.

Specified Director for a Quorum, Directors with a Conflict, and Director Voting

AB 1211 would amend Corporations Code Sections 5211(a) (7), 7211(a) (7), 9211(a) (7), and 12351(a) (7) to substitute “nonincumbency” for “death” to encompass all the situations where it would not be appropriate to require the presence of a specified director for a quorum.

AB 1211 would amend Corporations Code Sections 5211(b), 7211(b) and 9211(b), dealing with the unanimous written consent of the directors without the consent of an interested director. It would eliminate ambiguity regarding the definition of “interested director.”

It is important to remove this ambiguity because a consent presumably will not be valid unless a director who appears to be excused from signing it and does not do so actually falls within the correct definition.

Sections 5211(c), 7211(c), 9211(c), and 12351(c) are amended to clarify that the one vote and proxy rules apply, not only at meetings, but also to unanimous written consents.

Finally, the phrase “members of the board” and “member” have been changed to “director” or “directors”, both for simplicity and to not confuse them with members as defined in Section 5056.

Parallel Structure Revisions

AB 1211 makes the following changes so that the language is consistent in parallel code sections that were amended by AB 1233 (discussed below). In Sections 5213(a) and 7213(a), the language is changed from “chair of its board” to “chair of the board” to be consistent with Section 9213(a). Section 7213(a) and 9213(a) are changed to allow for both a chief financial officer and treasurer, like Section 5213(a). Section 9213(a) is amended to add “chairperson of the board” and to replace “such” with “any”. Sections 9213(a) and 12353(a) are amended to place “unless otherwise specified in the articles or bylaws” at the front of the third sentence like Sections 5213(a) and 7213(a). Sections 5213(a) and 9213(a) are also rewritten to clarify that certain officers cannot serve concurrently. In Sections 9211(a) (7) and 12351(a) (7), “in order”, which is present in the other two parallel sections, was omitted. In Section 12352, “or pursuant to” and “however” were omitted. These words have been added to the respective sections.

Board Committees

AB 1211 amends Sections 5212(b), 7212(b), 9212(b), and 12352(b) to clarify that both directors and nondirectors may serve on committees that do not exercise the authority of the Board. The prior language could have been misinterpreted to mean that only nondirectors could serve on such committees.

Reference to Applicable Provisions in the Government Code

AB 1211 provides cross-references in the Corporations Code to alert practitioners to important requirements contained in Government Code Section 12586 substantially affecting governance of nonprofit corporations and unincorporated associations. Amendments to do this are made as to nonprofit corporations to Sections 5212, 5213, 5235, 6321, 6324, 7213, 8324, 9212, and 9213, and as to unincorporated associations to Section 18300.

AB 1211 aims to alert practitioners to the existence of these significant laws affecting the organization, governance and reporting obligations of charitable organizations that are within the subject matter scope of existing sections of the Corporations Code but which were codified in the Government Code. By including cross-references in pertinent Corporations Code sections to the related section in the Government Code, practitioners will receive notice that a charitable organization may have additional obligations, stated in the Government Code, regarding committee structures, reporting obligations and executive compensation decisions.

Providing these cross-references in the Corporations Code to the Government Code will enhance practitioners' level of professional service to their clients by assuring they are aware of significant obligations of charitable organizations which do not appear in the Corporations Code. The cross-references will also contribute to the goal of the Nonprofit Integrity Act of 2004, of which Section 12586 is a part, to help assure compliance with its provisions so that the public's confidence in the financial integrity of charitable organizations is enhanced. Finally, the Proposal seeks to avoid inadvertent non-compliance with Section 12586, which may result in late filing penalties (Section 12586.1 of the Government Code), the suspension or revocation of the registration of a charitable organization (Government Code Section 12598(e)(1)), payment of the Attorney General's attorneys' fees and costs (Government Code Section 12598(b)), and civil or criminal penalties (Government Code Section 12591.1).

Reference to Removal by Court

Section 5222(d) provides that except as provided in Sections 5222, 5221, and 5223 a director may not be removed prior to the expiration of the director's term of office. Section 5227(c) provides a further exception, namely that if a corporation has too many "interested directors", a court could among other things order removal of directors. AB 1211 would add a reference in Section 5222(d) and (e) to Section 5227(c).

References to Health Facility Provisions

Corporations Code Sections 5914 *et seq.* impose specific filing requirements on corporations operating or controlling health facilities. These sections include religious corporations and mutual benefit corporations as well as public benefit corporations -- they cover "any nonprofit corporation that is defined in Corp. Code § 5046" (which defines public benefit, mutual benefit

and religious corporations) that owns or controls certain health facilities. However, there are no cross-references in the Nonprofit Mutual Benefit Corporation Law or the Nonprofit Religious Corporation Law that would incorporate these sections by reference and thereby call attention to them. Also, apparently, Sections 5915 through 5919 appear to apply only to public benefit corporations and Section 5920 through 5924 appear to apply to all three types of corporations (rather duplicative as to public benefit corporations).

AB 1211 adds the cross-references in new Sections 7914 and 9634. The cross-references are necessary; otherwise a mutual benefit or religious corporation might not even know that it is covered, and possibly fail to make required filings.

Ballot Measure Committees and Final Returns

The Attorney General's office generally has supervisory authority over public benefit corporations in California. This authority is exercised by the Attorney General's Registry of Charitable Trusts in accordance with the Supervision of Trustees and Fundraisers for Charitable Purposes Act (Government Code Sections 12580-12599.7). Public benefit corporations are required to register with and provide substantial documentation to the Registry of Charitable Trusts and to submit periodic reports and filings to the Registry of Charitable Trusts. However, with respect to public benefit corporations that are registered with the Secretary of State and which file campaign reports as ballot measure committees, such Attorney General's supervisory authority does not apply. Public benefit ballot measure corporations are specifically exempt from the Attorney General's supervisory authority pursuant to Government Code Sections 12581 and 12583. They are primarily subject to the supervisory authority of the California Fair Political Practices Commission, as well as to the authority of various enforcement and filing officials in California. They file various reports pursuant to and are subject to the California Political Reform Act and regulations promulgated by the Fair Political Practices Commission.

Several years ago, the Legislature amended Corporations Code Section 6615 to require all public benefit corporations to obtain a waiver from the Attorney General's office in order to file dissolution documents with the Secretary of State. The Legislature did not exempt public benefit ballot measure corporations, consistent with Government Code Sections 12581 and 12583, from this requirement. The result has been that public benefit ballot measure corporations, at the end of their existence, must submit substantial documentation to the Attorney General's office, just as a public benefit corporation must do at the beginning of their existence, in order to obtain the waiver letter. The issuance of the letter, which is essentially a pro forma formality, needlessly involves a waste of time, resources, attention, and money by the Attorney General's office and the dissolving public benefit ballot measure corporation that could be spent on more beneficial activities.

AB 1211 would amend Corporations Code Section 6615 and related Code Sections 5913, 6010, and 6716 to bring those sections into conformity with Government Code Sections 12581 and 12583.

Changes to subdivision (a) (4) of Section 6615 clarify that returns filed by nonprofit organizations under the Revenue and Taxation Code are not necessarily "franchise tax returns." The section now provides more inclusively that all "returns" of whatever type have been or will be filed by the dissolving corporation. The same change has been made to the corresponding Section 8615.

Reference to Repealed Code Section

There is an incorrect cross-reference in Section 12311(b) of the Consumer Cooperative Corporation Law. That section lists a number of prohibited names, including limited-equity housing cooperative “as defined in Section 33007.5 of the Health & Safety Code.” That section has been repealed and the term is now defined in Civil Code Section 817. AB 1211 amends Section 12311(b) correcting the cross-reference.

Reference to Uniform Management of Institutional Funds Act (UMIFA))

Probate Code Section 18508 as it read until January 1, 2009, provided that “nothing in this part alters the status of governing boards, or the duties and liabilities of directors, under other laws of this state.” This brought into play not only Corporations Code Sections 5231 and 5240, applicable to public benefit corporations, but also Corporations Code Sections 9241 and 9250, applicable to religious corporations. UPMIFA eliminated this section. SB 1329 (Harman) of 2008, which enacted UPMIFA in California, also amended Corporations Code Section 5240, but nothing was done about religious corporations.

To remedy this, the Proposal amends Section 9250 to add a subsection (b), which mirrors Section 5240.

PREVIOUS LEGISLATION:

AB 1233 (Silva) (Chapter 631, Statutes of 2009) made technical, clarifying and non-controversial changes to various sections of the Corporations Code pertaining to the organization and operation of nonprofit and consumer cooperative corporations.

SB 1329 (Harman) (Chapter 715, Statutes of 2008) Repeals the UMIFA and enacts the Uniform Prudent Management of Institutional Funds Act (UPMIFA).

REGISTERED SUPPORT / OPPOSITION:

Support

The Nonprofit and Unincorporated Organizations Committee of the Business Law Section of the State Bar of California (Sponsor)

Opposition

None on file.

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