

Oregon Legislature Updates Nonprofit Corporation Law
Susan N. Gary
Orlando J. and Marian H. Hollis Professor of Law, University of Oregon

In early 2014 the Executive Committee of Nonprofit Organizations Law Section (NOLS) of the Oregon State Bar appointed a Work Group to review ORS Chapter 65 and identify provisions that need clarification or modernization. The Work Group gathered comments and suggestions from lawyers who work with nonprofits and worked with the Nonprofit Association of Oregon to get the perspective of nonprofit managers. Initial Work Group members were David Atkin, Susan Bower, Cindy Cumfer, Elizabeth Grant, Kate Kilberg, Marisa Meltebeke, Nancy Murray, Anne O'Malley, and Jim White; Warren Binford joined the Work Group in 2017. Susan Gary served as Chair and Reporter.

The Work Group approached its work with 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 summary identifies some of the more significant provisions of SB 360. For a detailed explanation of the bill and discussion of the purposes behind some of the changes, see the Report on the NOLS website: <https://nonprofitlaw.osbar.org/files/2019/05/SB360report.pdf>.

Shell Entities. In 2017 changes to the corporation code addressed problems posed by shell entities. SB 360 adds these changes to Chapter 65.

Notice. ORS 65.034 now provides rules for effective notice for all purposes under Chapter 65. Notice may be delivered orally (in person or by telephone) or in writing (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 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. The corporation can provide in the Articles and Bylaws for alternative notice rules for members or directors, if the alternative notice provisions are more stringent than the rules required by ORS 65.034.

Members

SB 360 changes ORS 65.137 to reverse the default rule for whether a nonprofit corporation has members. A corporation will not have members unless the articles state that the corporation does have members.

Voting Rights. In current law, provisions regarding voting rights are spread throughout Chapter 65. ORS 65.144 now lists voting rights of members in one place. The list is non-exclusive, but captures most of the rights members have, unless the corporation provides otherwise in its articles or bylaws.

A member is now defined as someone who has one or more of the rights enumerated in ORS 65.144. Two rights are mandatory and cannot be changed by the articles and bylaws: (1) the right to vote on an action that would reduce or eliminate a member's right to vote, and (2) the right to inspect and copy the corporation's records, as provided (and limited) in ORS 65.774. Other than those two rights, ORS 65.144 gives each nonprofit corporation control over its structure and the rights of members. An existing corporation that wants to limit any of the rights members currently have would need to do so with a vote of the members, under ORS 65.144(2).

Removal. A member can be removed without a hearing for failure to pay dues, and otherwise a member can be removed through a procedure that is fair and reasonable. The statute provides two ways of structuring a procedure to be fair and reasonable.

Member Action by Email. Under current law members can take action without a meeting if they act unanimously. SB 360 adds a provision authorizing action taken by email, and if the requirements are followed, the decision need not be unanimous. If ballots are submitted electronically, the number of votes cast constitutes a quorum if the number of members present at a meeting would constitute a quorum.

Super-majority Removed. Under current law several actions by members require action by the lesser of two-thirds of the votes cast or a majority of the voting power. Because many public benefit corporations have a large number of inactive members, meeting this requirement can be difficult. SB 360 removes the super-majority requirement for member voting in public benefit corporations and permits those members to take action with a majority of the votes cast.

Changing to a Nonmember Corporation. SB 360 addresses 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 legislation makes it easier for a corporation to convert to a corporation with no voting members, while still protecting the rights of any members that exist. The proposal adds two new mechanisms.

Section 6 of SB 360 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 corporation must provide notice to known members and post notice on its website. The corporation cannot proceed using this process if a member objects within 30 days of the date of the notice.

Section 16 amends ORS 65.038. If the corporation cannot identify its members, delegates, or directors or is unable to call a meeting of members, delegates, or directors or otherwise obtain consent from any of them for actions on behalf of the corporation, a director,

officer, delegate, member or the Attorney General can petition the court for relief. The court can direct the corporation to call a meeting of the members, delegates, or directors, as under current law, and in addition the court can determine who the members or the directors are, or the court can amend the articles to state that the corporation does not have members.

Members' Right to Inspect List of Members. Under ORS 65.224 a nonprofit corporation must maintain a list of its members, and each member has the right to inspect the list. Due to concerns about personal safety and privacy, SB 360 permits a member to provide an email address as contact information.

Board of Directors

Board Action Using Email. A new provision permits a board of directors to take action using electronic mail, if the board follows a procedure set forth in the statute. The new section also states that directors can use email to discuss matters that come before the board, without following the requirements for taking board action. With this amendment, a board can take action in three ways: a meeting at which the board votes, a unanimous written consent signed by all directors under ORS 65.341, or a vote by email.

Election of Directors. A new subsection added to ORS 65.311 clarifies that if a corporation has no directors and no members who can elect directors, the Attorney General can ask a court to appoint one or more directors. Occasionally a nonprofit corporation will have assets or liabilities remaining, but all directors will have resigned or are facing removal. Rather than require dissolution, the court can appoint a new board of directors at the request of the Attorney General. An analogous provision for charitable trusts can be found at ORS 130.615(4).

Removal. A number of changes update the rules governing removal of directors.

Meetings of Directors. Under ORS 65.337 a nonprofit corporation can permit a director to participate in a meeting if all directors can simultaneously communicate with each other. SB 360 did not change this rule, because "simultaneously communicate" should cover changes in technology. Under current technology, a director can participate by conference call or Skype, but not by email, because email does not permit simultaneous communication.

Quorum. SB 360 amends 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 less than one-third of the directors in office immediately before the meeting.

Board Committees. A change clarifies language in ORS 65.354. All voting members of committees exercising the authority of the board must be directors. The board can create committees that do not exercise the authority of the board, with members who are not directors or members of the corporation.

Conflict of Interest Transaction. A corporation can enter into a conflict of interest transaction with a director, without risk that the transaction will be voidable or the director will

be liable, if the transaction is fair to the nonprofit corporation. The statute creates a presumption of fairness if certain procedures are followed. SB 360 amends ORS 65.361 to clarify that to avoid liability the transaction must in fact be fair to the nonprofit corporation. The process outlined in the statute creates a presumption of fairness but not a safe harbor.

A new subsection clarifies that a director has an indirect interest in a transaction involving a person related to a director or a business associate of a director.

Officers

The proposal amends ORS 65.371 to require that each nonprofit corporation have a treasurer, adding treasurer to president and secretary, the two officers required under the current statute. The same individual may simultaneously hold more than one office, but may not serve simultaneously as the president, secretary and treasurer. An officer need not be a director.

Dissolution

When a public benefit corporation dissolves, the assets that had been held by the corporation must be used to pay creditors and then must be distributed to another public benefit corporation. Amendments to ORS 65.627 strengthen the ability of the Attorney General to protect charitable assets when a corporation dissolves. The time period for notice to the Attorney General is increased, and the information provided to the Attorney General showing persons receiving property on dissolution must include creditors.

Definitions

SB 360 improves and adds a number of definitions. New definitions are created for “appointed director” and “designated director,” and the definition of director is amended to include the new terms. The term “contact address” is changed to “contact information” and is updated to reflect the ways a member or director can receive notice from the corporation, including email.

Under current law, a member is someone who can vote for a director. SB 360 changes the definition and provides that a member is someone entitled to exercise one or more of the rights identified in ORS 65.144. Under the amended definition a corporation could, for example, decide to give its members the right to vote to dissolve the corporation, but not to elect directors.

Several changes reflect the use of electronic tools. A new definition for “document” provides for both tangible documents and electronic documents. A new definition of “written” explains that written means embodied as a document, so reading the definitions together, something written can be written electronically. A new definition of “sign” includes electronic signatures.