

NOLS Legislative Review Project
Proposed Changes to Chapter 65 and a Request for Feedback
March 6, 2016

A Work Group created by the Nonprofit Organizations Law Section (NOLS) of the Oregon State Bar has reviewed Chapter 65 of the Oregon Revised Statutes – the Nonprofit Corporation Code. The Work Group solicited suggestions from members of the Bar about ways to modernize and improve the nonprofit statutes, considered developments in other states, and discussed experiences of Work Group members in developing a proposal. The Work Group requests feedback on the proposed changes before its next meeting on April 1. The Work Group plans to consider all comments it receives and then prepare the proposal for submission to the NOLS Executive Committee and then, if approved, the Bar. If approved by the Bar, the proposal will be introduced as a bill in the 2017 legislative session.

Comments, questions and suggestions can be sent to Susan Gary, the Chair of the Work Group and Reporter for the project (sgary@uoregon.edu), or to any member of the Work Group: David Atkin, Susan Bower, Cindy Cumfer, Elizabeth Grant, Kate Kilberg, Marisa Meltebeke, Nancy Murray, Anne O’Malley, and Jim White. The Work Group includes members from small and large law firms, the charities section of the office of the Attorney General, and the Nonprofit Association of Oregon.

The Work Group based its work on two guiding principles. First, changes should clarify or improve the functioning of the statutory framework, but not make major policy changes to the legal structure for nonprofit corporations in Oregon. Second, a nonprofit corporation should, with limited exceptions, be able to draft its own governance rules through its Articles and Bylaws. Certain rules will be mandatory and will be clearly identified as such in the statutes. Most rules will be default rules and will apply if the Articles and Bylaws of a nonprofit corporation are silent on the issue.

This memo will identify and explain some of the proposed changes. Also being circulated is a strike-and-score version of Chapter 65, showing the proposed changes. Some changes are made to clarify and not change existing law, and many of these clarifying changes are not described in this memo. The memo describes changes by topic, and does not always follow the statute, but references to ORS sections are provided.

Notice

The notice provision, ORS 65.034, is revised and now provides the rules for notice that apply throughout Chapter 65. In the current statutes, notice provisions appear in different sections, which can be confusing. In addition, the proposal updates the notice provision to include the types of notice currently used.

Notice may be delivered orally or in writing and written notice can be delivered electronically, by mail or by private carrier. The statute includes effective date rules for each type of notice: (1) oral notice is effective when communicated;

(2) electronic notice is effective on the earlier of when it is received or two days after it is sent; and (3) written notice delivered by mail or private carrier is effective on the earlier of when it is received, five days after it is mailed, or the date of receipt if sent by certified or registered mail. Notice will be correctly addressed if addressed to the address shown on the records of the corporation for the director or member. A person can choose to use an electronic or physical address for notice, or even use the address of the corporation, so that a person concerned about personal safety need not disclose a physical address. The proposal permits the corporation to provide in the Articles and Bylaws for alternative notice rules for members or directors, but not for notice required to be provided to the Attorney General.

The Work Group would like feedback on whether requiring two days for electronic notice, as a default rule, is too long.

Members

Default Rule – No Voting Members. The Work Group discussed the confusion in many nonprofit corporations about members. A new nonprofit may decide it wants to have members so that the members will pay dues, without realizing the role voting members play in an organization. Alternatively, a nonprofit may intend to have members who actively participate as voting members but over the years may find it cumbersome to have voting members and may stop having member meetings and votes. If a nonprofit's Articles state that it has members, but the nonprofit operates as if it does not have members, the legal functioning of the nonprofit is at risk. If the members do not elect the directors, then the directors may be acting without authority.

Initially, the Work Group thought that it could emphasize that “members” as used in the statute means voting members by using the term “voting member” throughout the Chapter, in place of the term “member.” On further consideration, however, the Work Group found that approach too cumbersome and probably not any more effective than the current statute. The Work Group decided instead to reverse the default rule with respect to members. Currently, ORS 65.137 says that a nonprofit corporation will have members unless the Articles say it does not have members. Under the proposal that section will say that a nonprofit corporation will have no voting members unless the Articles say it does have voting members.

Definition of Members. Under current law a member under the statutes is entitled to vote on certain things, including the election of directors and the dissolution of the corporation. The proposal changes this rule to make the provisions on voting default law. To be a “member” under the statute, a person must be entitled to vote on at least one of the items on a list provided in a new section that lists the items on which members currently can vote. A nonprofit corporation can eliminate the right to vote on any of these items, but if the corporation does not do so, a member can vote on the items listed in the new provision. ORS 65.001(26)(a).

Note that under the proposal a corporation could choose to have legal members with the right to vote on dissolution and no other voting rights, except the protected right to vote on any action that would restrict the members' voting rights. Members might not be entitled to vote on directors.

Rights and Obligations of Voting Members. ORS 65.144 will continue to permit a nonprofit corporation to create different classes of members with different voting rights. If a nonprofit has voting members, the right of members to vote on amendments to the Articles and any action that would reduce or eliminate the right of members to vote cannot be restricted by the Articles or Bylaws. ORS 65.144 will list the following things on which members can vote, unless the Articles or Bylaws provide otherwise:

- (a) the right to elect directors, as provided in ORS 65.311;
- (b) the right to remove directors, as provided in ORS 65.324;
- (c) the right to vote on any change to the number or the range for the size of the board or a change from a fixed or a variable-range size board if the articles establish the size or range, as provided in ORS 65.307(2);
- (d) the right to inspect and copy the records of the corporation, as provided in ORS 65.774;
- (e) the right to vote on the sale, transfer, exchange option, convey, merge or otherwise dispose of all or a significant portion of the assets of the corporation, as provided in ORS 65.803.
- (f) the right to vote on dissolution of the corporation as provided in ORS 65.624.
- (g) for voting members of a mutual benefit corporation, the right to approve a conflict of interest transaction, as provided in ORS 65.361

Notice. The new notice provisions apply to members. ORS 65.034. In addition, the proposal clarifies in ORS 65.167 that when notice is given to a member concerning termination, expulsion or suspension, the reasons for the action must be given only if cause is required to take the action.

Converting to a Corporation with No Voting Members. The Work Group considered the not infrequent problem of a nonprofit corporation that was set up to have voting members but no longer has a record of members, has not had member action for some years, and has no way to determine who members are. The Work Group wanted to make it easier for a corporation to convert to a corporation with no voting members. The proposal adds two new provisions:

Judicial Relief. In a subsection added to ORS 65.038, a court can declare who the members are and can amend the articles to provide that the corporation will not have voting members. A director, officer, delegate, member, or the Attorney General, can petition for this relief, if it is impossible or impractical for the corporation to identify its members.

Vote of Directors. A new section, following ORS 65.437, provides that if a nonprofit corporation has voting members, but for at least three years no meeting of the members has been held and no members have actively participated in the corporation, then the directors can amend the Articles to convert the corporation to one without voting members. The members will be deemed to have consented, and the corporation must provide notice to known members and post notice on its website.

Voting. Under current law several actions by members required action by the lesser of two-thirds of the votes cast or a majority of the voting power. Because many corporations have a large number of inactive members, meeting this requirement can be difficult. The proposal reduces the requirement to a majority of the votes cast. The change applies to amendments to the Articles, ORS 65.437(1)(b); merger, ORS 65.487; sale of assets, ORS 65.534;

New Procedure in Lieu of Annual Meeting. Under current ORS 65.201, a nonprofit corporation with members must hold an annual meeting. The annual meeting serves two purposes. One purpose is to provide information to the members on the activities and financial condition of the nonprofit. The second purpose is for the members to vote on directors. The Work Group was concerned that for some nonprofits an annual meeting of members is an ineffective way to accomplish those purposes because few members come. The Work Group proposes allowing a substitute procedure that a nonprofit could use in lieu of an annual meeting. Under this procedure a nonprofit would provide members with an annual report, either by mailing it (electronically or otherwise) or by posting it on the nonprofit's website, and then would provide for electronic voting under ORS 65.222.

Ways to Take Action. Under the proposal, a nonprofit corporation's members can take action in the following ways:

Hold annual and regular meetings under ORS 65.201. (Same as current law.)

Conduct an annual meeting without meeting in person, by following the new procedure. (New procedure in lieu of annual meeting).

Act by written consent without a meeting, but only if every member entitled to vote takes the action. (Same as current law – ORS 65.211.)

Act by written ballot under ORS 65.222, which currently provides for action by written ballot without a meeting, if the nonprofit corporation delivers a ballot to each member. The proposal adds language to clarify that if action is taken by written ballot, the number of ballots submitted will constitute a quorum, if for that nonprofit corporation the members who attend a meeting constitute a quorum.

List of Members. ORS 65.224 requires a nonprofit corporation to maintain a list of members and make it available for inspection by any member. The proposal creates a new definition of “contact information” in ORS 65.001 that permits a member to provide either an electronic or physical address for this purpose. Further, if a corporation permits, a member may use the corporation’s address as the member’s contact information.

Directors

Definitions. The proposal adds definitions for appointed and designated directors, so that the provisions on the election of directors could be written more clearly. In most nonprofit corporations the incorporators, the current directors, or the members elect directors, but in some nonprofit corporations directors may be appointed or designated. An “appointed director” is one appointed by someone other than the board of directors, and a “designated director” is one who serves by virtue of holding a position in another entity, as specified in the Articles or Bylaws (for example, the Mayor of a city).

Qualifications. The proposal may amend ORS 65.307 to clarify that a director may be under the legal age of majority. The Work Group is still discussing this issue.

No Directors – Court Can Appoint. The proposal adds a new section to provide that if a nonprofit has no directors and no members who can vote for directors, the circuit court can appoint one or more directors.

Removal. The proposal clarifies the section providing for removal of directors, ORS 65.324, by creating separate sections to make clear the procedure for removal under different circumstances. The default rules, unless the Articles or Bylaws provide otherwise, are the following:

Directors elected by members can be removed without cause by the members, by a majority vote of the votes cast.

Directors elected by directors can be removed with or without cause by a majority vote of the directors in office. This is a recommended change from a requirement of two-thirds of the directors in office.

Directors can be removed automatically for missing a specified number of meetings, but only if the Articles or Bylaws provide for the automatic removal at the beginning of the director’s term. This is a new provision.

If the Articles or Bylaws provide reasons for removal of a director elected by members or by directors, a majority of the directors can remove a director for such reasons.

A court can remove directors as set forth in ORS 65.327. No changes are recommended.

A designated director can be removed by changing the designation. ORS 65.331(1).

An appointed director can be removed by the person appointing the director. The proposal adds that the board of directors can remove an appointed director in the same fashion as any other director. ORS 65.331(2).

Regularly Scheduled Meeting. The proposal adds to ORS 65.337 an explanation of a regularly scheduled meeting. The revisions provide that such a meeting, which requires no further notice to directors, is one that the Board schedules in a manner that provides all directors with the date, time and place of the meeting without additional notice.

Ways to Take Action. The proposal clarifies and updates the ways in which a Board can take action, particularly with respect to the use of electronic forms of communication. A board can take action in any of the following ways:

A Meeting. A nonprofit corporation can permit a director to participate through a form of communication if all directors can simultaneously communicate with each other. ORS 65.337. The Work Group thought that in connection with a meeting, simultaneous communication is critical. The Work Group is aware that technology will continue to change, so the statute can simply provide for “simultaneous communication” and that will cover changes in technology. Under current technology, a director could participate by conference call or Skype, but not by email, because email does not permit simultaneous communication.

Email. The proposal adds a new section to provide for action by email. Members of the Work Group noted that Boards already take action in this way, and wanted to provide a structure for doing so that would guide and protect the nonprofit. The new section first notes that directors can use email to discuss matters that come before the board. This certainly is current practice. The new section then states that an action can be taken by email and provides the process for doing so. First, an email announcing that a vote will be taken must be sent to each director. The email must include a description of the matter and a deadline for the vote, which must be at least 48 hours from the time of the email. The directors can then vote by email, and a director can change his or her vote at any time before the deadline. An affirmative vote of a majority of directors in office is effective.

Unanimous written consent. ORS 65.341 will continue to provide that directors can take action by written consent, without a meeting, if the

consent is unanimous. The definitions of electronic, sign, and written have been moved because they now apply to additional sections.

Quorum. The proposal changes ORS 65.351 to provide that a quorum consists of a majority of directors in office immediately before the meeting begins. The Articles or Bylaws can provide otherwise, but cannot provide for a quorum of fewer than one-third of the directors in office immediately before the meeting. The current statute sets the default rule for a corporation with a fixed number of board members at a majority of the fixed number, rather than a majority of those in office. The language for a corporation with a variable range for its board is confusing and is clarified to set the quorum at a majority of the directors in office.

In current ORS 65.351(4) a director who is present at a meeting is deemed to have assented to action taken at the meeting unless certain requirements listed in the statute are met. The proposal changes “deemed” to “rebuttably presumed,” to allow for evidence of lack of assent in situations that might occasionally arise.

Voting. Current law requires that the board of directors approve certain actions by a majority of the directors in office at the time of the vote. The proposal removes the requirement so that approval will be by the directors’ normal voting rules for merger, ORS 65.487(2); sale of assets, ORS 65.534; dissolution, ORS 65.624.

Dissolution. Sometimes a nonprofit corporation needs to dissolve but no longer has enough directors to conduct business and approve the dissolution. The proposal adds a provision permitting the remaining directors to provide notice of the circumstances and a plan of dissolution to the Attorney General. After 60 days the Attorney General will be deemed to have authorized the dissolution, and the directors can then carry out the plan of dissolution.

Committees

The proposal modifies ORS 65.354 to clarify that all voting members of committees exercising the authority of the board must be directors. A new section provides that the board can create committees that do not exercise the authority of the board and these committees can have members who are not directors or members of the corporation. The current statute seems to assume the use of these other committees, but clarification seems appropriate.

Inspection of Records

Under the statutes members have had authority to inspect and copy records of a corporation, but the ability of a director to see corporate records has been unclear. Directors need access to corporate records in order to understand the functioning of the corporation and to carry out the directors’ duty of care to the corporation. The Work Group discussed balancing the need to make information available for the directors with the need to protect the administrative staff of the

corporation from unnecessary and excessive requests. The proposal adds a new subsection following ORS 65.771, stating that a director may inspect and copy any records of the corporation, to the extent reasonably necessary for the director to fulfill the director's fiduciary duties.

Officers

Required Officers. ORS 65.371 requires a nonprofit corporation to have a president and secretary. The proposal adds treasurer to the list of required officers and clarifies that an officer may or may not be a director. Although a person can hold more than one office at the same time, a new subsection provides that in a public benefit corporation the same person may not simultaneously serve as president, secretary, and treasurer.

Removal. The proposal adds a provision permitting the Department of Justice to remove an officer at any time, with or without cause.

Authority of the Attorney General

Derivative Suits. The Attorney General is added as a party who can bring a suit on behalf of a nonprofit corporation.

Amendment of Articles to Correct Characterization. Under current law the Attorney General has the authority to bring a judicial proceeding to correct the characterization of the corporation in the Articles as a public benefit, mutual benefit, or religious corporation. Current law requires that the proceeding be brought in Marion County and the proposal deletes that requirement. ORS 65.454.

Merger. Under current ORS 65.484, a public benefit or religious corporation merging with a business or mutual benefit corporation must provide notice 20 days in advance to the Attorney General, unless the surviving corporation will be a public benefit or religious corporation. The proposal expands the notice requirement to any merger involving a public benefit or religious corporation.

Receivership. The proposal adds a new section to permit the Attorney General to ask the Court to appoint a receiver or custodian for a nonprofit, after notice and a hearing. ORS 65.667 currently provides that a court can appoint a receiver or custodian for a corporation in dissolution. Under the proposal, the requirements set forth in ORS 65.667 will be moved to the new section, and ORS 65.667 will refer to the new section.

Notice Related to Sale of Assets. The proposal increases the time for notice given by a public benefit or religious corporation of the sale of all or substantially all of its assets from 20 days to 30 days. The Work Group wanted to give the Attorney General sufficient time to act before charitable assets disappeared, and noted that if

the corporation needs to act quickly the corporation can request that the Attorney General waive the requirement.

Dissolution. The proposal adds a subsection to ORS 65.647 providing that the Attorney General may administratively dissolve a public benefit corporation if the corporation loses its federal tax exemption.

Judicial dissolution. Current law requires the Attorney General to bring an action to dissolve a corporation in Marion County. The proposal removes that restriction.

Merger

The proposal modifies several provisions related to merger. Under the proposal, notice to the Attorney General is required for all mergers, ORS 65.484(2); the number of votes required for members to approve a merger is reduced to a majority of the votes cast, ORS 65.487; and the requirement of a super majority vote to approve a merger (a majority of the directors in office) is removed, ORS 65.487(2). In addition, if approval of the plan of merger by the Attorney General is required, the Articles of Merger must include a statement that the Attorney General approved the plan. ORS 65.491(d).

Dissolution – Publishing Notice

If a nonprofit corporation publishes notice, any claims against the corporation will be barred after five years. The Work Group discussed the problem of publishing notice in a newspaper and the fact that such notice was costly to the corporation and unlikely to be effective in reaching creditors. The proposal adds an option for the publication of notice “on the corporation’s primary media account if the account is stable and will remain accessible to the public for at least 30 days.” ORS 65.644(2)(b).