# Form of Bylaws

## California Nonprofit Public Benefit Corporation

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**About This Form**: Public Counsel's Community Development Project has designed the attached form bylaws for a non-membership California Nonprofit Public Benefit Corporation to serve as a drafting tool for nonprofit organizations that have chosen to incorporate in California, existing California nonprofit corporations engaged in a bylaws review, and the *pro bono* attorneys who represent them.

The form is annotated with explanatory endnotes, including citations to applicable laws. For further instructions on how to use this form, please see the first endnote. Public Counsel will update this form periodically for changes in law, recommended practices and available resources. For the latest version and a link to the word document, see *https://publiccounsel.org/publications/annotated-form-of-bylaws-for-a-california-nonprofit-public-benefit-corporation/*.

**Latest Updates:** The latest update of this form includes suggested language and provisions for an organization that wants its diversity, equity, and inclusion (DEI) goals and practices to be reflected in its bylaws. Best practices for achieving equity in governance and leadership vary, depending on organizational goals, structure, and mission. The equity-related provisions and accompanying annotations are not designed to provide a one-size-fits all manual on DEI for all nonprofit organizations. Instead, the bylaws provide suggested language for commonly recommended tools and a legal framework for questions that often arise related to DEI.

**Important Notes**: This form contains alternative language suggestions that may be applicable based on the corporation's activities. It is important that anyone creating bylaws for a nonprofit corporation carefully consider the explanations in the endnotes so that they will fully understand the ramifications of their drafting choices. Once the bylaws are adopted by the corporation, its officers and directors will be required to follow the procedures described in the bylaws. Please see the first endnote for more information.

610 SOUTH ARDMORE AVENUE, LOS ANGELES, CA 90005 | TEL: 213.385.2977 | FAX: 213.385.9089 | WWW.PUBLICCOUNSEL.ORG

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***This form should not be construed as legal advice***. Please contact an attorney for legal advice about your organization's specific situation. This form should not be used "as is" but should be modified after careful consideration of the explanations and alternative wording choices in the text of the bylaws and endnotes. Some corporations may need to include additional provisions not discussed in this form to qualify for certain grants or government funding.

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Public Counsel's Community Development Project provides free legal assistance (including bylaws review) to qualifying nonprofit organizations that share our mission of serving low-income communities and addressing issues of poverty within Los Angeles County. If your organization needs legal assistance, or to provide comments on this form, visit *https://publiccounsel.org/programs/community-development-project/* or call (213) 385-2977, extension 200.

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# Bylaws[1] of

# **[Name of Corporation]**

A California Nonprofit Public Benefit Corporation

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**ARTICLE 1 CORPORATE NAME**[2]

The name of this corporation is **[Name of Corporation]** (the "Corporation").

**ARTICLE 2 OFFICES**

Section 2.1 Principal Office[3]
The principal office for the transaction of the business of the Corporation may be established at any place or places within or without the State of California by resolution of the Board.

Section 2.2 Other Offices[4]
The Board may at any time establish branch or subordinate offices at any place or places where the Corporation is qualified to transact business.

**ARTICLE 3 PURPOSES**

Section 3.1 General Purpose[5]
The Corporation is a nonprofit public benefit corporation and is not organized for the private gain of any person. It is organized under the Nonprofit Corporation Law of California ("California Nonprofit Corporation Law") for ***[public* OR *charitable* OR *public and charitable*]** purposes.

Section 3.2 Specific Purpose[6]
The specific purpose of the Corporation shall include without limitation, **[insert description]**.

Section 3.3 [*Commitment to Equity*][7]
[*Insert corporation's equity statement, if any*]

**ARTICLE 4 LIMITATIONS**

Section 4.1 Political Activities[8]
The Corporation has been formed under California Nonprofit Corporation Law for the charitable purposes described in Article 3, and it shall be nonprofit and nonpartisan. No substantial part of the activities of the Corporation shall consist of carrying on propaganda, or otherwise attempting to influence legislation, and the Corporation shall not participate in or intervene in any political campaign (including the publishing or distribution of statements) on behalf of, or in opposition to, any candidate for public office.

Section 4.2 Prohibited Activities[9]
The Corporation shall not, except in any insubstantial degree, engage in any activities or exercise any powers that are not in furtherance of the purposes described in Article 3. The Corporation may not carry on any activity for the profit of its Officers, Directors or other private persons or distribute any gains, profits or dividends to its Officers, Directors or other persons as such. Furthermore, nothing in Article 3 shall be construed as allowing the Corporation to engage in any activity not permitted to be carried on (i) by a corporation exempt from federal income tax under section 501(c)(3) of the Internal Revenue Code of 1986, as amended (the "Code") or (ii) by a corporation, contributions to which are deductible under section 170(c)(2) of the Code.

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**ARTICLE 5 DEDICATION OF ASSETS**

Section 5.1 Property Dedicated to Nonprofit Purposes[10]
The property of the Corporation is irrevocably dedicated to **[insert exempt purpose(s) stated in Articles of Incorporation (e.g., "charitable")]** purposes. No part of the net income or assets of the Corporation shall ever inure to the benefit of any of its Directors or Officers, or to the benefit of any private person, except that the Corporation is authorized and empowered to pay reasonable compensation for services rendered and to make payments and distributions in furtherance of the purposes set forth in Article 3 hereof.

Section 5.2 Distribution of Assets upon Dissolution[11]
Upon the dissolution or winding up of the Corporation, its assets remaining after payment, or provision for payment, of all debts and liabilities of the Corporation shall be distributed to a nonprofit fund, foundation, or corporation which is organized and operated exclusively for **[insert exempt purpose(s) stated in Articles of Incorporation (e.g., "charitable")]** purposes and which has established its tax exempt status under Section 501(c)(3) of the Code.

**ARTICLE 6 MEMBERSHIPS**

Section 6.1 Members[12]
The Corporation shall have no members within the meaning of section 5056 of the California Nonprofit Corporation Law.

Section 6.2 Non-Voting Members
The Board may adopt policies and procedures for the admission of associate members or other designated members who shall have no voting rights in the Corporation. Such associate or other members are not "members" of the Corporation as defined in section 5056 of the California Nonprofit Corporation Law.

**ARTICLE 7 DIRECTORS**[13]

Section 7.1 Number and Qualifications[14]

7.1.1 Number
*[The authorized number of directors of the Corporation ("Directors") shall be not less than [_____] or more than [_____]; the exact authorized number to be fixed, within these limits, by resolution of the Board.]*

OR

*[The authorized number of directors of the Corporation ("Directors") shall be [_____].]*

OR

*[The authorized number of directors of the Corporation ("Directors") shall be determined by the following method: [_____].]*

7.1.2 [*Qualifications*][15]
*[Insert qualifications for serving on the Board, if any.]*

7.1.3 [*Community Representation*][16]
[*E.g., At least (#) Directors shall be individuals who* [***are eligible to receive services from the Corporation/reside in areas served by the Corporation/fill in applicable board qualification***].

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*Failure to comply with this Section 7.1.3 shall not affect the validity or enforceability of any resolution or transaction approved by the Board.]*

Section 7.2 Corporate Powers Exercised by Board[17]

Subject to the provisions of the Articles of Incorporation of the Corporation (the "Articles of Incorporation"), California Nonprofit Corporation Law and any other applicable laws, the business and affairs of the Corporation shall be managed, and all corporate powers shall be exercised, by or under the direction of the board of Directors (the "Board"). The Board may delegate the management of the activities of the Corporation to any person or persons, management company or committee however composed, provided that the activities and affairs of the Corporation shall be managed and all corporate powers shall be exercised under the ultimate direction of the Board.

Section 7.3 Terms; Election of Successors[18]

*[Alternative 1: Directors shall be elected at each annual meeting of the Board for [_____] year terms. Each Director, including a Director elected to fill a vacancy, shall hold office until the expiration of the term for which they were elected and until the election and qualification of a successor, or until that Director's earlier resignation or removal in accordance with these Bylaws and California Nonprofit Corporation Law.[19] By resolution, the Board may arrange for terms to be staggered.]*

OR

*[Alternative 2 (Staggered Terms):[20]At the first annual meeting, the Directors shall be divided into [three] approximately equal groups and designated by the Board to serve one, two, or three year terms. Thereafter, the term of office of each Director shall be [three] years. Each Director, including a Director elected to fill a vacancy, shall hold office until the expiration of the term for which they were elected and until the election and qualification of a successor, or until that Director's earlier resignation or removal in accordance with these Bylaws and California Nonprofit Corporation Law.]*

*[Directors shall not serve for more than **[#]** consecutive terms. A Director who has served [#] consecutive terms may be eligible to serve as a Director after **[#]** year(s) have passed since that person was last a Director.]*

Section 7.4 Vacancies

7.4.1 Events Causing Vacancy[21]

A vacancy or vacancies on the Board shall be deemed to exist on the occurrence of the following: (i) the death, resignation, or removal of any Director; (ii) whenever the number of authorized Directors is increased; or (iii) the failure of the Board, at any meeting at which any Director or Directors are to be elected, to elect the full authorized number of Directors.

7.4.2 Removal[22]

The Board may by resolution declare vacant the office of a Director who has been declared of unsound mind by an order of court, or convicted of a felony, or found by final order or judgment of any court to have breached a duty under California Nonprofit Corporation Law.

*[The Board may by resolution declare vacant the office of a director who fails to attend (#) [consecutive] Board meetings [during any calendar year].]*

*[The Board may by a majority vote of the Directors who meet all of the required qualifications to be a Director set forth in Section 7.1.2 declare vacant the office of any Director who fails or ceases to meet any required qualification that was in effect at the beginning of that Director's current term of office.]*

Directors may be removed without cause by a majority of Directors then in office.

7.4.3 No Removal on Reduction of Number of Directors[23]
No reduction of the authorized number of Directors shall have the effect of removing any Director before that Director's term of office expires unless the reduction also provides for the removal of that specified Director in accordance with these Bylaws and California Nonprofit Corporation Law.

7.4.4 Resignations[24]
Except as provided in this Section 7.4.4, any Director may resign by giving written notice to the Chairperson, the President, the Secretary, or the Board. Such a written resignation will be effective on the later of (i) the date it is delivered or (ii) the time specified in the written notice that the resignation is to become effective. No Director may resign if the Corporation would then be left without a duly elected Director or Directors in charge of its affairs, except upon notice to the California Attorney General (the "Attorney General").

7.4.5 Election to Fill Vacancies[25]
If there is a vacancy on the Board, including a vacancy created by the removal of a Director, the Board may fill such vacancy by electing an additional director as soon as practicable after the vacancy occurs. If the number of Directors then in office is less than a quorum, additional directors may be elected to fill such vacancies by (i) the unanimous written consent of the Directors then in office, (ii) the affirmative vote of a majority of the Directors in office at a meeting held according to notice or waivers complying with section 5211 of the California Nonprofit Corporation Law, or (iii) a sole remaining Director.

Section 7.5 Regular Meetings[26]
Each year, the Board shall hold at least one meeting, at a time and place fixed by the Board, for the purposes of election of Directors, appointment of Officers, review and approval of the corporate budget and transaction of other business. This meeting is sometimes referred to in these Bylaws as the "annual meeting." Other regular meetings of the Board may be held at such time and place as the Board may fix from time to time by resolution. [27]

Section 7.6 Special Meetings[28]
Special meetings of the Board for any purpose may be called at any time by the Chairperson, or the President, or the Vice President (if any), or the Secretary, or any two Directors.

Section 7.7 Notice of Meetings

7.7.1 Manner of Giving[29]
Except when the time and place of a regular meeting is set by the Board by resolution in advance (as permitted by Section 7.5), notice of the time and place of all regular and special meetings shall be given to each Director by one of the following methods:

(a) Personal delivery of oral or written notice;

(b) First-class mail, postage paid;

(c) Telephone, including a voice messaging system or other system or technology designed to record and communicate messages; or

(d) Facsimile, electronic mail ("e-mail") or other means of electronic transmission if the recipient has consented to accept notices in this manner.

All such notices shall be given or sent to the Director's address, phone number, facsimile number or e-mail address as shown on the records of the Corporation. Any oral notice given personally or by telephone may be communicated directly to the Director or to a person who would reasonably

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be expected to promptly communicate such notice to the Director. Notice of regular meetings may be given in the form of a calendar or schedule that sets forth the date, time and place of more than one regular meeting.

7.7.2 Time Requirements[30]
Notices sent by first-class mail shall be deposited into a United States mailbox at least four days before the time set for the meeting. Notices given by personal delivery, telephone, voice messaging system or other system or technology designed to record and communicate messages, facsimile, e-mail or other electronic transmission shall be delivered at least 48 hours before the time set for the meeting.

7.7.3 Notice Contents[31]
The notice shall state the time and place for the meeting, except that if the meeting is scheduled to be held at the principal office of the Corporation, the notice shall be valid even if no place is specified. The notice need not specify the purpose of the meeting unless required to elsewhere in these Bylaws.

Section 7.8 Place of Board Meetings[32]
Regular and special meetings of the Board may be held at any place within or outside the state that has been designated in the notice of the meeting, or, if not stated in the notice or, if there is no notice, designated by resolution of the Board. If the place of a regular or special meeting is not designated in the notice or fixed by a resolution of the Board, it shall be held at the principal office of the Corporation.

7.8.1 Meetings by Telephone or Similar Communication Equipment[33]
Any meeting may be held by conference telephone or other communications equipment permitted by California Nonprofit Corporation Law, as long as all Directors participating in the meeting can communicate with one another concurrently and all other requirements of California Nonprofit Corporation Law are satisfied. All such Directors shall be deemed to be present in person at such meeting.

Section 7.9 Quorum and Action of the Board

7.9.1 Quorum[34]
A majority of Directors then in office (but no fewer than two Directors or one-fifth of the authorized number in Section 7.1.1, whichever is greater) shall constitute a quorum for the transaction of business, except to adjourn as provided in Section 7.11.

7.9.2 Minimum Vote Requirements for Valid Board Action[35]
Every act taken or decision made by a vote of the majority of the Directors present at a meeting duly held at which a quorum is present is the act of the Board, unless a greater number is expressly required by California Nonprofit Corporation Law, the Articles of Incorporation or these Bylaws. A meeting at which a quorum is initially present may continue to transact business, notwithstanding the withdrawal of Directors from the meeting, if any action taken is approved by at least a majority of the required quorum for that meeting.

7.9.3 When a Greater Vote Is Required for Valid Board Action[36]
The following actions shall require a vote by a majority of all Directors then in office in order to be effective:

(a) Approval of contracts or transactions in which a Director has a direct or indirect material financial interest as described in Section 10.1 (provided that the vote of any interested Director(s) is not counted);

(b) Creation of, and appointment to, Committees (but not advisory committees) as described in Section 8.1; and

(c) Removal of a Director without cause as described in Section 7.4.2.

Section 7.10 Waiver of Notice[37]

The transactions of any meeting of the Board, however called and noticed or wherever held, shall be as valid as though taken at a meeting duly held after regular call and notice, if (i) a quorum is present, and (ii) either before or after the meeting, each of the Directors who is not present at the meeting signs a written waiver of notice, a consent to holding the meeting, or an approval of the minutes. The waiver of notice or consent does not need to specify the purpose of the meeting. All waivers, consents, and approvals shall be filed with the corporate records or made a part of the minutes of the meeting. Also, notice of a meeting is not required to be given to any Director who attends the meeting without protesting before or at its commencement about the lack of adequate notice. Directors can protest the lack of notice only by presenting a written protest to the Secretary either in person, by first-class mail addressed to the Secretary at the principal office of the Corporation as contained on the records of the Corporation as of the date of the protest, or by facsimile addressed to the facsimile number of the Corporation as contained on the records of the Corporation as of the date of the protest.

Section 7.11 Adjournment[38]

A majority of the Directors present, whether or not constituting a quorum, may adjourn any meeting to another time and place.

Section 7.12 Notice of Adjournment[39]

Notice of the time and place of holding an adjourned meeting need not be given, unless the meeting is adjourned for more than 24 hours, in which case personal notice of the time and place shall be given before the time of the adjourned meeting to the Directors who were not present at the time of the adjournment.

Section 7.13 Conduct of Meetings[40]

[*Alternative 1: Meetings of the Board shall be presided over by the Chairperson, or, if there is no Chairperson or the Chairperson is absent, the President or, if the President and Chairperson are both absent, by the Vice President (if any) or, in the absence of each of these persons, by a chairperson of the meeting, chosen by a majority of the Directors present at the meeting*.]

OR

[*Alternative 2: The Chairperson (or, if there is no Chairperson, the President) shall use best efforts to ensure that every Director is given the opportunity to facilitate a meeting of the Board at least once while serving as a Director of the Corporation.*][41]

The Secretary shall act as secretary of all meetings of the Board, provided that, if the Secretary is absent, the presiding officer shall appoint another person to act as secretary of the meeting. Meetings shall be governed by rules of procedure as may be determined by the Board from time to time, insofar as such rules are not inconsistent with or in conflict with these Bylaws, with the Articles of Incorporation, or with any provisions of law applicable to the Corporation.[42]

Section 7.14 Action without Meeting[43]

Any action required or permitted to be taken by the Board may be taken without a meeting, if all members of the Board, individually or collectively, consent in writing to the action and the number of Directors then in office constitutes a quorum. For the purposes of this Section 7.14 only, "all members of the Board" shall not include any "interested Director" as defined in section 5233 of the California Nonprofit Corporation Law or any "common director" as described in section 5234 of the California Nonprofit Corporation Law if such director abstains in writing from providing consent and the further requirements of section 5211(b) of the California Nonprofit Corporation Law are satisfied. Such written consent shall have the same force and effect

as a unanimous vote of the Board taken at a meeting. Such written consent or consents shall be filed with the minutes of the proceedings of the Board.

Written consent may be transmitted by first-class mail, messenger, courier, facsimile, e-mail or any other reasonable method satisfactory to the Chairperson or the President.

Section 7.15 Fees and Compensation of Directors[44]

The Corporation shall not pay any compensation to Directors for services rendered to the Corporation as Directors, except that Directors may be reimbursed for expenses incurred in the performance of their duties to the Corporation, in reasonable amounts as approved by the Board.

Also, Directors may not be compensated for rendering services to the Corporation in a capacity other than as Directors, unless such compensation is reasonable and further provided that not more than 49% of the persons serving as Directors may be "interested persons" which, for purposes of this Section 7.15 only, means:

(a) any person currently being compensated by the Corporation for services rendered to it within the previous 12 months, whether as a full or part-time Officer or other employee, independent contractor, or otherwise, excluding any reasonable compensation paid to a Director as Director; or

(b) any sibling, ancestor, descendant, spouse, sibling-in-law, child-in-law, or parent-in-law of any such person.

Section 7.16 Non-Liability of Directors[45]

The Directors shall not be personally liable for the debts, liabilities, or other obligations of the Corporation.

Section 7.17 Emergency Bylaws[46]

7.17.1 When Applicable

Notwithstanding anything to the contrary herein, Section 7.17 applies solely during an emergency, which is the limited period of time during which a quorum cannot be readily convened for action as a result of the following events or circumstances until the event or circumstance has subsided or ended and a quorum can be readily convened in accordance with the notice and quorum requirements in Sections 7.7 and 7.9.

(a) A natural catastrophe, including, but not limited to, a hurricane, tornado, storm, high water, wind-driven water, tidal wave, tsunami, earthquake, volcanic eruption, landslide, mudslide, snowstorm, drought, epidemic, pandemic, or disease outbreak. or, regardless of cause, any fire, flood, or explosion;
(b) An attack on or within this state or on the public security of its residents by an enemy of this state or on the nation by an enemy of the United States of America, or on receipt by this state of a warning from the federal government indicating that any such enemy attack is probable or imminent;
(c) An act of terrorism or other manmade disaster that results in extraordinary levels of casualties or damage or disruption severely affecting the infrastructure, environment, economy, government function, or population, including, but not limited to, mass evacuations; or
(d) A state of emergency proclaimed the Governor of the state, including any person serving as Governor in accordance with the California Constitution or Government Code, in which one or more Directors are resident, or by the President of the United States.

7.17.2 Emergency Actions

In anticipation of or during an emergency, the Board may take either or both of the following actions necessary to conduct the Corporation's business operations and affairs:

(a) Modify lines of succession to accommodate the incapacity of any director, officer, employee, or agent resulting from the emergency;
(b) Relocate the principal office or authorize the officers to do so.

During an emergency, the Board may take either or both of the following actions necessary to conduct the Corporation's business operations and affairs:

(a) Give notice to a Director or Directors in any practicable manner under the circumstances when notice of a meeting of the Board cannot be given to that Director or Directors in the manner prescribed by Section 7.7.
(b) Deem that one or more officers present at a board meeting is a Director, in order of rank and within the same rank in order of seniority, as necessary to achieve a quorum.

In anticipation of or during an emergency the Board may take any action that it determines to be necessary or appropriate to respond to the emergency, mitigate the effects of the emergency, or comply with lawful federal and state government orders. Any actions taken in good faith during an emergency under this section bind the Corporation and shall not be used to impose liability on a director, officer, employee, or agent. All provisions of the regular bylaws consistent with these emergency bylaws shall remain effective during the emergency.

## ARTICLE 8 COMMITTEES

Section 8.1 Committees of Directors[47]

The Board may, by resolution adopted by a majority of the Directors then in office, create one or more Board Committees ("Committees"), including an executive committee, each consisting of two or more Directors, to serve at the discretion of the Board. Any Committee, to the extent provided in the resolution of the Board, may be given the authority of the Board except that no Committee may:

(a) approve any action for which the California Nonprofit Public Benefit Corporation Law also requires approval of the members or approval of a majority of all members regardless of whether the Corporation has members;

(b) fill vacancies on the Board or in any Committee which has the authority of the Board;

(c) fix compensation of the Directors for serving on the Board or on any Committee;

(d) amend or repeal Bylaws or adopt new Bylaws;

(e) amend or repeal any resolution of the Board which by its express terms is not so amendable or repealable;

(f) appoint any other Committees or the members of these Committees;

(g) expend corporate funds to support a nominee for Director after more persons have been nominated than can be elected; or

(h) approve any transaction (i) between the Corporation and one or more of its Directors or (ii) between the Corporation and any entity in which one or more of its Directors have a material financial interest unless the conditions of Section 10.1.2.2 are satisfied.

Section 8.2 Meetings and Action of Board Committees[48]

Meetings and action of Committees shall be governed by, and held and taken in accordance with, the provisions of Article 7 concerning meetings of Directors, with such changes in the context of

Article 7 as are necessary to substitute the Committee and its members for the Board and its members, except that the time for regular meetings of Committees may be determined by resolution of the Board, and special meetings of Committees may also be called by resolution of the Board. Minutes shall be kept of each meeting of any Committee and shall be filed with the corporate records. The Committee shall report to the Board from time to time as the Board may require. The Board may adopt rules for the governance of any Committee not inconsistent with the provisions by these Bylaws. In the absence of rules adopted by the Board, the Committee may adopt such rules.

Section 8.3 Quorum Rules for Board Committees[49]

A majority of the Committee members shall constitute a quorum for the transaction of Committee business, except to adjourn. A majority of the Committee members present, whether or not constituting a quorum, may adjourn any meeting to another time and place. Every act taken or decision made by a majority of the Committee members present at a meeting duly held at which a quorum is present shall be regarded as an act of the Committee, subject to the provisions of the California Nonprofit Corporation Law relating to actions that require a majority vote of the entire Board. A meeting at which a quorum is initially present may continue to transact business, notwithstanding the withdrawal of Committee members, if any action taken is approved by at least a majority of the required quorum for that meeting.

Section 8.4 Revocation of Delegated Authority[50]

Subject to Section 8.1, the Board may, at any time, revoke or modify any or all of the authority that the Board has delegated to a Committee, increase or decrease (but not below two) the number of members of a Committee, and fill vacancies in a Committee from the members of the Board.

Section 8.5 Nonprofit Integrity Act/Audit Committee[51]

In any fiscal year in which the Corporation receives or accrues gross revenues of two million dollars or more (excluding grants from, and contracts for services with, governmental entities for which the governmental entity requires an accounting of the funds received), the Board shall (i) prepare annual financial statements using generally accepted accounting principles that are audited by an independent certified public accountant ("CPA") in conformity with generally accepted auditing standards; (ii) make the audit available to the Attorney General and to the public on the same basis that the Internal Revenue Service Form 990 is required to be made available; and (iii) appoint an Audit Committee.[52]

The Audit Committee shall not include paid or unpaid staff or employees of the Corporation, including, if staff members or employees, the President or chief executive officer or the Treasurer or chief financial officer (if any). If there is a finance committee, members of the finance committee shall constitute less than 50% of the membership of the Audit Committee and the chairperson of the Audit Committee shall not be a member of the finance committee. Subject to the supervision of the Board, the Audit Committee shall:

(a) make recommendations to the Board on the hiring and firing of the CPA;

(b) confer with the CPA to satisfy Audit Committee members that the financial affairs of the Corporation are in order;

(c) approve non-audit services by the CPA and ensure such services conform to standards in the Yellow Book issued by the United States Comptroller General; and

(d) if requested by the Board, negotiate the CPA's compensation on behalf of the Board.

Section 8.6 Advisory Committees[53]

The Board may create one or more advisory committees to the Board. Appointments to such advisory committees need not, but may, be Directors. The Board shall appoint and discharge advisory committee members. Advisory committees may not exercise the authority of the Board to

make decisions on behalf of the Corporation, but shall be limited to making recommendations to the Board and to implementing Board decisions and policies. Advisory committees shall be subject to the supervision and control of the Board.

## ARTICLE 9 OFFICERS[54]

Section 9.1 Officers[55]

The officers of the Corporation ("Officers") shall be either a President or a Chairperson, or both, a Secretary, and a Treasurer or chief financial officer, or both. Other than the Chairperson, these persons may, but need not be, selected from among the Directors.[56] The Board shall have the power to designate additional Officers, including a Vice President, who also need not be Directors, with such duties, powers, titles and privileges as the Board may fix, including such Officers as may be appointed in accordance with Section 9.6.6.Any number of offices may be held by the same person, except that the Secretary, the Treasurer and the chief financial officer (if any) may not serve concurrently as either the President or the Chairperson.

Section 9.2 Election of Officers[57]

The Officers, except those appointed in accordance with Section 9.6.6, shall be elected by the Board at the annual meeting of the Corporation for a term of one year, and each shall serve at the discretion of the Board until their successor shall be elected, or their earlier resignation or removal. Officers may be elected for **[__]** consecutive terms.

Section 9.3 Removal of Officers[58]

Subject to the rights, if any, of an Officer under any contract of employment, any Officer may be removed, with or without cause, (i) by the Board, at any regular or special meeting of the Board, or at the annual meeting of the Corporation, or (ii) by an Officer on whom such power of removal may be conferred by the Board.

Section 9.4 Resignation of Officers

Any Officer may resign at any time by giving written notice to the Corporation. Any resignation shall take effect at the date of the receipt of that notice or at any later time specified in that notice; and, unless otherwise specified in that notice, the acceptance of the resignation shall not be necessary to make it effective. Any resignation is without prejudice to the rights, if any of the Corporation under any contract to which the Officer is a party.

Section 9.5 Vacancies in Offices

A vacancy in any office because of death, resignation, removal, disqualification, or any other cause shall be filled in the manner prescribed in these Bylaws for regular appointments to that office, provided that such vacancies shall be filled as they occur and not on an annual basis. In the event of a vacancy in any office other than the President or one appointed in accordance with Section 9.6.6, such vacancy shall be filled temporarily by appointment by the President, or if none, by the Chairperson, and the appointee shall remain in office for 60 days, or until the next regular meeting of the Board, whichever comes first. Thereafter, the position can be filled only by action of the Board.

Section 9.6 Responsibilities of Officers

9.6.1 Chairperson of the Board[59]

The chairperson of the Board (the "Chairperson"), if any, shall be a Director and [*shall preside at meetings of the Board/select which Director shall preside at each meeting of the Board as required by Section 7.13*] and exercise and perform such other powers and duties as may from time to time be assigned to them by the Board or prescribed by these Bylaws. If the Board

designates both a Chairperson and a President, the Board shall, by resolution, establish the specific duties carried by each position.

9.6.2 President[60]

The president of the Corporation (the "President") shall, if there is no Chairperson, or in the Chairperson's absence, [*preside at meetings of the Board/select which Director shall preside at each meeting of the Board, as required by Section 7.13*] and exercise and perform such other powers and duties as may from time to time be assigned to them by the Board or prescribed by these Bylaws. If no other person is designated as the chief executive, the President shall, in addition, be the chief executive and shall have the powers and duties prescribed in Section 9.7.

9.6.3 Vice President[61]

The vice president of the Corporation (the "Vice President"), if any, shall, in the absence or disability of the President, perform all the duties of the President and, when so acting, have all the powers of and be subject to all the restrictions upon, the President. The Vice President shall have such other powers and perform such other duties as may be prescribed by the Board.

9.6.4 Secretary

The secretary of the Corporation (the "Secretary") shall attend to the following:

9.6.4.1 Bylaws

The Secretary shall certify and keep or cause to be kept at the principal office of the Corporation the original or a copy of these Bylaws as amended to date.

9.6.4.2 Minute Book[62]

The Secretary shall keep or cause to be kept a minute book as described in Section 12.1.

9.6.4.3 Notices

The Secretary shall give, or cause to be given, notice of all meetings of the Board in accordance with these Bylaws.

9.6.4.4 Corporate Records

Upon request, the Secretary shall exhibit or cause to be exhibited at all reasonable times to any Director, or to their agent or attorney, these Bylaws and the minute book.

9.6.4.5 Corporate Seal and Other Duties

The Secretary shall keep or cause to be kept the seal of the Corporation, if any, in safe custody, and shall have such other powers and perform such other duties incident to the office of Secretary as may be prescribed by the Board or these Bylaws.

9.6.5 Treasurer[63]

The treasurer of the Corporation (the "Treasurer") shall attend to the following:

9.6.5.1 Books of Account

The Treasurer shall keep and maintain, or cause to be kept and maintained, adequate and correct books and records of accounts of the properties and transactions of the Corporation, including accounts of its assets, liabilities, receipts, disbursements, gains, losses, capital, retained earnings, and other matters customarily included in financial statements. The books of account shall be open to inspection by any Director at all reasonable times.

9.6.5.2 Financial Reports

The Treasurer shall prepare, or cause to be prepared, and certify, or cause to be certified, the financial statements to be included in any required reports.

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9.6.5.3 Deposit and Disbursement of Money and Valuables

The Treasurer shall deposit, or cause to be deposited, all money and other valuables in the name and to the credit of the Corporation with such depositories as may be designated by the Board; shall disburse, or cause to be disbursed, the funds of the Corporation as may be ordered by the Board; shall render, or cause to be rendered to the President and Directors, whenever they request it, an account of all of their transactions as Treasurer and of the financial condition of the Corporation; and shall have other powers and perform such other duties incident to the office of Treasurer as may be prescribed by the Board or these Bylaws.

9.6.5.4 Bond

If required by the Board, the Treasurer shall give the Corporation a bond in the amount and with the surety or sureties specified by the Board for faithful performance of the duties of his office and for restoration to the Corporation of all its books, papers, vouchers, money, and other property of every kind in his possession or under his control on his death, resignation, retirement, or removal from office.

9.6.6 Additional Officers[64]

The Board may empower the Chairperson, President, or chief executive, to appoint or remove such other Officers as the business of the Corporation may require, each of whom shall hold office for such period, have such authority, and perform such duties as are provided in these Bylaws or as the Board from time to time may determine.

Section 9.7 Chief Executive[65]

Subject to such supervisory powers as may be given by the Board to the Chairperson or President, the Board may hire a chief executive who shall be the general manager of the Corporation, and subject to the control of the Board, shall supervise, direct and control the Corporation's day-to-day activities, business and affairs. The chief executive (who may be referred to as the "chief executive officer" or "executive director" ***[Insert other desired titles]***) shall be empowered to hire, supervise and fire all of the employees of the Corporation, under such terms and having such job responsibilities as the chief executive shall determine in their sole discretion, subject to the rights, if any, of the employee under any contract of employment. The chief executive may delegate their responsibilities and powers subject to the control of the Board. They shall have such other powers and duties as may be prescribed by the Board or these Bylaws.

Section 9.8 Compensation of Officers

9.8.1 Salaries Fixed by Board

The salaries of Officers, if any, shall be fixed from time to time by resolution of the Board or by the person or Committee to whom the Board has delegated this function, and no Officer shall be prevented from receiving such salary by reason of the fact that they are also a Director, provided, however, that such compensation paid to a Director for serving as an Officer shall only be allowed if permitted under the provisions of Section 7.15. In all cases, any salaries received by Officers shall be reasonable and given in return for services actually rendered for the Corporation which relate to the performance of the public benefit purposes of the Corporation. No salaried Officer serving as a Director shall be permitted to vote on their own compensation as an Officer.

9.8.2 Fairness of Compensation[66]

The Board shall periodically review the fairness of compensation, including benefits, paid to every person, regardless of title, with powers, duties, or responsibilities comparable to the president, chief executive officer, treasurer, or chief financial officer (i) once such person is hired, (ii) upon any extension or renewal of such person's term of employment, and (iii) when such person's compensation is modified (unless all employees are subject to the same general modification of compensation).

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## ARTICLE 10 TRANSACTIONS BETWEEN CORPORATION AND DIRECTORS OR OFFICERS; DISCLOSURE OF CONFLICTS OF INTEREST[67]

Section 10.1 Transactions with Directors and Officers[68]

10.1.1 Interested Party Transactions

Except as described in Section 10.1.2, the Corporation shall not be a party to any transaction:

(a) in which one or more of its Directors or Officers has a material financial interest, or

(b) with any corporation, firm, association, or other entity in which one or more Directors or Officers has a material financial interest.

10.1.2 Requirements to Authorize Interested Party Transactions

10.1.2.1 By the Board of Directors

The Corporation shall not be a party to any transaction described in Section 10.1.1, unless:

(a) the Corporation enters into the transaction for its own benefit;

(b) the transaction is fair and reasonable to the Corporation at the time the transaction is entered into;

(c) prior to consummating the transaction or any part thereof, the Board authorizes or approves the transaction in good faith, by a vote of a majority of Directors then in office (without counting the vote of the interested Directors), and with knowledge of the material facts concerning the transaction and the interested Director's or Officer's financial interest in the transaction;

(d) prior to authorizing or approving the transaction, the Board considers and in good faith determines after reasonable investigation that the Corporation could not obtain a more advantageous arrangement with reasonable effort under the circumstances; and

(e) the minutes of the Board meeting at which such action was taken reflect that the Board considered and made the findings described in paragraphs (a) through (d) of this Section 10.1.2.

10.1.2.2 By a Committee

A Committee shall not approve a transaction described in Section 10.1.1 unless:

(a) the Committee approves the transaction in a manner consistent with the standards set forth in Section 10.1.2.1;

(b) it was not reasonably practicable to obtain approval of the transaction by the Board prior to entering into the transaction; and

(c) the Board, after determining in good faith that the two above-enumerated conditions of this Section 10.1.2.2 are satisfied, ratifies the transaction at its next meeting by a vote of the majority of the Directors in office without counting the vote of the interested Director or Directors.

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10.1.3 Material Financial Interest[69]

A Director or Officer shall not be deemed to have a "material financial interest" in a transaction:

(a) that fixes the compensation of a Director as a Director or Officer;

(b) if the contract or transaction is part of a public or charitable program of the Corporation and it (1) is approved or authorized by the Corporation in good faith and without unjustified favoritism, and (2) results in a benefit to one or more Directors or their families only because they are in the class of persons intended to be benefited by the program; or

(c) where the interested Director has no actual knowledge of the transaction and it does not exceed the lesser of one percent of the gross receipts of the corporation for the preceding year or $100,000.

Section 10.2 Loans to Directors and Officers[70]

The Corporation shall not make any loan of money or property to or guarantee the obligation of any Director or Officer, unless approved by the Attorney General; except that the Corporation may advance money to a Director or Officer for expenses reasonably anticipated to be incurred in the performance of duties of such Director or Officer, if in the absence of such advance, such Director or Officer would be entitled to be reimbursed for such expenses by the Corporation.

The limitation above does not apply if (i) the loan is necessary, in the judgment of the Board, to provide financing for the purchase of the principal residence of an Officer in order to secure the services of (or continued services of) the Officer and the loan is secured by real property located in California; or (ii) the loan is for the payment of premiums on a life insurance policy on the life of a Director or Officer and repayment to the Corporation of the amount paid by it is secured by either the proceeds of the policy or its cash surrender value, or both, and the contract securing the loan meets the requirements of section 5236 of the California Nonprofit Corporation Law .

Section 10.3 Interlocking Directorates[71]

No contract or other transaction between the Corporation and any corporation, firm or association of which one or more Directors are directors is either void or voidable because such Director(s) are present at the Board or Committee meeting that authorizes, approves or ratifies the contract or transaction, if (i) the material facts as to the transaction and as to such Director's other directorship are fully disclosed or known to the Board or Committee, and the Board or Committee authorizes, approves or ratifies the contract or transaction in good faith by a vote sufficient without counting the vote of the common Director(s) (subject to the quorum provisions of Article 7); or if (ii) the contract or transaction is just and reasonable as to the Corporation at the time it is authorized, approved or ratified.

Section 10.4 Duty of Loyalty; Construction with Article 11[72]

Nothing in this Article 10 shall be construed to derogate in any way from the absolute duty of loyalty that every Director and Officer owes to the Corporation. Furthermore, nothing in this Article 10 shall be construed to override or amend the provisions of Article 11. All conflicts between the two articles shall be resolved in favor of Article 11.

Section 10.5 Duty to Disclose Actual and Potential Conflicts of Interest

Directors and Officers shall make an appropriate disclosure of all material facts, including the existence of any financial interest, at any time that any actual or potential conflict of interest arises. This disclosure obligation includes instances in which a Director or Officer knows of the potential for an Interested Party Transaction as described in Section 10.1.1 related to their interests or a transaction involving interlocking directorates as described in Section 10.3. It also includes instances in which a Director or Officer plans not to attend a meeting of the Board or a Committee of the Board described in Section 8.2 at which such Director or Officer has reason to believe that the Board or Committee will act regarding a matter about which such Director or Officer may

have a conflict. Depending on the circumstances, this disclosure may be made to the Chairperson or President, or, if the potential conflict of interest first arises in the context of a Board or Committee meeting, the entire Board or the members of the Committee considering the proposed transaction or arrangement that relates to the actual or possible conflict of interest.

## ARTICLE 11 INDEMNIFICATION OF DIRECTORS, OFFICERS, EMPLOYEES AND AGENTS[73]

Section 11.1 Definitions[74]
For purpose of this Article 11

11.1.1 "Agent"
means any person who is or was a Director, Officer, employee, or other agent of the Corporation, or is or was serving at the request of the Corporation as a Director, Officer, employee, or agent of another foreign or domestic corporation, partnership, joint venture, trust, or other enterprise, or was a Director, Officer, employee, or agent of a foreign or domestic corporation that was a predecessor corporation of the Corporation or of another enterprise at the request of the predecessor corporation;

11.1.2 "Proceeding"
means any threatened, pending, or completed action or proceeding, whether civil, criminal, administrative, or investigative; and

11.1.3 "Expenses"
includes, without limitation, all attorneys' fees, costs, and any other expenses reasonably incurred in the defense of any claims or proceedings against an Agent by reason of their position or relationship as Agent and all attorneys' fees, costs, and other expenses reasonably incurred in establishing a right to indemnification under this this Article 11.

Section 11.2 Applicability of Indemnification Provisions

11.2.1 Successful Defense by Agent
To the extent that an Agent has been successful on the merits in the defense of any proceeding referred to in this Article 11, or in the defense of any claim, issue, or matter therein, the Agent shall be indemnified against expenses actually and reasonably incurred by the Agent in connection with the claim.

11.2.2 Settlement or Unsuccessful Defense by Agent
If an Agent either settles any proceeding referred to in this Article 11, or any claim, issue, or matter therein, or sustains a judgment rendered against them, then the provisions of Section 11.3 through Section 11.6 shall determine whether the Agent is entitled to indemnification.

Section 11.3 Actions Brought by Persons Other than the Corporation
This Section 11.3 applies to any proceeding other than an action "by or on behalf of the corporation" as defined in Section 11.4. Such proceedings that are not brought by or on behalf of the Corporation are referred to in this Section 11.3 as "Third Party proceedings."

11.3.1 Scope of Indemnification in Third Party Proceedings[75]
Subject to the required findings to be made pursuant to Section 11.3.2, the Corporation ***[may OR shall]*** indemnify any person who was or is a party, or is threatened to be made a party, to any Third Party proceeding, by reason of the fact that such person is or was an Agent, for all expenses, judgments, fines, settlements, and other amounts actually and reasonably incurred in connection with the proceeding**.**

11.3.2 Required Standard of Conduct for Indemnification in Third Party Proceedings[76]

Any indemnification granted to an Agent in Section 11.3.1 above is conditioned on the following. The Board must determine, in the manner provided in Section 11.5, that the Agent seeking reimbursement acted in good faith, in a manner they reasonably believed to be in the best interest of the Corporation, and, in the case of a criminal proceeding, they must have had no reasonable cause to believe that their conduct was unlawful. The termination of any proceeding by judgment, order, settlement, conviction, or on a plea of *nolo contendere* or its equivalent shall not, of itself, create a presumption that the person did not act in good faith or in a manner they reasonably believed to be in the best interest of the Corporation or that they had reasonable cause to believe that their conduct was unlawful.

Section 11.4 Action Brought By or On Behalf Of the Corporation[77]

This Section 11.4 applies to any proceeding brought (i) by or in the right of the Corporation, or (ii) by an Officer, Director or person granted relator status by the Attorney General, or by the Attorney General, on the ground that the defendant Director was or is engaging in self-dealing within the meaning of section 5233 of the California Nonprofit Corporation Law, or (iii) by the Attorney General or person granted relator status by the Attorney General for any breach of duty relating to assets held in charitable trust (any such proceeding is referred to in these Bylaws as a proceeding "by or on behalf of the Corporation").

11.4.1 Scope of Indemnification in Proceeding By or On Behalf Of the Corporation

Subject to the required findings to be made pursuant to Section 11.4.2, and except as provided in Sections 11.4.3 and 11.4.4, the Corporation may indemnify any person who was or is a party, or is threatened to be made a party, to any proceeding by or on behalf of the Corporation, by reason of the fact that such person is or was an Agent, for all expenses actually and reasonably incurred in connection with the defense or settlement of such action.[78]

11.4.2 Required Standard of Conduct for Indemnification in Proceeding By or On Behalf Of the Corporation[79]

Any indemnification granted to an Agent in Section 11.4. is conditioned on the following. The Board must determine, in the manner provided in Section 11.5, that the Agent seeking reimbursement acted in good faith, in a manner they believed to be in the best interest of the Corporation and with such care, including reasonable inquiry, as an ordinarily prudent person in a like position would use under similar circumstances.

11.4.3 Claims Settled Out of Court

If any Agent settles or otherwise disposes of a threatened or pending action brought by or on behalf of the Corporation, with or without court approval, the Agent shall receive no indemnification for amounts paid pursuant to the terms of the settlement or other disposition. Also, in cases settled or otherwise disposed of without court approval, the Agent shall receive no indemnification for expenses reasonably incurred in defending against the proceeding, unless the proceeding is settled with the approval of the Attorney General.

11.4.4 Claims and Suits Awarded Against Agent

If any Agent is adjudged to be liable to the Corporation in the performance of the Agent's duty to the Corporation, the Agent shall receive no indemnification for amounts paid pursuant to the judgment, and any indemnification of such Agent under Section 11.4.1 for expenses actually and reasonably incurred in connection with the defense of that action shall be made only if both of the following conditions are met:

(a) The determination of good faith conduct required by Section 11.4.2 must be made in the manner provided for in Section 11.5; and

(b) Upon application, the court in which the action was brought must determine that, in view of all of the circumstances of the case, the Agent is fairly and reasonably entitled to indemnity

for the expenses incurred. If the Agent is found to be so entitled, the court shall determine the appropriate amount of expenses to be reimbursed.

Section 11.5 Determination of Agent's Good Faith Conduct[80]
The indemnification granted to an Agent in Sections 11.3 and 11.4 is conditioned on the findings required by those Sections being made by:

(a) the Board by a majority vote of a quorum consisting of Directors who are not parties to the proceeding; or

(b) the court in which the proceeding is or was pending. Such determination may be made on application brought by the Corporation or the Agent or the attorney or other person rendering a defense to the Agent, whether or not the application by the Agent, attorney, or other person is opposed by the Corporation.

Section 11.6 Limitations[81]
No indemnification or advance shall be made under this Article 11, except as provided in Section 11.2 or 11.5(b), in any circumstances when it appears:

(a) that the indemnification or advance would be inconsistent with a provision of the Articles of Incorporation, as amended, or an agreement in effect at the time of the accrual of the alleged cause of action asserted in the proceeding in which the expenses were incurred or other amounts were paid, which prohibits or otherwise limits indemnification; or

(b) that the indemnification would be inconsistent with any condition expressly imposed by a court in approving a settlement.

Section 11.7 Advance of Expenses[82]
Expenses incurred in defending any proceeding may be advanced by the Corporation before the final disposition of the proceeding on receipt of an undertaking by or on behalf of the Agent to repay the amount of the advance unless it is determined ultimately that the Agent is entitled to be indemnified as authorized in this Article 11.

Section 11.8 Contractual Rights of Non-Directors and Non-Officers[83]
Nothing contained in this Article 11 shall affect any right to indemnification to which persons other than Directors and Officers of the Corporation, or any of its subsidiaries, may be entitled by contract or otherwise.

Section 11.9 Insurance[84]
The Board may adopt a resolution authorizing the purchase and maintenance of insurance on behalf of any Agent, as defined in this Article 11 against any liability asserted against or incurred by any Agent in such capacity or arising out of the Agent's status as such, whether or not the Corporation would have the power to indemnify the Agent against the liability under the provisions of this Article 11; provided, however, that the Corporation shall have no power to purchase and maintain insurance to indemnify any Agent for a violation of the prohibition on self-dealing in section 5233 of the California Nonprofit Corporation Law.

## ARTICLE 12 CORPORATE RECORDS AND REPORTS

Section 12.1 Minute Book[85]
The Corporation shall keep a minute book which shall contain a record of all actions by the Board or any committee including (i) the time, date and place of each meeting; (ii) whether a meeting is regular or special and, if special, how called; (iii) the manner of giving notice of each meeting and a copy thereof; (iv) the names of those present at each meeting of the Board or any Committee thereof; (v) the minutes of all meetings; (vi) any written waivers of notice, consents to the holding

of a meeting or approvals of the minutes thereof; (vii) all written consents for action without a meeting; (viii) all protests concerning lack of notice; and (ix) formal dissents from Board actions. The minute book may either be in written form or in any other form capable of being converted into clearly legible tangible form.

Section 12.2 Books and Records of Account

The Corporation shall keep adequate and correct books and records of account. "Correct books and records" includes, but is not necessarily limited to: accounts of properties and transactions, its assets, liabilities, receipts, disbursements, gains, and losses.

Section 12.3 Articles of Incorporation and Bylaws

The Corporation shall keep at its principal office, the original or a copy of the Articles of Incorporation and Bylaws as amended to date.

12.3.1 Maintenance and Inspection of Federal Tax Exemption Application and Annual Information Returns[86]

The Corporation shall at all times keep at its principal office a copy of its federal tax exemption application and, for three years from their date of filing, its annual information returns. These documents shall be open to public inspection and copying to the extent required by the Code.

Section 12.4 Annual Report; Statement of Certain Transactions[87]

The Board shall cause an annual report to be sent to each Director within 120 days after the close of the Corporation's fiscal year containing the following information:

(a) The assets and liabilities of the Corporation, including the trust funds, as of the end of the fiscal year;

(b) The principal changes in assets and liabilities, including trust funds, during the fiscal year;

(c) The revenue or receipts of the Corporation, both unrestricted and restricted to particular purposes, for this fiscal year;

(d) The expenses or disbursements of the Corporation for both general and restricted purposes during the fiscal year;

(e) A statement of any transaction (i) to which the Corporation, its parent, or its subsidiary was a party, (ii) which involved more than $50,000 or which was one of a number of such transactions with the same person involving, in the aggregate, more than $50,000, and (iii) in which either of the following interested persons had a direct or indirect material financial interest (a mere common directorship is not a financial interest):

(1) Any Director or Officer of the Corporation, its parent, or its subsidiary;

(2) Any holder of more than 10% of the voting power of the Corporation, its parent, or its subsidiary.

The statement shall include: (i) a brief description of the transaction; (ii) the names of interested persons involved; (iii) their relationship to the Corporation; (iv) the nature of their interest in the transaction, and; (v) when practicable, the amount of that interest, provided that, in the case of a partnership in which such person is a partner, only the interest of the partnership need be stated.

(f) A brief description of the amounts and circumstances of any loans, guaranties, indemnifications, or advances aggregating more than $10,000 paid during the fiscal year to any Officer or Director under Article 10 or Article 11.

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The annual report shall be accompanied by a report of independent accountants on which the annual report is based, or, if there is no such report, the certificate of an authorized officer of the Corporation that such statements were prepared without audit from the books and records of the Corporation.

Section 12.5 Directors' Rights of Inspection[88]

Every Director shall have the absolute right at any reasonable time to inspect the books, records, documents of every kind, and physical properties of the Corporation and each of its subsidiaries. The inspection may be made in person or by the Director's agent or attorney. The right of inspection includes the right to copy and make extracts of documents.

## ARTICLE 13 EXECUTION OF INSTRUMENTS, DEPOSITS AND FUNDS

Section 13.1 Execution of Instruments[89]

The Board may, by resolution, authorize any Officer, agent, or employee of the Corporation to execute and deliver any contract or instrument in the name of and on behalf of the Corporation or to otherwise bind the Corporation, and such authority may be general or confined to specific instances as the Board may determine. Unless so authorized, no officer, agent, or employee shall have any power or authority to bind the Corporation by any contract, instrument, or in any other way. If no other officer, agent, or employee has been so solely authorized, the President, Chair, or Chief Executive shall be an authorized signatory to execute and deliver any contract or instrument in the name of and on behalf of the Corporation, or to otherwise bind the Corporation.

Section 13.2 Checks and Notes

Except as otherwise specifically determined by resolution of the Board, or as otherwise required by law, checks, drafts, promissory notes, orders for the payment of money, and other evidence of indebtedness of the Corporation may be signed by each of the Chair, President, Treasurer, or Chief Executive.

Section 13.3 Deposits[90]

All funds of the Corporation shall be deposited from time to time to the credit of the Corporation in such banks, trust companies, or other depositories as the Board may select.

Section 13.4 Gifts

The Board may accept on behalf of the Corporation any contribution, gift, bequest, or devise for the charitable or public purposes of the Corporation.

## ARTICLE 14 CONSTRUCTION AND DEFINITIONS

Unless the context requires otherwise, the general provisions, rules of construction, and definitions of California Nonprofit Corporation Law shall govern the construction of these Bylaws. Without limiting the generality of the above, the singular number includes the plural, the plural number includes the singular, and the term "person" includes both legal entities and natural persons. All references to statutes, regulations, and laws shall include any future statutes, regulations and laws that replace those referenced.

## ARTICLE 15 AMENDMENTS

The Board may adopt, amend or repeal bylaws. Such power is subject to the following limitations:

(a) Where any provision of these Bylaws requires the vote of a larger proportion of the Directors than otherwise is required by law, such provision may not be altered, amended or repealed except by the vote of such greater number.

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(b) No amendment may extend the term of a Director beyond that for which such Director was elected.

(c) No amendment may add a provision that is in conflict with law or the Corporation's Articles of Incorporation.

**CERTIFICATE OF SECRETARY**

I certify that I am the duly elected and acting Secretary of **[Name of Corporation]**, a California nonprofit public benefit corporation; that these Bylaws, consisting of ***[##]*** pages, are the Bylaws of this Corporation as adopted by the Board of Directors on _____; and that these Bylaws have not been amended or modified since that date.

Executed on _____at _____, California.

_____

**[NAME]**
Secretary

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[1] **HOW TO USE THIS FORM:** For each section of the form bylaws, the endnote discusses the applicable law and indicates if the provision is required to be included in the bylaws. If the provision recites a default rule in the law that may be changed by putting a different rule into the bylaws, the endnote explains the parameters within which the bylaws may vary from the default rule.

Some of the provisions included in the bylaws are not required by law to be stated in a corporation's bylaws, but rather recite law that is applicable to all nonprofit public benefit corporations whether or not so stated. These provisions have been included so that the directors and officers of the corporation can look at the bylaws to find the laws that govern the corporation, instead of remembering where to look within the California Corporations Code for each rule. The endnotes explain why these provisions are included in the form, so that a user can decide whether to include these in the corporation's bylaws.

Where the bylaws contain [bracketed] text, this indicates where the user is required to insert language (explained in the endnotes) to replace the bracketed terms. Other provisions contain *italicized* text that shows alternative language choices based on a nonprofit corporation's expected activities. In such cases, the endnotes explain under what circumstances a corporation would use these alternatives.

***Important Note:*** In order for a corporation to make a truly informed choice about the provisions that will govern its corporate operations, this form should not be used "as is." Rather, it should be modified after consideration of the explanations and alternative wording choices in the text and the endnotes. It is very important that anyone creating bylaws for a nonprofit corporation fully understand the ramifications of each bylaw, and choose provisions that apply to the corporation's specific situation.

All directors and officers should have a copy of the bylaws, and should understand their respective rights and responsibilities. Directors and officers of a corporation are legally obligated to follow its bylaws. **Failure to do so can provide an adverse party challenging a corporate decision or transaction with grounds to overturn the decision or invalidate a contract. In certain circumstances, harsher consequences subjecting the directors and officers to individual liability may follow.** Therefore, it is important to thoughtfully select bylaw provisions that the corporation will be able to follow on an ongoing basis. Also, before drafting the bylaws, it is important to research whether the potential sources of funding for the nonprofit's proposed activities may require any particular features to be included in the bylaws.

The endnotes discuss relevant provisions of law, in effect as of May 2023. The primary sources of law described in these endnotes are (a) the California Nonprofit Corporation Law (California Corporations Code sections 5000 *et seq)*, which is referred to in the form bylaws as the "California Nonprofit Corporation Law" and in these endnotes as "the law," and (b) the Internal Revenue Code of 1986, as amended (U.S. Code Title 26), which is referred to in the form bylaws and these endnotes as the "Code."

Occasionally the endnotes refer to annotated articles of incorporation. This resource, also created by Public Counsel's Community Development Project with the support of the Annenberg Foundation, can be found on the Public Counsel website at *https://publiccounsel.org/wp-content/uploads/2021/12/Annotated-Form-of-Articles-of-Incorporation-for-a-California-Nonprofit-Public-Benefit-Corporation-2021.pdf*.

[2] **Law:** The name of the corporation as stated in the bylaws should exactly match the name (including punctuation) stated in the articles of incorporation of the corporation (referred to in these endnotes as the "articles"). The only way to legally change the name of the corporation is to amend the articles and file the amendment with the Secretary of State. Changing the name solely in the bylaws has no legal effect. See the annotations to the form of articles accompanying these form bylaws for more information.

[3] **Law:** The law does not require a corporation to state its principal office in the bylaws. However, the corporation is required to designate a principal office and list the street address in the biannual statement of information filed with the Secretary of State. *[Cal. Corp. Code § 6210(a)]*

**Recommended Practice:** To avoid having to amend the bylaws each time the corporation moves, the corporation should not designate an exact address in the bylaws. The bylaws should instead permit the board to set the exact address by board resolution.

[4] **Law:** The law does not prohibit satellite offices, whether or not this provision is contained in the bylaws.

[5] **Law:** The general purpose statement and the limitation relating to private gain of any person, are required by law to be in the corporation's articles, but are not required to be in the bylaws. *[Cal. Corp. Code § 5130]* **If also stated in the bylaws, the general purposes and private gain language should be <u>exactly</u> as stated in the articles.** For a more detailed explanation of the "private gain" language in Section 3.1, please see Note 9.

If an amendment is made to the purpose statement contained in the articles, the same amendment should be made to the bylaws to ensure consistency. In addition, the corporation must notify the IRS and other agencies of the amendments (see Note 6. Likewise, if an amendment is made to the purpose statement in the bylaws, the board must confirm it is consistent with the articles.

**Recommended Practice:** These provisions regarding the general purpose should be repeated in the bylaws exactly as written in the articles to remind the officers and directors of the legal limitations on the corporation's activities. **The purpose(s) listed in this section should be <u>exactly</u> as stated in the articles.**

[6] **Law:** No law requires the corporation to state a specific purpose in its bylaws. If a nonprofit public benefit corporation states in its articles that its purposes include "public" purposes rather than just "charitable" purposes, the corporation is required to provide a further description of those public purposes in the articles. *[Cal. Corp. Code §§ 5130, 5131]* If also stated in the bylaws, the specific purposes can be no broader than the specific purposes contained in the articles. A corporation is not permitted to engage in broader purposes than are stated in the articles, regardless of what is stated in the bylaws. A corporation may, but is not required to, include a more specific or narrower purpose in its bylaws than what is stated in its articles. In such case, the corporation would be bound to conduct activities that are consistent with the narrower purposes stated in the bylaws until such time as the board amends the bylaws.

If the corporation wants to change its activities and the new activities are no longer consistent with the statement of specific purposes in its articles, the corporation must amend the articles and bylaws to reflect that change before it starts the new activities. Note that any material changes in activities must be reported to the IRS. Amendment of the articles to expand the charitable purpose may require the approval of the Attorney General, who will monitor the use of the charitable funds raised before such amendment to ensure they are used for the earlier purpose.

**Recommended Practice**: If a specific purpose is stated in the articles, the corporation must operate to further those purposes, so it is good practice to restate it in the bylaws to remind the directors and officers of the purposes and mission of the corporation. If there is no specific purpose stated in the articles, the board should consider whether to include a specific purpose in the bylaws to serve as a mission statement and remind new directors and officers why the corporation was formed. This may serve to keep future leaders of the corporation on the same track envisioned by the founders. Keep in mind, however, that if either the articles or the bylaws contain a specific purpose, the corporation should not engage in (or raise money to fund) other activities that do not fall within the specific purpose, until after amending the purpose statement.

Further Reading: Public Counsel, Notification Requirements for California Public Benefit Corporations: Change of Address, Name, Mission or Specific Purpose, Scope of Activities, or Other Significant Changes to Bylaws, at: https://publiccounsel.org/publications/notification-requirements-for-california-public-benefit-corporations-change-of-address-name-mission-or-specific-purpose-scope-of-activities-or-other-significant-changes-to-bylaws/.

[7]An organization may choose to include a diversity and equity statement in its bylaws to establish that the organization is committed to operating in line with equity principles it has developed. A diversity and equity statement must be carefully drafted so that it reflects the values of the organization. An organization should also be cautious about creating additional obligations in the bylaws that it is unable to fulfill. For example, if the statement

requires the Board and staff to consider diversity as the primary consideration in all of its decisions, the corporation may find itself in violation of its bylaws. One possibility would be for the bylaws to refer to an external DEI policy. For example, "*The Corporation shall operate consistently with its Diversity, Equity, and Inclusion Policy ("DEI Policy"). In the event that the DEI Policy conflicts with these Bylaws, these Bylaws shall take precedence."*

[8] **Law:** These limitation provisions are required by law to be in the articles if a corporation wants to qualify for exemption under section 501(c)(3) of the Code. A section 501(c)(3) corporation may not spend any time on political campaign activities for or opposing a candidate for any elected office (whether or not it is a nonpartisan office). In contrast, a section 501(c)(3) corporation is permitted to attempt to influence legislation through lobbying, as long as lobbying does not constitute a "substantial part" of its activities. Corporations that expect to conduct some lobbying activities should consult counsel about the potential benefit of making an election under section 501(h) of the Code. This election provides a clear test of what constitutes a "substantial part" of its activities.

**Recommended Practice:** These provisions should be restated in the bylaws, using identical language as is found in the articles, to remind directors and officers of the legal limitations on the corporation's political activities.

Further Reading: IRS - *www.irs.gov/pub/irs-pdf/p526.pdf*

[9] **Law:** To qualify as tax-exempt, a corporation must be organized and operated primarily in furtherance of exempt purposes. Only an insubstantial amount of the corporation's activities may be unrelated to its exempt purpose. Any such unrelated activities may be subject to unrelated business income tax (UBIT), and if a substantial part of a corporation's activities are in furtherance of non-exempt purposes, it may lose its tax exemption. This provision recites this section 501(c)(3) restriction on activities that are not in furtherance of the corporation's purposes.

The limitations on carrying on activities that are not permitted under sections 501(c)(3) or 170(c)(2) of the Code are required by law to be in the articles in order for the corporation to qualify for tax-exempt status under section 501(c)(3) of the Code. *[Cal. Corp. Code §§ 5130, 5131; Code § 501(c)(3)]* **If also stated in the bylaws, the limitations language should be exactly as stated in the articles.**

***A Note on Private Benefit and Private Inurement:*** The text in Section 5.1 (and similar language in Section 3.1) that prohibits the distribution of profits or gains to officers, directors or any other persons relates to the important requirement that the activities of a section 501(c)(3) tax-exempt corporation may not be operated for the purpose of creating a benefit or profit for any private person. This principle is embodied in the tax law in two ways. First, a section 501(c)(3) corporation cannot operate in a way that creates a substantial benefit to private individuals or for-profit entities. This is called the "private benefit" doctrine. Second, no part of the profits or assets of a section 501(c)(3) corporation may be used to create a benefit for an insider. This doctrine is called the prohibition on "private inurement."

***Private Benefit Explained:*** Under section 501(c)(3) of the Code, the corporation must not conduct activities that provide a substantial benefit to the private interest of any individual or for-profit entity (except for a benefit that is merely incidental to the corporation's tax-exempt purpose). This means, for example, that a section 501(c)(3) corporation could not make a distribution of its assets to a private individual, or give its assets to a private company, or use its assets in a way that creates a benefit to a private person. This does not mean that the corporation cannot pay reasonable salaries to its directors, officers, employees and other agents, or pay reasonable prices for goods or services purchased from other entities. These transactions create no private benefit because they are an exchange of fair value. The tax-exempt corporation cannot create a substantial benefit for a private person in which the private person receives something of value and the exempt corporation is not compensated for that value. A simple example is when a nonprofit corporation gives a gift to a private person who is not a member of the charitable class that the corporation is supposed to serve. For this reason, the IRS may deny tax-exempt status under section 501(c)(3) of the Code if the corporation's proposed programs will benefit a group that is not a charitable class, or a small group of private individuals. It is also possible for a corporation to create a private benefit indirectly, by conducting its charitable activities in a way that causes a private entity to benefit substantially. For example, if a nonprofit corporation were set up to educate students for the purpose of enabling them to work for one particular company, this might be a substantial private benefit to that company. See American Campaign Academy v. Commissioner, 92

T.C. 1053 (1989).

***Private Inurement Explained:*** The term "private inurement" is used to describe a private benefit to a person who is an "insider" to the corporation. Section 501(c)(3) of the Code states that no part of a corporation's net earnings may inure to (be used for the advantage of) the benefit of a private shareholder or individual. Unlike private benefits to unrelated persons, which may occur to an incidental degree, providing a private benefit to insiders is absolutely prohibited. An "insider" is a person who has a personal and private interest in the activities of the corporation (e.g., directors, officers and key employees and independent contractors, and persons who have substantial influence on the organization, such as major donors). For example, the corporation may not pay dividends or unreasonable compensation (compensation in excess of the fair value of services rendered) to insiders, and cannot transfer property to insiders for less than fair market value.

**The prohibition of inurement to insiders under section 501(c)(3) of the Code is absolute. The IRS may revoke an organization's tax-exempt status if any amount of private inurement occurs.** However, unless cases of private inurement are egregious and ongoing it is likely that the IRS will not revoke tax exempt status, and will instead impose the "intermediate sanction" of excise taxes. Under section 4958 of the Code, if a section 501(c)(3) corporation provides an excess benefit to certain defined insiders, **the insider who receives the excess benefit is subject to excise taxes, as are any corporate managers who approved the excess benefit**. As with the concept of private benefit, prohibited inurement does not include reasonable payments for services, other payments that further tax-exempt purposes, or payments for the fair market value of real or personal property. However, any compensation in excess of a reasonable fair market amount can give rise to these excise taxes. As a result, it is extremely important that any salaries, benefits and other compensation paid to anyone who is an officer, director or other insider, must be reasonable based on what a similarly situated employer would pay to a similar employee for similar services. *[Treas. Reg. § 53-4958]*

**Recommended Practice:** Directors should periodically review the corporation's activities to ensure the activities are consistent with the purposes stated in the articles and bylaws, and are in furtherance of a purpose that the IRS considers to be an exempt purpose under section 501(c)(3) of the Code. To the extent that any activities are not in furtherance of these purposes, directors should ensure that those activities are not substantial, or if such activities are becoming a substantial percentage of the corporation's overall activities, should consider whether to separate these activities into a different legal entity, such as a for-profit subsidiary.

Furthermore, these provisions regarding prohibited activities should be repeated in the bylaws exactly as written in the articles to remind the officers and directors of the legal limitations on the corporation's activities.

**Further Reading:**
IRS information on UBIT - *www.irs.gov/charities-non-profits/unrelated-business-income-defined*
IRS Publication on UBIT (Publication 598) - *https://www.irs.gov/pub/irs-pdf/p598.pdf*

[10] **Law:** These provisions are required to be in the articles if the corporation wants to qualify for exemption under section 501(c)(3) of the Code. Section 501(c)(3) of the Code requires a dedication of all assets of an exempt corporation to its exempt purposes and prohibits the distribution of assets to insiders or provision of private benefit to any person. This does not prevent a corporation from payment of reasonable compensation for goods or services. This irrevocable dedication language is also required if the corporation wants to qualify for California property tax exemption on real property owned and operated by the corporation. **The exempt purpose(s) in each of Section 5.1 and Section 5.2 should be identical to the exempt purpose(s) listed in the articles.**

**Recommended Practice:** This language must be included in the articles. See Public Counsel's Annotated Form of Articles of Incorporation at *https://publiccounsel.org/publications/annotated-form-of-articles-of-incorporation-for-a-california-nonprofit-public-benefit-corporation-2021/* for more information about property tax requirements. **The bylaws language should be identical to the irrevocable dedication clause in the articles.** If the corporation expects to own, or lease from another nonprofit, real property in the state of California, the corporation should be aware of the requirements for the welfare exemption from property tax. *[Cal. Rev. & Tax. Code § 214]* In California, property tax exemption is not automatic for all nonprofits. A corporation must apply for this exemption with the State Board of Equalization and the County Assessor's office where the property is located. Not all

corporate purposes that qualify for tax exemption under section 501(c)(3) of the Code will also qualify for the welfare property tax exemption in California (for example, some educational purposes will qualify under section 501(c)(3) of the Code but will not qualify for the property tax exemption). A corporation with a purpose other than exclusively charitable that intends to own or operate real property in California should ensure that its purpose, and the organizations to which it is permitted to distribute assets on dissolution, meet the requirements for the welfare exemption from property tax contained in section 214 of the California Revenue and Taxation Code.

**Further Reading:** See generally Note 9 for a description of private benefit and inurement. See also the IRS good governance practices relating to reasonable compensation, at *www.irs.gov/pub/irs-tege/governance_practices.pdf*.

[11] **Recommended Practice:** The language used here should be identical to the dissolution clause in the articles. The exempt purpose(s) listed in Section 5.2 should mirror the exempt purpose(s) listed in Section 5.1.

[12] **Law:** A legal member of the corporation is any person with governance rights, including the right to vote on (i) the election of directors, (ii) dissolution, (iii) merger, and (iv) the disposition of all or substantially all the corporate assets. California nonprofit corporations are not required by law to have legal members. If the articles and bylaws do not make specific provision for members, the corporation is presumed to have no members. *[Cal. Corp. Code §§ 5310, 5056]*

**Recommended Practice:** To avoid confusion, state clearly in the articles and/or bylaws (as in these form bylaws) whether or not the corporation will have legal members.

There are valid reasons to have legal members in some nonprofit corporations. For example, a community revitalization group might want to give voting control to those residing within the area. A residents' advisory council in a public housing development might be required to grant membership to all residents of the development. A group of nonprofit organizations forming a corporation to collaborate on a common goal might want to give the founding nonprofits voting control.

However, members add an additional layer of bureaucracy that may be difficult to manage for a smaller corporation. For example, if a corporation has members who are specific named individuals, and the corporation can no longer locate them, corporate action may be prevented or delayed because no membership vote can occur. **Therefore, in the absence of a specific reason to do so, the corporation should not establish legal memberships.**

Also note that because California previously required all corporations to have legal members, some nonprofits formed under prior law without members typically appointed their directors as the sole members. This legal fiction is no longer required and is not advisable.

NOTE**:** This form of bylaws is designed for a non-member nonprofit corporation only and does not contain language that would be required for a membership corporation. If the corporation will have legal members, please contact counsel for appropriate bylaw language.

A corporation may create a "member" class without establishing legal membership to create a funding base or show broad community involvement. Section 6.2 allows corporations to have a separate class of associate "members" or honorary "members" who pay dues and remain involved, but do not have legal rights to vote for the governing board.

[13] **Law:** Each nonprofit corporation must have a board of directors (referred to in these endnotes as "the board"). The board of a nonprofit corporation has the authority and the legal obligation to govern the corporation, oversee its operations and safeguard its assets. An individual referred to as a director of a corporation must have authority to act as a member of the governing board of the corporation, including through voting rights, in order to be a "director" as that term is understood by the law and in these endnotes. *[Cal. Corp. Code § 5047]* The board acts as a group, voting in accordance with the procedures set in Article 7. Directors may delegate the day-to-day operations of the corporation to a staff or volunteers, but are ultimately responsible for the actions they delegate to others. *[Cal. Corp. Code § 5210]*

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Though directors as a group may delegate authority, an individual director may not appoint a substitute or alternate to act in such director's place. Also, each director present and voting at a meeting shall have one vote on each matter presented to the board for action at that meeting, and directors may not vote by proxy *[Cal. Corp. Code § 5211(c)]* or by mailing in ballots. In order to validly act for the corporation, directors must vote either in person or through permissible electronic means at a properly noticed board meeting or by unanimous written consent (see Notes 33 and 43).

Directors must act in the best interests of the corporation, and have a duty of loyalty and due care when overseeing its operations. The bylaws may, but are not required to, include any qualifications required to serve as a director. *[Cal. Corp. Code § 5151(c)(3)]*

***Right to Vote:*** Each director, whether elected, designated, appointed, or serving *ex officio* (see paragraph below), must have the same rights and obligations, including voting rights, as the other directors. *[Cal. Corp. Code § 5047]* Thus, a nonprofit corporation's board may not have "non-voting directors." It is possible, however, that an individual director's vote should not be counted on some matters, such as in a case where they may have a conflict of interest or may benefit financially as the result of a transaction with the corporation that is coming before the board for approval. *[Cal. Corp. Code § 5233(d)(2)(C)]*

***Ex Officio Directors:*** Some nonprofit corporations choose to fill one or more of the director positions "*ex officio*," which means by reason of office. For example, it is not uncommon for a nonprofit's chief executive to serve as a member of the board by reason of office, rather than through election. Other examples of *ex officio* board members could be government officials who are named to the board of a corporation to fulfill a major grant provision, or church officials required to represent their denomination in a faith-based social service agency. These directors are appointed solely because of the position they hold, and cannot continue to serve as directors *ex officio* if no longer holding that position.

*Ex officio* directors have all the same rights and duties as other members of the board, including the right to vote. *[Cal. Corp. Code § 5047]* However, the term of office of an ex officio director must coincide with that director's respective term of office in the specified position entitling them to serve on the board. Upon the ex officio director's resignation or removal from that position, or resignation or removal from the board for any reason, their term of office as a director shall immediately cease, and their successor in office shall become an ex officio director of the corporation in their place. *[Cal. Corp. Code § 5220(f)]* Following is a sample of language which can be added to the end of Section 7.1 to authorize the chief executive officer to serve as an ex officio director. The suggested limitation on the chief executive officer's right to vote on employment status and compensation is consistent with good governance principles related to the setting of executive compensation and the general authority of the board to hire and fire its chief executive:

*"One of the authorized director positions shall be filled ex officio by the Chief Executive Officer, who shall be entitled to vote on all matters except those related to their employment status and compensation. The remaining directors shall be elected pursuant to the procedures set forth in Section 7.3.*

***Duty of Care Explained:*** The duty of care requires a director to act in a reasonable and informed manner when participating in the board's decisions and its oversight of the corporation's management. The duty of care requires first, a director be informed; and second, a director discharge his duties in good faith, with the care that an ordinarily prudent person in a like position would reasonably believe appropriate under similar circumstances.

To meet the duty of care, a director should: (i) regularly attend meetings; (ii) exercise independent and informed judgment on all corporate decisions; (iii) judge what is in the corporation's best interest, irrespective of other entities with which the director is affiliated or sympathetic, or to which the director owes his board appointment; (iv) have adequate information and assure the adequacy and clarity of information.

***Duty of Loyalty Explained:*** The duty of loyalty requires a director to act in the interest of the corporation, rather than in the personal interest of the director or some other person or organization. In particular, the duty of loyalty requires a director to avoid conflicts of interest that are detrimental to the corporation. The IRS recommends that

corporations adopt a written conflict of interest policy to address potential conflicts of interest involving their directors, officers, and other employees (see Note 68).

**Recommended Practice:** It is in the best interests of the corporation to recruit a diverse, qualified, and committed board that can properly manage the affairs of the corporation. Because directors have legal obligations to exercise loyalty and due care, and to act in the best interests of the corporation, no person should be elected as a director if that person is not willing to attend meetings and play an active role in oversight of the nonprofit's activities. Corporations should provide a copy of guidelines and governing documents to new board members to make sure they understand their obligation to the corporation.

Directors also should play an important role in fundraising, and some directors are elected primarily because of their fundraising skill or connections. However, nonprofit corporations generally should not elect major donors, celebrities or any other persons as directors unless such persons are prepared to accept all the legal rights of a fully franchised director, including the right of inspection provided in Section 12.5. If a corporation wants to honor its supporters who do not want to take an active role, it can appoint these persons to an advisory council/board or other group or give them another honorary title that does not carry legal obligations. Such an advisory council can be created whether or not it is described in the bylaws. The board can receive suggestions from such an advisory council, but the ultimate decisionmaking responsibility rests with the board. See Article 8 and Note 53 for more information about delegating functions to a committee that does not have the power to act on behalf of the board.

[14] **Law:** The corporation must have at least one director, but the law does not place a limit on the maximum number of directors. The law requires that unless already provided in the corporation's articles, the bylaws shall state either the number of directors or a range establishing a minimum and maximum number of directors, or a method for determining the number of directors. *[Cal. Corp. Code § 5151(a)]* If a range is given, the exact authorized number must be by board resolution. The law requires that the board be composed of not more than 49% "interested" directors. A corporation will often need to have more than one board member to satisfy this requirement. *[Cal. Corp. Code § 5227(a)]*

**Recommended Practice: Number of Directors.** Although a corporation where no board members are "interested" may legally have as few as one director, other factors exist to compel the decision to recruit more board members. The IRS has indicated that a very small board is problematic because it may demonstrate that it does not represent a sufficiently broad public interest and that it lacks the required skills and other resources to effectively govern the corporation. As a result, the IRS may question whether a corporation with fewer than three board members will qualify for tax exemption under section 501(c)(3) of the Code. Also, some governmental funding sources may require a corporation to have a specified number of community-based board members. *[Cal. Corp. Code §§ 5151(a), 5151, 5227]* Independent Sector's best practices recommend that a board consist of at least five directors who are committed to work with the corporation. For a discussion on principles for good governance, see *https://independentsector.org/programs/principles-for-good-governance-and-ethical-practice/*

**Recommended Practice: Range of Authorized Directors.** Rather than set the exact number of authorized directors in the bylaws, establishing a range allows for flexibility and eliminates the need to amend the bylaws each time there is a change in the exact number. The corporation should set a reasonable range within which the exact number of authorized directors can later be set by board resolution. Start-up corporations may find a range between five and fifteen to be manageable. The range may be amended in accordance with the provisions for amending the bylaws in Article 15. If the bylaws specify a range, it is important that the board adopt a resolution setting a specific number of authorized directors. The board must also adopt a resolution increasing or decreasing the number of authorized directors within the specified range every time it wishes to change the specific number of authorized directors. If the board elects new members and does not pass a resolution increasing the number of directors, then the additional people on the board are arguably not directors and any vote they take is invalid.

[15] **Law:** The articles or bylaws may establish the qualifications of directors. *[Cal. Corp. Code 5151(c)(3)]* If at the beginning of a director's term the bylaws contain qualifications for board service, and then the director stops meeting those requirements, the majority of the directors who do meet the qualifications can remove that director who does not (see 7.4.2 and Note 22). *[Cal. Corp. Code § 5221]*

**Recommended Practice:** If a corporation does not wish to establish qualifications for the removal of directors, but still wants to give the board some guidance for selecting directors, it should use language that provides for broad guidelines that are not strictly required. For example, an organization working with diverse populations throughout California might use the following language:

*"The Board shall make reasonable efforts to include Directors who represent the diversity of the State of California, including, but not limited to, factors such as race, age, ethnicity, gender, or geography. Directors shall support the goals, philosophies and objectives of the Corporation and the laws and regulations under which it is founded."*

If a corporation does wish to establish strict qualifications, in conjunction with the removal of directors who fail or cease to meet the qualifications, it may want to use the following language:

*"A director shall not:*

*engage in any activity that is directly contrary to the interests of the Corporation;*

*engage in the misrepresentation of the Corporation and its policies to outside third parties, either willfully, or on a repeated basis; or*

*be disruptive or unprofessional during [#] or more board meetings or exhibit behavior that is deemed to be detrimental to the function of the board meeting."*

The provisions may be modified to suit the needs and circumstances of the corporation, and other qualifications can be added to this list. If the founders wish to provide for some flexibility to adopt additional qualifications for board service in the future, this list could end with the following language:

*violate any other qualification or requirement for board service that has been adopted by resolution of the Board of Directors prior to the commencement of that director's term of office, if that director was notified of such qualification or requirement at the commencement of their term of office.*

Note that because the bylaws are not required to include any qualifications to serve as a director, a corporation may also state that there are no qualifications for board service or may delete 7.1.2 entirely.

[16] Some organizations may want to ensure the Board of Directors remains responsive to the needs of the communities it serves by requiring that a portion of the Directors represent those communities. For example, the bylaws may require that a certain portion of the Directors receive services from the organization or live in areas the organization serves. It is important however to ensure that failure to meet the community representation requirement does not prevent the Board from carrying out its functions. Organizations may also wish to provide that staff members be represented on the Board. However, in doing so the Corporation must ensure that no more than 49% of the Directors are paid staff or relatives of paid staff (See Section 7.15 and Note 44). For more information on giving employees and workers power within an organization, visit the Sustainable Communities Law Center's online resources on Worker Self-Directed Nonprofits, available at https://www.theselc.org/worker_selfdirected_nonprofits.

[17] **Law:** Although the statements in Section 7.2 are not required to be in the bylaws, this clause reminds directors of their fiduciary duties and that they are responsible under the law for conducting the activities and affairs of the corporation. Even if the board properly delegates management activities, all corporate powers are required to be exercised under the ultimate supervision and direction of the board, meaning that the directors will still have liability if they were not reasonable in delegating the activity or in overseeing the people to whom they assigned those tasks (see Note 45). *[Cal. Corp. Code § 5210]*

[18] **Law:** If the articles or bylaws do not designate a term length, the law provides that the term is one year. Thus, if the corporation wants to elect directors for terms longer than one year, the term length must be stated in the bylaws. However, the term length in the bylaws must be within the limits specified by law. For a non-membership corporation, terms cannot exceed six years. *[Cal. Corp. Code § 5220]* While a director's term must be a determined length, term limits (i.e., the number of consecutive terms that a director may serve) are optional.

**Recommended Practice:** Term length (and limit) considerations will vary based upon the corporation's specific situation. The best practice is one that the corporation will actually follow – if the board fails to re-elect directors when their term is over or keeps them on the board after they are termed out, board actions can be attacked as invalid if the board is not properly elected. For this reason, one-year terms with no term limits is the simplest structure because there is no confusion as to who is on the board, when their term began and will end, and how much longer they can remain on the board. The board must simply reelect the directors it wishes to retain every year. On the other hand, term limits can prevent board stagnancy and ensure that new ideas and leadership will come in to the corporation from time to time, although this must be weighed against the risk of losing qualified and experienced board members due to an artificial limit.

[19] **Law:** The law and these bylaws state that a director shall serve "until a successor has been elected and qualified" unless the articles or bylaws state otherwise (see Section 7.4.1). Thus, a director continues to serve even if their term has expired and no election has taken place. This language can protect a corporation that fails to conduct prompt elections at the end of expiring terms because it ensures that the existing directors' terms will not expire until the election of the new directors. This provision is also useful if the corporation needs additional time to find a new director at the end of an expiring term, especially if the current director is willing to stay involved until a successor is found.

**Recommended Practice:** It is recommended to keep this protection, but corporations should make a practice of having annual board meetings to re-elect board members and officers, and, if original terms have expired or a director resigns or is removed, should act diligently to promptly hold elections.

[20] **Law:** The law permits a corporation to provide for staggered terms for directors in its articles or bylaws. *[Cal. Corp. Code § 5220(a)]*

**Recommended Practice:** If the corporation is concerned that there will be too many vacancies on the board or too little continuity because all terms expire at the same time, the corporation might permit staggered boards, as in Alternative 2. The board, at a meeting or by unanimous written consent, would be divided into as many groups as there are years in the term and randomly assigned so that each group had a different term expiry date. For instance, on a board with three-year terms, nine directors could be divided into three groups of three people each. The board would resolve that group A's term would expire in one year, group B's in two years, and group C's in three years. After the initial terms, each director would be elected for the same term length (e.g., three years), but the terms would expire at different times so that at all times the board would include at least some directors who had experience with the board and its operations. If a vacancy occurs, a successor director would be elected, but the successor director would finish out the term they were elected for. The successor director would not be elected for an entirely new term. Thus, it is important for the corporation to keep clear records of each director and the specific term they are serving.

If the board is not ready to establish a staggered board at the outset (perhaps because the board is still at the lower end of the permitted range in size), but wants to have the flexibility to do so in the future without amending the bylaws, use the language in Alternative 1. When a staggered board is established by board resolution, it will be important to retain the resolution establishing the staggered board together with the bylaws so that future boards will be aware of this change. If the board is ready to establish a staggered board at the outset, use the language in Alternative 2.

[21] **Law:** A vacancy on the board is created when there are fewer directors on the board than the authorized number of directors. A vacancy occurs upon the death of a director, the resignation of a director, the removal of a director, and when the board votes to increase the authorized board size within the range contained in Section 7.1. As

described in Section 7.4.2, the law also permits the board to declare a vacancy when a director is found to be of unsound mind. This is one example of the removal of a director for "cause" (see Note 22).

[22] **Law:** Removal of a director for "cause" requires only the regular vote of a majority of directors present at a meeting where there is a quorum, which is the same vote required for other board actions (see Section 7.9.1). Removals without "cause" require a greater vote - the majority of all directors then in office. For instance, if a corporation with ten directors in office (and a quorum of six directors) has six directors attend a meeting, at least four of the six directors (a majority of those present) would have to vote in favor of removing a director for "cause" for that action to be valid. However, all six directors (a majority of all directors then in office) would have to vote in favor of removing a director without "cause" in order for that action to be valid. *[See Cal. Corp. Code § 5222]*

The law limits the items that can constitute "cause" and give the board a reason to remove a director with a regular board vote. Some conditions can constitute "cause" only if those conditions are stated in the bylaws at the time the director joins the board. For example, if at the time the director is elected the bylaws state that missing a certain number of board meetings will be cause for removal, then a director may be removed for "cause" if that director misses the specified number of meetings. If the bylaws do not contain such a provision, the director could be removed for missing those meetings only by the higher level of vote required for removal without cause. Similarly, if at the beginning of a director's term the bylaws contain qualifications for board service (as discussed in Note 15 and Section 7.1.2) and then the director stops meeting those requirements, the majority of the directors who do meet the qualifications can remove that director who does not. *[Cal. Corp. Code § 5221]*

For boards that choose to make decisions by consent as described in Note 35, a majority of all directors must be present at a meeting to remove a director without cause in order to meet the requirements California Corporation Code section 5222.

**Recommended Practice**: As described above, a corporation may include language in the bylaws that would create a vacancy for absentee directors, as provided by the bracketed meeting attendance language in Section 7.4.2. The number of meetings specified should be adjusted to reflect a reasonable number of meetings based on the total number held by the corporation each year. This language provides flexibility to allow the board to decide whether or not to remove a director for this "cause." To further ensure that directors attend board meetings, a corporation should also consider including a separate requirement in board member guidelines, mandating attendance at a certain number of board meetings. Board member guidelines should then be reviewed when re-electing directors.

To remove a director without cause, the corporation may in its bylaws require an even greater vote than what is required by law. This provision does not institute such a greater vote requirement. Going beyond minimum defaults under the law will make it more difficult to remove a non-contributing or dissident board member and may contribute to stagnancy.

If a corporation dislikes the idea of allowing removal of directors without "cause," it should consider establishing qualifications for board service (see Section 7.1.2 and Note 14). In this way, if a director no longer meets the qualifications, the board may declare such director's office vacant, as provided for in the bracketed qualifications language in Section 7.4.2. However, this type of removal is permitted only if the qualifications are established before the director's term begins, and the vote to declare that director's office vacant must be made by the majority of directors who do meet the qualifications.

**Further Reading:** For a sample board attendance policy, see *www.managementhelp.org/boards/brdattnd.htm*.

[23] **Law:** The law prohibits a board from removing a director before their term ends merely by eliminating a board position through reduction of the number of authorized directors. This provision is in place to make sure that a board will not be able to avoid the higher voting requirement to remove a director without "cause" (see Note 22 regarding voting standards for removal of a director from office). A bylaw amendment or board resolution to authorize reduction of the number of authorized directors would not normally require this higher vote unless otherwise specifically stated in the bylaws. However, a bylaw amendment or board resolution to reduce the number of director seats which also provides for the contemporaneous removal of one or more specified directors can result in the

removal of a director provided that the board has followed the procedures for removal contained in the bylaws. *[Cal. Corp. Code § 5222]* Assuming that the board lacked cause to remove the director whose board position is to be eliminated, then such a compound resolution or amendment would require approval of a majority of directors then in office.

**Recommended Practice**: This provision restates the law and should not be altered or deleted. It is important for the corporation to be clear on who is a director at any time, to ensure that board votes are valid. The bylaw provisions that restate the law about election and removal of directors will serve as a handy reference for these laws so that the board can clearly determine how to elect and remove a director.

[24] **Law:** The law permits a director to resign at any time, even mid-term, upon giving written notice in accordance with this provision, as long as the director's resignation does not leave the corporation without any directors (in which case the Attorney General must first be notified). As in the case of director removal, if a director resigns, a vacancy is created and must be filled pursuant to Section 7.4.5. *[Cal. Corp. Code §§ 5224(c), 5226]*

**Recommended Practice**: A director's right to resign as described in this provision is granted by law and cannot be taken away regardless of what is written in the bylaws. Therefore, the provision should remain in the bylaws to remind directors of these rights.

[25] **Law:** The law permits a vacancy to be filled in the standard manner (i.e., majority vote of board at meeting where a quorum is present), but also provides alternate processes for vacancies to be filled where there are not enough remaining board members to meet the minimum quorum requirements. *[Cal. Corp. Code § 5224]* Alternatively, the remaining directors may simply reduce the authorized number of directors when there are vacancies.

[26] **Law:** The law does not specify a minimum number of times a board must meet per year. *[Cal. Corp. Code § 5211(a)(2)* The law also has no specific requirement that directors must attend any specified number or percentage of the corporation's board meetings. However, a director's fiduciary responsibilities to properly oversee the corporation's activities can be interpreted to require reasonable attendance. *[See Note 17; Cal. Corp. Code § 5231]*

**Recommended Practice:** Directors' fiduciary duties require in most cases that the board meet at minimum once a year to elect directors, approve the budget and discuss the overall activities of the corporation. Depending on the activity level of the corporation, the board may need to meet a number of times per year to satisfy its fiduciary obligations. This bylaw requires only one meeting per year to give the board the flexibility to determine how often it needs to meet to satisfy its fiduciary obligations. In most cases, it is good practice to meet at least quarterly so that the board can exercise some oversight over the corporation's activities. *[See Note 17]* If the board does not meet regularly, it is recommended to have an executive and/or finance committee meet regularly to oversee the corporation's activities (see Note 47).

[27] **Law:** If the board fixes the time and place of any regular meeting, the notice requirements contained in Section 7.7 7.7 will not apply, unless the time and place are changed, in which case the change must adhere to the provisions contained in Section 7.7. *[Cal. Corp. Code § 5211(a)(2)]*

**Recommended Practice:** At the beginning of each year, many corporations find it helpful to create a schedule of meetings for the year that contains the date, time and place of each meeting. If it contains all of the information referenced in Section 7.7.3, this schedule could replace individual notices and act as a notice for all the regular meetings that year. This is a helpful practice because it allows directors to plan in advance and makes it more likely that the directors will fulfill their duty of care to the corporation.

[28] **Law:** Under the law, a board meeting can be called at any time as described in this provision, unless the bylaws say otherwise. *[Cal. Corp. Code § 5211(a)(1)]* The form bylaws refer to these as "special meetings" because they are meetings called in addition to the regular meetings required by the form bylaws. The board must follow the formal notice requirements for all special meetings. The law states that the bylaws may not dispense with the notice requirement for a special meeting. *[Cal. Corp. Code § 5211(a)(2)]*

**Recommended Practice:** This provision tracks the default language of the law in allowing the chairperson, president, vice president, secretary, or any two directors to call a special meeting. The law does not include the treasurer, but the bylaws may give this or any other officers the right to call a special meeting by adding them to the list in Section 7.6. However, in a larger corporation, the board may wish to limit the ability of some of the officers to call a special meeting without the concurrence of another officer or director.

[29] **Law:** This provision is consistent with the legal default requirements for permitted methods of giving notice of board meetings. *[Cal. Corp. Code § 5211(a)(2)]* The required notice of a board meeting may be waived, if all the directors consent in writing, either before or after the meetings. Any such consent should be filed with the meeting minutes. See Section 7.10 for procedures to obtain directors' consent for no notice or improper notice. *[Cal. Corp. Code § 5211(a)]* If the corporation intends to give notice via fax or email, it must obtain the director's consent to receive notice in this manner. *[Cal. Corp. Code § 20]*

[30] **Law:** This provision is consistent with the legal default requirements for the amount of time required for notice of board meetings. *[Cal. Corp. Code § 5211(a)(2)]*

**Recommended Practice:** It is good practice to send notices of the meetings far enough in advance so that it is practical for the directors to attend, even where the law and the bylaws require as little as 48 hours' notice. This provision does not require more than what is required by law to give the corporation the flexibility to call meetings quickly in an emergency. If the bylaws are revised to contain a provision requiring more notice than what would be required by law, the corporation must follow the stricter provisions in the bylaws to avoid a potential challenge to a board action by an absent director.

[31] **Recommended Practice:** This provision does not require the notice to specify the purpose of the meeting, except when the meeting deals with amending the bylaws. The corporation may alter this provision to require the purpose of the meeting to be stated in every notice, or only for certain subjects, such as election and removal of directors. However, if a purpose statement is required in the notice, the board loses the ability to act on additional matters in that meeting, unless all directors waive notice pursuant to Section 7.10 (see Note 37). Consider listing any additional notice requirements in Section 7.7.3.

[32] **Law:** The law does not prescribe any particular location for board meetings, but requires the corporation to give all board members notice of where the meeting will be held, as described in Section 7.7. This provision is consistent with the law and should not be altered. *[Cal. Corp. Code § 5211(a)(5)]*

[33] **Law:** Although technology is evolving, the law only permits a limited number of authorized means to hold board meetings. The law permits the use of conference telephone and video screen communication at a board meeting only if all participating members can hear one another. Participation in a meeting through use of electronic transmission other than conference telephone or electronic video screen is permissible if the following requirements are met: (i) each member participating in the meeting can communicate with all of the other members concurrently, each member is provided the means of participating in all matters before the board, including the capacity to propose or to interpose an objection to specific action to be taken by the corporation, and (iii) the transmission creates a record that is capable of retention, retrieval, and review, and that may thereafter be rendered into clearly legible tangible form. For example, a board could meet through the use of an instant messenger service, in which each member's comments are instantly visible to the entire group, and each member has the ability to input their comments, and the corporation can save and print out the comments. On the other hand, the use of e-mail communication, in which each member's comments are not instantly visible, would not constitute a board meeting. *[Cal. Corp. Code §§ 5211, 20, 21]*

**Recommended Practice**: Although this provision is drafted as broadly as is permitted by existing law as of the date of this form, as technology and the law change, corporations may need to amend their bylaws in order to legally use new technology. In practice, however, a corporation should encourage meetings in person or, at the very least, by telephone to permit the free flow of ideas and to minimize the potential for conflict based on written

miscommunications.

[34] **Law:** A quorum is the minimum number of directors required to be present at a meeting for a valid action to be taken. The law provides that a quorum cannot be less than one-fifth of the number of authorized directors or fewer than two directors, whichever is larger. *[Cal. Corp. Code § 5211(a)(7)]* For this reason, when the bylaws set a range, it is important that the board officially vote to set the actual number of authorized directors. **If no quorum requirement is stated in the bylaws, the default quorum will be a majority of authorized directors.** The quorum requirement in this Section 7.9.1 is drafted to change the default rule. Nonprofit corporations also have the option of adding a provision requiring the presence of one or more specified directors at a meeting in order to constitute a quorum, provided that the death of that director or the death or nonexistence of any person authorized to appoint or designate that director does not prevent the corporation from transacting business in the normal course of events. *[Cal. Corp. Code § 5211(a)(7)]*.

**Recommended Practice:** As in this example, newly forming nonprofit corporations should consider changing the default rule so that the quorum requirement in Section 7.9.1 is set at a majority of the number of directors currently in office, rather than a majority of the number of authorized directors. Counting the quorum based on the number of actual directors rather than the number of authorized directors ensures that the corporation will always be able to muster a quorum. This can be important if there are vacancies on the board and the board needs to take a corporate action before it has recruited and elected enough new board members to fill the authorized number of directors. For example, if the board has set the authorized number of directors at 7, and there are 3 vacancies, the actual number of directors will be 4. With the default quorum rule, the quorum would also be 4, and therefore the corporation could only hold a meeting if all directors were able to attend. If the quorum is instead based on the actual number of directors, the quorum would be 3 and the corporation could hold a meeting even when one of the board members is absent. In any case, it is good practice for a board to fill any vacancies as promptly as possible.

Unless a corporation has a very large board, the corporation should generally provide that a quorum is a majority of the number of directors in office. This ensures accountability by making sure that a majority of the directors will consider and vote on every corporate action. If the quorum is reduced below a majority, a small minority of the board could act on its own to bind the corporation. If a quorum is set much higher than a majority, then a small minority of the board could effectively veto any action by failing to attend meetings. However, when a corporation has a very large board (e.g., 25 directors or more), the corporation may find it difficult to get a majority of directors in office to attend a meeting. Larger corporations may, thus, need to have a lesser quorum requirement (but in no event can it be less than one-fifth of the authorized number of directors). For discussion of delegating some operations to committees where a corporation has a very large board, see Note 47.

Directors of nonprofit corporations often represent various constituencies and want to ensure that those constituencies are represented when the board takes action. In that case, the corporation may want to include a provision requiring the presence of one or more specific directors to meet quorum. However, this option must be weighed against the risk of allowing one or a few directors to effectively veto any action by failing to attend meetings.

[35] **Law:** In most cases, the law requires a vote of a majority of directors present at a meeting where a quorum is present in order for a board action to be valid. If a quorum is not present, no action or vote taken by the board is valid. As an example, if a corporation with ten directors in office has six directors attend a meeting (thereby meeting the quorum requirement), at least four of the six directors (a majority of those present) would have to vote in favor of a particular action in order for that action to be valid. The law states that the articles and bylaws cannot reduce the vote requirement for valid action to less than the majority of directors present at a meeting. Thus, in the previously stated example, where a quorum of the board is six directors, if nine directors actually attend the meeting, at least five of the nine directors (a majority of those present) would have to vote in favor of a particular action in order for that action to be valid. *[Cal. Corp. Code §§ 5211(a)(7), 5211(a)(8)]* See Section 7.9.3 and Note 36 for when a greater vote is required for valid board action.

**Alternative Practice:** Some organizations are moving away from a “majority rules” mode of decision making and instead have embraced the concept of “consent.” A consent model does not require affirmative consensus of every

director present at a meeting. Instead, under the consent model, a resolution or decision will be adopted so long as no one present at the meeting *objects* to it, after being given an opportunity to ask question and engage in a discussion about the proposal, during which the proposal may be amended to incorporate the feedback given during discussions. Objections are allowed only if the director feels that adopting the decision will violate a fiduciary duty, will cause harm to the organization, or will be contrary to the organization's mission. Organizations that adopt a consent model of decision making believe that the practice allows for more decisions to move forward and encourages gathering input on proposals. However, keep in mind, that for actions taken without a meeting, consent would not be appropriate because California corporations law requires unanimous written consent. For more information on consent, see Sustainable Economies Law Center, Meeting Processes and Decision Making, at https://www.theselc.org/meeting_processes.

Here is sample language for a consent model. Note that for decisions which require more than a simple majority of a quorum (see, e.g., Notes 22, 36, 47, and 68), a majority of a directors in office must be present in order to adopt the decision by consent:

*Unless otherwise required by California Nonprofit Corporation Law, the Articles of Incorporation, or these Bylaws (specifically Section 7.14 and the actions listed in Section 7.9.3), all decisions made by the Directors shall be made through the consent of every Director present at a meeting duly held at which a quorum is present. Directors present at a meeting at which a matter is being decided shall be given the opportunity to ask questions and voice opinions. After all questions have been answered, the individual facilitating the meeting will ask if there are objections. A Director may object to a decision on the grounds that it violates or may violate a fiduciary duty, will result in irreparable harm to the Corporation, or is inconsistent with the mission of the Corporation. A decision will be adopted if no Directors object to it.*

[36] **Law:** Certain actions under the law are required to be approved by a majority vote of directors in office, as distinguished from a majority vote of a quorum. For example, in order for a corporation with ten directors in office to remove a director without cause, six directors would have to vote in favor of such action, even if the quorum requirement was six or less than six. These actions requiring a greater approval under the law are set forth in Section 7.9.3.

For boards that decide to operate on the consent model described in Note 35, a majority of directors in office need to be present at the meeting in order to meet the required threshold. For example, this section can state at the outset: *The following actions shall require the consent of all Directors present at a meeting at which a majority of Directors then in office are present, pursuant to Section 7.9.2*:

**Recommended Practice:** Section 7.9.3 (listing actions that require greater approval than a majority of directors present at a meeting) restates the law, and should not be removed because it is important for directors to remember that these actions may not be valid if approved only by a majority of those present at a meeting. If the corporation wishes to impose this greater approval requirement on other actions, it should add them to the list in this provision.

[37] **Law:** Even if notice is not given in the manner required by law and by Section 7.7 directors can waive the right to receive the required notice by signing a written waiver of notice, a written consent to holding the meeting, or an approval of the minutes of the meeting; or by attending the meeting and not protesting the lack of notice before or at the start of the meeting. *[Cal. Corp. Code § 5211(a)(3)]* Directors who waive notice cannot later challenge actions taken at the meeting solely because they did not receive proper notice.

**Recommended Practice:** It is recommended that a corporation follow the notice requirements of Section 7.7 in all respects. However, if an emergency arises or such practice will be too impractical, written waiver or consent forms can be used as an alternative to formal notice of board meetings, especially if the board is not large. Waivers, consents and approvals of the minutes should be made a part of the minutes of the meetings or otherwise filed with the corporate records. If all of the directors attend a meeting without protesting the lack of notice, formal waiver will not be necessary, but their presence and failure to protest should be reflected in the minutes.

[38] **Law:** This provision is consistent with the default rules in the law, which allows meetings to be adjourned (i.e., postponed or suspended) to another time or place if no quorum exists. This is necessary because no valid action can be taken at a meeting where a quorum is not present (see Note 34). *[Cal. Corp. Code § 5211(a)(4)]* Because technically an adjournment is a corporate action, the provision in this provision and in the law clarifies that the adjournment can be accomplished without a quorum. For example, if the meeting being adjourned is a required annual meeting at which the board is required to elect directors and officers, the board can adjourn the meeting until such time as a quorum can be convened, so that it can hold the required elections that could not take place without a quorum present.

[39] **Law:** The law permits any adjourned meeting to reconvene within 24 hours without providing additional notices to the other directors, unless the bylaws state otherwise. Also, unless the bylaws state otherwise, if a meeting is adjourned for more than 24 hours, notice must be given to the directors who were not present at the time the meeting was adjourned. This provision does not change the default rule in the law. *[Cal. Corp. Code § 5211(a)4)]*

**Recommended Practice:** In general, these provisions would allow a board to determine that it needed to continue to discuss certain corporate business, and to reconvene to continue the discussion without formally calling another meeting and sending another notice. This can be helpful in providing flexibility to a board to complete its deliberations and not rush to take action. It is always good practice to give absent directors notice of meetings when possible, and it may be necessary in case of adjournment for lack of quorum, but this provision will permit a board to give less than the 48 hours that is usually required if reconvening within 24 hours of the original meeting time.

[40] **Law:** A corporation is not required to include in its bylaws any particular procedures for the conduct of meetings. Also, a corporation is not required by law to use a parliamentary procedure such as "Robert's Rules of Order" to conduct meetings. However, if such procedures are specified in the bylaws, the corporation must follow them. This means that before formally adopting any system for the conduct of the board meetings, the incorporators or others who are drafting the bylaws should understand what those rules are and assess whether the corporation's board will be able to follow them.

Regardless of the procedures used, minutes of all board meetings should be taken and retained in corporate record books, and the minutes should include the names of the people attending the meeting, what votes were taken, and, to the extent there are any objections or abstentions, how each director voted. In addition, when the board or a committee acts on any matters for which there are specialized voting rules, such as where there is or may be a conflict of interest, the minutes should clearly explain what information or documents the directors relied on when making their decision. In the case of section 501(c)(3) tax-exempt corporations, such minutes and documentation (such as comparable salary information when determining how to compensate an officer) will be necessary if the corporation wants to qualify under the "rebuttable presumption of reasonableness" safe-harbor for transactions covered by the IRS's private inurement rules (see Note 8).

**Recommended Practice:** It is best practice not to require a procedure in the bylaws. This provision allows the board to establish a procedure by resolution if it later determines it is necessary. If the corporation decides to use a specific set of rules, it should modify the last sentence of Section 7.13 or simply authorize the use of the rules by resolution.

If a board uses a formal parliamentary system, it will have rules determining how a subject may be introduced for discussion and vote, who may speak, what may be discussed at any time, and when debate can be cut off so that the board can take a binding vote. This system requires the chairperson of the meeting to recognize each speaker, and requires motions to be made before discussion or a vote can be taken on any corporate matter. Having strict procedural rules can be advantageous in situations where boards are very large or when meetings are expected to be contentious, because all members, even those in the minority opinion on the question, may have a chance to speak if they follow proper procedures, and the debate can be cut off when a majority believes it is necessary to stop discussion and act.

If a corporation is required by its bylaws or by resolution to use a formal parliamentary system, the chairperson must be sure to understand the detailed rules, and each board member should be given a copy of the rules when joining the board. Regardless of the method chosen, at the end of discussion, a vote should be taken and recorded in the

minutes. The minutes should also reflect that a discussion took place and that every board member had the chance to speak.

**Further Reading:** For a discussion on whether to adopt a formal procedure, see *Guidebook for Directors of Nonprofit Corporations*, *Committee on Nonprofit Corporations*, 2nd Edition, Ch.2., p. 28.

[41] The law does not require the president, chairperson, or any officer to facilitate a board meeting. While it is traditional for the chairperson/president to do so, the organization may decide that rotating the responsibility allows directors to develop skills for board leadership. Further, it also may lead to more active participation from directors, including those with lived experience and diverse backgrounds. It is not unusual for board meetings to be dominated by a few individuals who feel most comfortable contributing. Rotating facilitation responsibilities may provide a structure for a broader range of directors to participate.

[42] No matter how and by whom the meetings are conducted, minutes of all board meetings should be taken and retained in corporate record books, and the minutes should include the names of the people attending the meeting, what votes were taken, and, to the extent there are any objections or abstentions, how each director voted. In addition, when the board or a committee acts on any matters for which there are specialized voting rules, such as where there is or may be a conflict of interest, the minutes should clearly explain what information or documents the directors relied on when making their decision. In the case of section 501(c)(3) tax-exempt corporations, such minutes and documentation (such as comparable salary information when determining how to compensate an officer) will be necessary if the corporation wants to qualify under the "rebuttable presumption of reasonableness" safe-harbor for transactions covered by the IRS's private inurement rules (see Notes 9 and 44). For sample board minutes, resolutions, and consents please see https://publiccounsel.org/publications/sample-minutes-resolutions-and-consents/.

[43] **Law:** The law does not permit action by vote or consent of less than all directors without a meeting. The board may act without a meeting if 100% of the directors (other than a director that is "interested" with respect to the vote being taken) give written consent to the action. *[Cal. Corp. Code § 5211(b)]* For these purposes, the law defines an "interested director" under section 5233 of the law (see Note 68), rather than using the definition found in Section 7.15 of the form bylaws. The written consent to the action may be signed in counterparts (i.e., the directors sign separate copies). Consents via email do not require actual signatures, but the corporation must print the messages and keep them with other consents.

**Recommended Practice:** Board action by written consent may be appropriate in the transaction of routine business, or for the approval of specific actions that have already been fully discussed at prior board meetings. Directors should, however, be cautious about the ratification or authorization of major activities or decisions without a meeting or other opportunity for the board as a whole to raise questions and fully evaluate the ramifications of the action because due care is shown by having the opportunity to ask questions (see Note 13). Unanimous consents should not regularly be used as a substitute for regular meetings. Any written unanimous consents should be kept with the minutes of the corporation.

**Further Reading:** *Guidebook for Directors of Nonprofit Corporations*, Ch. 2, p. 26

[44] **Law:** Although the law permits directors to be paid a reasonable amount for their services as directors, public charities rarely do so. Reimbursement of reasonable expenses related to attending board and committee meetings, such as travel costs, mileage and/or parking, are not considered compensation for this purpose. Note that reasonable expenses do not include expenses incurred in taking a guest, such as a spouse.

Some organizations may decide that providing a stipend to directors allows the organization to recruit and maintain a more economically diverse board. Board service can involve an enormous investment of time that can interfere with a director's ability to do paid work. Offering payment to directors may make it possible to ensure that individuals who cannot afford to do unpaid work are willing and able to serve on the Board and contribute their expertise. However, should an organization choose to compensate its Directors, it must be prepared to justify its decision to funders.

Further, there are several legal issues involved with compensating directors beyond reimbursement of reasonable expenses. First, a director loses the statutory protections exempting ***volunteer*** directors from personal liability for most board actions, when she/he accepts compensation to serve as director. *[Cal. Corp. Code § 5047.5; see Notes accompanying Article 11]* Second, a nonprofit corporation must ensure that it does not pay its directors more than a "reasonable" amount of compensation for serving as a director. Under section 5227 of the law, no more than 49% of the directors of a nonprofit public benefit corporation may be "interested directors." An "interested" director for this purpose is (i) any person currently being compensated by the corporation for services rendered to it within the previous 12 months… excluding any *reasonable* compensation paid to a director as director and (ii) any close relative of any person currently being compensated. *[Cal. Corp. Code §§ 5227(a) & (b) (emphasis added)]* Thus, if a corporation were to pay its directors more than what the Attorney General ultimately determines is a "reasonable" payment, the corporation would be violating this rule and its board would not be validly constituted. The Attorney General's office has indicated it will audit any payment to a director that is "more than nominal," to determine whether the amount of compensation is reasonable.

Similarly, for corporations that are tax-exempt under section 501(c)(3) of the Code, the IRS's ***private inurement rule*** may be triggered by director compensation that is in excess of the fair market value of the services provided. If the IRS were to determine that the corporation paid its directors excessively, the corporation could lose its section 501(c)(3) tax-exempt status (see Note 9. Private inurement rules would also require that a nonprofit corporation ensure that it is not engaging in an excess benefit transaction under Internal Revenue Code section 4958. An excess benefit transaction is a transaction where an economic benefit is provided by the organization to a person who meets the definition of a disqualified person, such as a Director, and the value of the benefit exceeds the value of the consideration (goods or services) received in exchange for the benefit. (IRC § 4958(c); Treas. Reg. § 53.4958-4(a)). If the IRS finds that the organization engaged in an excess benefit transaction, it might impose an excise tax on the organization (and its Directors) and in some circumstances, revoke tax-exempt status. The IRS regulations put forth procedures an organization an organization must follow to establish a presumption that the compensation paid was reasonable (and therefore not an excess benefit transaction). (Treas. Reg. § 53.4958-6). The procedures require an organization to rely on comparability compensation data from other organizations. (Treas. Reg. 53-4958-6(c)). Since it is so rare for nonprofit organizations to compensate board members, it might be difficult for a nonprofit organization to establish that the compensation paid is reasonable in light of what other organizations due and therefore take advantage of the rebuttable presumption of reasonableness. An organization compensating its directors for their services as directors may have a difficult time establishing that the compensation was reasonable. For more information on the rebuttable presumption of reasonableness, please see Public Counsel's Executive Compensation Policy, available at https://publiccounsel.org/publications/executive-compensation-policy/.

**Recommended Practice:** Most nonprofits, including hospitals, universities and nonprofit schools, have volunteer boards, based on widely-held custom and practice that individuals should contribute volunteer resources to nonprofits. For this reason as well as the legal reasons described above, it is best to follow these form bylaws and build in to the bylaws this prohibition on director compensation. Should the nonprofit wish to allow the Board to authorize a stipend to Directors, Section 7.15 may be worded as follows:

*The Board may by resolution decide to compensate Directors for services rendered to the Corporation as Directors, so long as any such compensation is reasonable. Notwithstanding the previous sentence, Directors may be reimbursed for expenses incurred in the performance of their duties to the Corporation, in reasonable amounts as approved by the Board.*

**Further Reading:** Attorney General's Guide for Charities, p. 52 - *https://www.oag.ca.gov/system/files/media/Guide%20for%20Charities.pdf*

[45] **Law:** The limitation on personal liability for corporate directors is not absolute under the law. Directors can still be held personally responsible for certain actions of the corporation, such as tort claims, if the directors do not exercise due care when carrying out their duties. Also, under the tax laws, a director can be held personally liable for unpaid payroll taxes of the corporation if the director was a person responsible for paying or controlling the payment of those taxes and failed to do so. See Note 73 for further information about indemnification, insurance, and legal protections for volunteer directors and officers.

**Recommended Practice**: To better understand their responsibilities and help avoid personal liability, all directors should receive periodic training on their corporate duties and responsibilities.

**Further Reading:** Publications and resources related to board training and responsibilities: The Nonprofit's Insurance Alliance Of California – *www.niac.org*
Board Source – *www.boardsource.org*
Candid – *https://candid.org/?fcref=lr*

[46] **Law:** Subject to any provisions in a corporation's bylaws, the law allows a board to take certain actions (listed in Section 7.17.2) in the absence of a quorum in anticipation of or during an emergency. *[Cal. Corp. Code §5140(n)]* An emergency is defined to include several circumstances as a result of which a board cannot achieve a quorum, such as a natural catastrophe, severe act of terrorism, pandemic/epidemic, or an attack on the State of California or United States. *[Cal. Corp. Code §5140(n)(5)]* Alternatively, the law allows a corporation to adopt provisions in its bylaws, effective only in an emergency, to manage and conduct the affairs of the corporation, including procedures for calling a board meeting, quorum requirements for a board meeting, and designation of additional or substitute directors. *[Cal. Corp. § 5151(g)]* Under both emergency bylaws adopted by a corporation or the default emergency provisions in the law, for a corporation with members, a board is specifically prohibited from taking any actions that require member approval. *[Cal. Corp. §§ 5140(n)(3) and 5151(g)(2)]* Further, corporate actions taken in good faith in accordance with the default provisions or emergency bylaws adopted by a corporation are binding on the corporation and shall not be used to impose liability on a corporate direct, officer, employee, or agent. *[Cal. Corp. §§ 5140(n)(4) and 5151(g)(4)]*

**Recommended Practice:** This provision serves to remind the board it has some governance flexibility in the event of a major catastrophe. If the default provisions under the law are inadequate, the corporation should consider adopting additional or alternative emergency provisions that are more appropriate for its circumstances.

[47] **Law**: The law permits a board to appoint committees made up of two or more directors, which can be delegated the authority to act on behalf of the board, by a resolution by a majority of the directors in office. *[Cal. Corp. Code §§ 5210, 5212]* For nonprofits using consent decision making described in Note 35 a majority of all directors in office need to be present at the meeting in order to establish a committee with the power of the board by consent. This voting requirement cannot be lowered and committees exercising the authority of the board are expressly prohibited from having members that are not directors (see Note 53 for more information on "advisory committees"). *[Cal. Corp. Code § 5212(b)]* While it is not uncommon for committees of the board to invite non-director officers or others to attend their meetings in an advisory capacity, such persons cannot be voting committee members if the intention is for the committee to be able to exercise the authority of the board rather than to act in merely an advisory capacity.

A duly authorized and appointed committee can act with the same authority as the board to handle functions that the board delegates to it, that would otherwise be left to the entire board. *[Cal. Corp. Code § 5212]* However, these committees are prohibited from taking certain actions, which must be approved by a vote of the board. The limitations in Section 8.1 as to what may be delegated to committees are consistent with the limitations found in the law. *[Cal. Corp. Code § 5212(a)(1)-(8)]*

Note that committees that have the power to act on behalf of the board, especially executive committees, by definition exclude non-committee members from participating in certain aspects of high-level decision making. If an organization adds people with diverse backgrounds to the board of directors, but then maintains a structure where a large portion of decisions are made by a small group of people on the board, the organization is not ensuring that a variety of experiences and skills are brought to bear on board decision making.

**Further Reading**: Ruth Sessler Bernstein, Paul F. Salipante, and Judith Y. Weisinger, *Performance through Diversity and Inclusion: Leveraging Organizational Practices for Equity and Results* (2022) 102-107 (discussing the practice of ensuring equal insider status for all members).

**Recommended Practice**: The use of committees allows the corporation to accomplish administrative, ministerial or specialized tasks without requiring the presence or approval of the entire board. Section 8.1 8.1 allows the board the flexibility to create committees, but does not require the board to create any committees. Thus, at the startup phase, while the board is small, the full board can act on all decisions, and if the board grows in size and has many different projects to monitor and supervise, the board can create committees later. However, reliance on an executive committee for decision making may undercut an organization's equity goals, as it maintains a structure where a small group of individuals have the power to make many or most decisions.

Some corporations may want to have standing, or permanent, committees. In that case, the function and makeup of such committees may be described in the bylaws. Common standing committees include: an executive committee, a nominating committee, an audit committee, a budget committee, a compensation committee, a development committee, and (where a corporation has assets held in reserve that need to be invested) an investment committee. Some corporations describe committees in their bylaws but this provision permits a corporation to create a standing committee by board resolution. This is done to avoid having to amend the bylaws every time the board decides to create, dissolve, or alter a committee. If a committee is not created in the bylaws, then in order to create such a committee the board should adopt a resolution by a majority vote of directors in office setting forth the composition and duties of the committee. The only committee established in these form bylaws is the audit committee, described in Section 8.5 a special committee required by law for certain corporations with revenues of two million dollars or more which may, but does not, require all members to also be directors (see Note 51). To create standing committees in the bylaws, the following example language can be inserted in Article 8 and revised to reflect the specific needs of the corporation. Please note that all of these examples assume that the named officers are also directors of the corporation.

Sample Executive Committee Provision
*"The Executive Committee shall consist of the Officers, and the immediate past President, if the immediate past President still is a Director. It shall meet as necessary to carry out its duties. The Executive Committee shall act in place of the Board in between regular Board meetings, when immediate action is required, and shall report on any action taken at the next Board meeting. When a decision can be deferred until the next Board meeting, the Executive Committee will not act on the matter. No Executive Committee meeting shall be held in lieu of a regular Board meeting, unless agreed to by a majority of the Directors. The Executive Committee may also initiate new issues for recommendation to the Board on its own volition."*

Sample Finance Committee Provision
*"The Finance Committee shall act as financial advisor to the Board in all financial affairs of the Corporation, including, but not limited to: overseeing the preparation of the annual operating budget, considering and making recommendations on matters of financial interest with respect to which the Board may request its consideration and action, recommending the adoption of policies for financial management practices, and long-range financial planning. The Treasurer shall be a member of the Finance Committee. The Finance Committee may include members of the Audit Committee, subject to the requirements set forth in Section 8.5 and assuming that each is also a director of the corporation."*

Sample Nominating Committee Provision
*"The Nominating Committee shall have responsibility for locating qualified candidates to serve as Directors and for recommending the same to the Board whenever a vacancy in the position of Director occurs."*

**Further Reading**: For more detailed information on committees within a nonprofit entity see *Nonprofit Governance and Management*, Ch. 11, and also *Guidebook for Directors of Nonprofit Corporations*, Ch. 3.

[48] **Law**: The law requires that the members of a committee receive notice of committee meetings consistent with the manner of giving, time, and notice contents requirements applicable to full board meetings. *[Cal. Corp. Code § 5211(d)]*

**Further Reading**: *Nonprofit Governance and Management*, Ch. 11, and also *Guidebook for Directors of Nonprofit Corporations*, Ch. 3.

[49] **Law**: A quorum for a committee meeting refers to the minimum number of committee members who must be present for the committee to validly conduct its business. This provision maintains the default statutory quorum requirement of a majority of committee members. A committee may also require the presence of one or more specified committee members to meet quorum. [*Cal. Corp. Code §§ 5211(a)(7), 5211(d)]*

**Recommended Practice**: Although a quorum for a committee can be as low as 1/5$^{th}$ of the committee members (but not less than two), the best practice is to have the quorum set at a simple majority of the committee members as in this example. This will ensure that at least a majority of the committee members actively participate in committee activities.

**Further Reading**: *Nonprofit Governance and Management, Ch. 11,* and also *Guidebook for Directors of Nonprofit Corporations, Ch. 3.*

[50] **Law:** This section ensures that after creating a committee, the board may dissolve it at any time, and that thereafter, such committee will have no authority to act on behalf of the board.

[51] **Law:** This section restates the provisions of the Nonprofit Integrity Act of 2004 that require corporations with gross revenues of two million dollars or more (excluding government payments as described in the form bylaws text) to conduct an audit and have an audit committee. The audit committee may consist of board members and non-board members, but may not include any staff members, including the president, CEO, treasurer or CFO. The term "staff" includes any employee (or independent contractor) of the corporation and any person, whether paid or not, who has the day to day role of president, CEO, treasurer or CFO. *[https://oag.ca.gov/charities/laws]* Persons who are barred from being members of the audit committee may be invited to attend committee meetings and are permitted to provide reports to the committee.

Members of a separate finance committee of the board may also serve on the audit committee. However, finance committee members must constitute less than half of the audit committee membership. Additionally, the chairperson of the audit committee may not be a member of the finance committee.

This provision does not give the audit committee the authority to act with the authority of the board, even if it is composed solely of directors. Furthermore, the Attorney General takes the position that the powers of the audit committee are always subject to the supervision of the board of directors. [*https://oag.ca.gov/charities/laws]* Thus, the audit committee's actions will need to be ratified by the full board to be valid and the minutes should reflect this process.

An audit committee member cannot receive any compensation from the corporation in excess of the compensation, if any, received by members of the board for service on the board. Because most boards serve on a voluntary basis, in practice the rule that audit committee members cannot be paid more than directors are paid to serve on the board means most audit committee members cannot be paid. Likewise, an audit committee member cannot have a material financial interest in any entity doing business with the corporation. *[Cal. Gov. Code § 12586(e)(2)]*

Note that the act does not provide for an extension of time, thus the extension for filing IRS Form 990 does not also apply to the completion of the audit.

**Recommended Practice**: Given the restrictions on which directors can serve on the audit committee, some corporations recruit non-directors to serve.

**Further Reading:**

Attorney General's FAQ's – Nonprofit Integrity Act of 2004:
*https://oag.ca.gov/charities/laws*

Attorney General's summary of the key provisions of the Nonprofit Integrity Act of 2004:

*https://oag.ca.gov/sites/all/files/agweb/pdfs/charities/publications/nonprofit_integrity_act_nov04.pdf*

[52] **Further Reading**: For more information regarding the public disclosure requirements for making the Form 990 available, visit the IRS website at *https://oag.ca.gov/charities/content/new_990* and *https://oag.ca.gov/sites/all/files/agweb/pdfs/charities/notice-amend-regs/initial-statement-reasons-1218.pdf*.

[53] **Law:** This section makes clear that the board can create committees that do not have the authority to bind the corporation or act on behalf of the board. *[Cal. Corp. Code § 5212(b)]* These "advisory committees" are normally created when the board wants to charge specific individuals with information-gathering, researching, planning, and making recommendations to the board. Whether or not this provision is included in the bylaws, the board may appoint committees that do not have the authority to act on behalf of the board, under its general power to delegate certain tasks subject to ultimate board supervision. An organization may wish to create a Diversity, Equity, and Inclusion (DEI) committee, comprised of directors, staff, clients, and/or community members, to make recommendations for DEI goals and implementation plans.

**Recommended Practice:** This provision is recommended because it reminds the board that if non-directors are included on a committee, the committee does not have authorization to bind the corporation without further approval from the full board.

Some sources suggest using advisory committees for purposes of recruiting directors. These committees can be used to ensure that prospective directors share the corporation's commitment to its purpose and to introduce them to the corporation before asking them to join the board. Appointments to advisory committees are also a great way to recognize a person's contributions to the corporation without having to increase the size of the board or impose on the person the legal obligations of a board member.

**Further Reading:** See *Guidebook for Directors of Nonprofit Corporations*, Ch. 3, p. 57

[54] **Law:** The law requires each corporation to have both (i) a board, which acts as a group, and (ii) at least three officers who have responsibilities to fulfill a variety of corporate compliance tasks, including the execution of contracts and other documents. Because the president cannot be the same person as the secretary or treasurer/chief financial officer, at least two separate individuals will have to serve as officers of the corporation. People chosen to serve as officers are not required by law to be directors (except that these bylaws require that the chairperson must be a director), but officers may be, and frequently are, selected from among the directors. Even if an officer is also serving as a director, the two roles are distinct. An individual serving in both capacities should always keep in mind in which role they are acting. Like directors, officers owe fiduciary duties to the corporation and therefore should not be appointed merely for honorary reasons.

[55] **Law:** The law specifies that the required officers are (i) a chairperson of the board or a president, or both; (ii) a secretary; and (iii) a treasurer or a chief financial officer, or both. Nonprofit corporations may choose to identify any of these statutory officers by a title not used in the law, such as "chief executive officer" instead of president. If such is the corporation's preference, then these form bylaws should be modified accordingly. With respect to statutory officers, the best practice would be to maintain the statutory title in these form bylaws, but include a reference to the title used by the corporation (see Section 9.7 for sample language on alternative titles).

These form bylaws also permit a vice president, though such office is not required by law. However, many nonprofit corporations view the office of vice president as an opportunity for the holder to be groomed and evaluated for eventual succession to president. If the corporation wants to require a vice president it may do so by modifying this section.

The law also specifies that unless the bylaws state otherwise, the president (or if there is none, then the chairperson) is the general manager of the corporation. See Note 65 for information about appointing a chief executive to fulfill this role under the supervision of the board. The law gives the secretary the responsibility to certify corporate documents, and provides that a third party can rely on a certification from a duly elected secretary. The law also states that if any corporate document is signed by both (i) the president or chairperson or any vice president, and (ii)

the secretary, the treasurer or chief financial officer or any assistant secretary or assistant treasurer, then a third party can rely on the document as being validly signed by the corporation. For that reason, the law does not allow the president or chairperson to serve concurrently as the secretary, the treasurer or the chief financial officer.

[56] This provision makes clear that officers are not required to be chosen from among the board, and the default language in this form does not impose qualifications or requirements as to who can serve as officers other than that the chairperson of the board be a director. *[But note that the executive committee, which is often comprised of officers, will not be able to exercise the authority of the board unless all of its members are directors (see Note 47).]* Corporations may wish to establish qualifications for president or chairperson, in order to guarantee that the office-holder has sufficient knowledge of the corporation and its history to effectively serve in these functions. A corporation can address this concern in its bylaws by including a requirement that the president or chairperson have previously served on the board for a period of time. Bylaws can also be used to establish a succession plan such as by requiring a vice president and designating the vice president as a president-elect. Language to effectuate these alternative are as follows:

**Requirement that president or chairperson have previous experience serving the corporation.** Add to the end of Section 9.1 the following:

*"It shall be a requirement that any person serving as either the Chairperson or President shall have previously served for at least one year as either an Officer or a Director."*

**OR**

**Formal succession mechanism from vice president to president.** Add to end of Section 9.6.3 the following:

*"The Vice President shall serve as the president-elect and shall prepare to assume the office of President following completion of the President's current term of office and any renewals thereof."*

[57] **Recommended Practice:** These form bylaws provide that each officer will be elected for a one year term, which may be renewed for the number of successive terms to be inserted in the blank. Term limits are not required by law, but many corporations choose to establish term limits in order to encourage new leadership and prevent stagnation. On the other hand, a corporation may suffer if a highly effective officer is forced to resign due to term limits. Corporations should weigh these merits when deciding whether to institute term limits. Larger corporations with large boards and many committed individuals are most likely to benefit from officer term limits.

It should be noted, however, that even while limiting the total number of times that a term can be renewed, many corporations choose to elect officers, particularly the president, for terms of two years rather than single year duration in order to maintain leadership stability and give the officer more time to develop expertise in office. The corporation should take note to coordinate the terms, so that an individual's term as director does not expire before their term as officer expires.

[58] **Law:** Under the law, officers are selected by the board and may be removed by the board at any time, unless the bylaws provide otherwise or the board has altered this by contract with the individual officer. *[Cal. Corp. Code § 5213(b)]* These bylaws provide that the board may delegate this right with respect to removal of officers appointed under Section 9.6.6 to the chairperson, the president, or the chief executive.

**Recommended Practice**: In general, if the officers are not also employees of the corporation, the board should have the sole right to select and remove them. In some corporations, the board may find it convenient to grant to one or more employees the legal duties and rights of a corporate officer. For example, in many corporations, the president (sometimes also called the "chief executive officer") may be a staff person hired by the board to run the day to day operations of the corporation. *[See discussion at Note 65 as to the issues the board should consider when determining whether the manager of the corporation should be appointed as a statutory officer.]* In such case, the board may wish to delegate to the chief executive officer the right to hire and select other officers (such as the chief financial officer) and the right to remove the same officers. Once the board has delegated this power, it should

generally not interfere in the hiring and firing decisions made by the chief executive officer. However, it is recommended that the board retain the right to remove any officer from the position as a statutory corporate officer (with the resulting ability to bind the corporation to contracts) so that the board can exercise its duties to safeguard the corporation's assets, even if the board then leaves to the discretion of the chief executive officer whether to terminate that individual's employment with the corporation.

[59] **Law:** The law requires a corporation to have a chair of its board or a president or both. The chair may be given the title of "chair of the board," "chairperson of the board" (as this form does), "chairman of the board," or "chairwoman of the board." *[Cal. Corp. Code §§ 5039.5 and 5213(a)]* If the Corporation chooses to rotate facilitation responsibilities among directors, rather than have it be the sole responsibility of the chairperson, the second option in the brackets should be chosen. See Note 41.

[60] In some corporations, the board appoints as the statutory officer of "president" the same individual who is hired by the board to be the chief executive or executive director of the corporation's day to day operations. See the discussion at Note 65 as to the issues the board should consider when determining whether the statutory officer role of president should be given to the employee hired to manage the corporation's day to day business or retained by a volunteer board member.

[61] A corporation is not required to have a vice president. Section 9.1 makes the position of vice president optional. See Note 56 for a discussion on having the vice president serve as president-elect.

[62] See discussion on the minute book in Note 85.

[63] The law requires that each nonprofit public benefit corporation have a treasurer or a chief financial officer, or both. Unless otherwise specified, if there is no chief financial officer, the treasurer is the chief financial officer of the corporation. Often nonprofit corporations choose to have a treasurer that serves on the board and conducts the legally required oversight function, and a chief financial officer who is an employee and operates the day-to-day financial activities of the corporation. Such a structure is permitted by these bylaws, and if the board determines to establish this structure, the board resolution should clearly describe the division of duties of these persons and whether or not the chief financial officer is also a statutory officer. See Note 65 for a discussion on the issues the corporation should consider when determining whether a statutory officer role should be given to an employee. In this structure, it is common for the board member who serves as treasurer to be involved in overseeing compliance with internal financial controls by the corporation's staff (including the chief financial officer).

[64] See Note 58 for when the board might delegate to the chief executive the power to hire and fire all employees.

[65] Generally, in order to make sure that a nonprofit's day-to-day activities run smoothly, the board will appoint one chief executive to oversee the corporation, under the ultimate supervision of the board. This person may serve as a volunteer, or a paid staff member, depending on the funds available to the corporation. In a small or start-up corporation in which the board is running the day-to-day activities of the corporation, the president (often the founder) may originally serve as the corporation's chief executive. When the corporation has grown to the point that a volunteer board can no longer operate the corporation's activities, a board will generally appoint a chief executive who is not on the board and who serves at the pleasure of the board (or under an employment contract). In best practices, the executive director or chief executive officer is typically the one employee who is hired directly by the board. The board then can give this chief executive the authority to select and supervise all other employees. his type of structure helps to establish clear lines to ensure that all other employees understand that they must report to the chief executive, and not directly to the board.

[66] **Law:** Charitable corporations and unincorporated associations must have their board (or an authorized board committee) review and approve the compensation of the chief executive officer or president, and the compensation of the chief financial officer or treasurer, to ensure that the payment is "just and reasonable" (see Note 9. *[Cal. Gov. Code § 12586(g)]*

If a board hires a chief executive to manage the day-to-day operations of the corporation, the board will often delegate to that chief executive the authority to hire and fire subordinate employees, including the chief financial officer. In such case, in order to comply with this legal requirement to review the chief financial officer's compensation while not undermining the chief executive's supervisory role, the board may want to put in place a policy that the CEO can negotiate and establish compensation within an approved range, and then bring the recommended salary to the board for final approval.

The language of Section 9.8.2 does not require the board to review the compensation of any officers other than those specifically required by California law. However, to maintain its tax exemption under section 501(c)(3) of the Code, the corporation must ensure that all compensation paid to any person, especially officers and other insiders, is reasonable and does not constitute a private benefit. Thus, as a best practice the board should establish procedures to ensure that all salaries paid are reasonable, such as setting salary ranges, or requiring the chief executive to set salaries based on comparable salaries paid by other corporations and share those comparables with the board.

**Further Reading:** See the Attorney General's FAQs (17 and 18) on the Nonprofit Integrity Act, at *https://oag.ca.gov/sites/all/files/agweb/pdfs/charities/publications/nonprofit_integrity_act_nov04.pdf*

[67] See discussion on private benefit and private inurement in Note 9.

[68] **Law:** The law governs transactions to which the corporation is a party and any director (volunteer or paid) has a material financial interest (self-dealing transactions). Self-dealing transactions are allowed only if the provisions of Section 10.1 10.1 are followed, requiring (i) full disclosure to the board of the director's financial interest, (ii) a determination in good faith by the board that the corporation could not obtain a more advantageous arrangement elsewhere, (iii) that the corporation enters into the transaction for its own benefit; (iv) that the transaction is fair and reasonable to the corporation and (v) that the transaction is approved in good faith by a majority vote of directors who have no financial interest in the transaction. *[Cal. Corp. Code § 5233(a)]* While the law only applies the self-dealing rules to *directors*, Article 10 applies the rules to both directors and officers in order to mitigate against excess benefit transactions (see note 9), which may involve officers and other insiders.

**Recommended Practice:** This law governs the corporation whether or not it is included in the bylaws. It is recommended that the language be included in the bylaws to ensure that the board remembers to make each of these required findings, and document them in the minutes, whenever approving a transaction where a director has a material financial interest. The law and this provision provide that a director (or officer) with a material interest in a transaction cannot vote to approve such a transaction. However, the law, like this provision, permits the interested director to remain in the room when the merits are discussed and when the vote is taken. It is best practice, in order to permit free flow of discussion by the disinterested directors, so that they can make a reasoned, good faith decision, that the interested director should leave the room after answering all questions about the transaction and that director's interest in it, until the decision whether to approve the transaction is made.

**Note regarding IRS suggested conflict of interest policies:** When a nonprofit corporation files IRS Form 1023 to apply for recognition of tax exempt status under section 501(c)(3) of the Code, the corporation will be required to inform the IRS whether it has adopted a "conflict of interest policy" that is similar to the sample policy the IRS includes in its instructions to the IRS Form 1023. The IRS strongly suggests that a corporation adopt a conflict of interest policy to make sure that any transactions where a director or officer has a material financial interest will be approved by the disinterested directors. This form of bylaws includes language in Articles 9, 10, and 12 that should generally serve as a conflict of interest policy for IRS purposes. The inclusion of officers in Article 10 allows for this, as the IRS rules concerning conflicts of interest and excess benefit transactions apply to officers. If the corporation does not include this language in its bylaws, the corporation will either have to adopt a separate conflict of interest policy or explain in detail why it has not done so, when filing the IRS Form 1023 exemption application. To minimize any potential confusion, a corporation that adopts a separate conflict of interest policy should delete from the bylaws any provisions handled in the conflict of interest policy (i.e., provisions dealing with self-dealing transactions and director compensation), or ensure that any overlapping provisions are identical and not incompatible. It is advisable to specify in advance which provisions will control should a case of conflicting

interpretation between the bylaws and a separate policy later arise.

Public Counsel's Community Development Project has designed a sample conflict of interest policy for California nonprofit public benefit corporations seeking to adopt or amend such a policy and the *pro bono* attorneys who represent them. This sample is annotated with explanatory endnotes, including citations to applicable laws, alternatives and recommended practices. The Annotated Conflict of Interest Policy can be accessed at *https://publiccounsel.org/publications/annotated-form-of-conflict-of-interest-policy/*.

[69] **Law:** Certain transactions are excluded from the definition of self-dealing transactions under the law. These transactions do not have to be approved by a disinterested board in the manner stated in Section 10.1. A decision to set the compensation of a director falls within this exclusion, as do any transactions that are part of the corporation's charitable activities if the benefit to a director from these activities is as a result of that director being part of the charitable class the corporation generally serves. Finally, if the interested director has no actual knowledge of the transaction and it is of a relatively small monetary value, the transaction is also excluded from this rule. The provision contains these exceptions as permitted in the law. *[Cal. Corp. Code § 5233(b)]*

**Recommended Practice:** Although not required by law, to avoid any appearance of impropriety a corporation would want a policy prohibiting management from voting on its own compensation. Section 9.8 of these form bylaws effectuates this policy by prohibiting directors who are also officers from voting on their compensation as officers, without subjecting such a transaction to the other requirements contained in Article 10 (see Note 9). Note that the IRS sample conflict of interest policy prohibits a director that receives compensation from the corporation from voting on matters pertaining to their compensation.

[70] **Law:** The law prohibits loans to directors and officers unless approved by the Attorney General. There are a few limited exceptions to this rule, including for advancement of expenses, payment of life insurance premiums or a secured loan to help the director or officer finance the purchase of a principal residence (only if this is necessary to retain the director or officer's services). *[Cal. Corp. Code § 5236]*

**Recommended Practice:** If a corporation intends to lend money to an officer or director under any circumstances other than advancement of expenses being incurred for legitimate corporate business, the corporation should consult with counsel before doing so.

[71] **Law:** This provision tracks the law, and would apply to the corporation whether or not it was included in the bylaws. *[Cal. Corp. Code § 5234]* The provision is included here to clarify for the board that where directors serve on more than one board, this alone will not invalidate a transaction between the two corporations if proper safeguards are followed.

**Further Reading:** For more information on duties of directors who serve on multiple boards, see Public Counsel's Compliance Alert on Mutual Directorships, at *https://publiccounsel.org/publications/mutual-directorships/*.

[72] **Law:** See Note 13 for a discussion of the duty of loyalty imposed on every director and officer of the corporation. *[Cal. Corp. Code § 5231]*

[73] **Law:** This section of the bylaws describes the circumstances when the corporation can "indemnify," or pay the expenses (including legal fees and judgments) of, its directors and officers, employees and other agents acting on behalf of the corporation, if they are sued in connection with actions they took when serving their role as agent of the corporation. Under the law, a nonprofit public benefit corporation is generally permitted to indemnify its directors and officers and other agents for costs of threatened, pending or completed legal actions or proceedings (whether civil, criminal, administrative or investigative) if the agent acted in good faith, in a manner that the agent believed to be in the best interest of the corporation. As further described below, in some cases, the law requires the corporation to indemnify an agent, and in other cases, the law will not permit the corporation to indemnify an agent.

Generally, if an agent wins a lawsuit brought against them due to their acts on behalf of the corporation, the corporation must indemnify the agent. *[Cal. Corp. Code § 5238(d)]* In cases where the agent does not win the lawsuit, the determination of whether the corporation may indemnify the agent depends in part on whether the lawsuit was brought against the agent by or on behalf of the corporation (such as if the corporation sues a director for breaching a duty to the corporation or by a third party (such as when the agent is sued because an unrelated person was harmed by the corporation). In cases where the lawsuit is by or on behalf of the corporation, the corporation is not permitted to indemnify the agent if the agent loses the lawsuit (unless the Court determines that the agent is entitled to indemnification), or for amounts paid to settle the lawsuit, or for amounts paid in defense of a lawsuit that is settled without Court or Attorney General approval. In cases other than those described in this paragraph, a corporation generally may indemnify an agent if the agent's conduct meets the requirements described in Sections 11.3 and 11.4.

***A Note about Legal Protections for Volunteer Directors and Officers:*** Federal law provides a defense to volunteers serving in any capacity (e.g., officers, directors, etc.) who receive no compensation, if they meet certain requirements. *[Volunteer Protection Act of 1997, 11 Stat. 218]* Federal law also permits the states to provide additional liability protection to volunteers or impose additional conditions. California law provides the following protections, which are not changed by what is stated in a corporation's bylaws. A volunteer director or executive officer of a nonprofit public benefit corporation is not personally liable to a third party for monetary damages caused by a negligent act in the performance of their duties as a director or officer. *[Cal. Corp. Code § 5239]* However, this general protection applies only if (i) the damages are covered under the corporation's general liability insurance, a D&O insurance policy or a personal insurance policy of that director or officer, or (ii) the damages are not covered by insurance, but the board of directors and the volunteer made all reasonable efforts in good faith to obtain available insurance. *[Cal. Corp. Code § 5239(a)(4)]* Special rules for what constitutes "reasonable efforts" to obtain insurance apply to tax-exempt nonprofit corporations with annual budgets of $25,000 or less. Also, for this protection to apply, the act must have been within the scope of the person's duties, performed in good faith, and not reckless, wanton, intentional, or grossly negligent. The liability of a director or officer is not eliminated or limited for self-dealing transactions, illegal distributions, loans, and guaranties, or in any action brought by the Attorney General. This statute does not limit the liability of the corporation itself to these third parties, just the liability of individual volunteer directors and officers.

Another California law provides that no lawsuit may be brought against uncompensated directors or officers of nonprofit corporations for alleged negligent acts, if the act was performed (i) within the scope of the director's or officer's duties, (ii) in good faith, (iii) in a manner believed to be in the best interests of the corporation, and (iv) in the exercise of policymaking judgment. This immunity applies only if the claim made against the director or officer can also be made directly against the corporation, and if the corporation maintains a liability insurance policy that covers the alleged damages. The policy must provide for coverage of at least of $500,000 if the nonprofit corporation's annual budget is less than $50,000, and at least $1,000,000 if the nonprofit corporation's annual budget equals or exceeds $50,000. Again, the liability of a director or officer is not eliminated or limited for self- dealing transactions, any action brought by the Attorney General, or damages arising from intentional, wanton, or reckless acts, gross negligence, fraud, oppression, or malice by the director or officer. *[Cal. Corp. Code § 5047.5]*

These protections in the law for volunteer officers and directors may ultimately mean that a director or officer would win a lawsuit by a third party for negligence. However, the statutory liability protections contain exceptions, exclusions and qualifications so that the protections do not apply in all cases. Also, as a practical matter, in cases where these protections do apply, directors and officers may face months or even years of litigation before showing that they are entitled to these protections. Therefore, as a practical matter, nonprofit corporations should maintain adequate liability insurance, not only to qualify for the protection offered under California law, but also to provide a fund for the defense of directors named in liability suits.

**Alternative Language:** If the corporation prefers a shorter indemnification provision, consider this alternative:

*To the maximum extent permitted by California Nonprofit Corporation Law, the Corporation. shall indemnify all Directors and Officers against any and all liability, excluding liabilities incurred by self-dealing, fraud, or bad faith, of such Director(s) or Officer(s) incurred in connection with services rendered in such capacities or services,*

*at the Corporation's request, as director, officer, partner, employee or agent of another corporation, partnership, joint venture, trust or other enterprise and against all reasonable expenses, including attorney's fees that may be incurred in connection with any threatened, pending or completed action, suit or proceeding, whether civil, criminal, administrative or investigative, to which any director or officer, by reason of service in that capacity, may be made a party or in which any director or officer shall be called as a witness, or in connection with any proceeding against the Corporation to enforce a director's or officer's right of indemnification of directors, officers, employees and agents.*

**Recommended Practice:** Potential directors are often interested in confirming, before agreeing to serve on the board, that the corporation has policies in place that will allow it to indemnify them. Potential directors also often want to see that the corporation has purchased directors & officers liability insurance or otherwise has the financial ability to indemnify them. These form bylaws can be modified to require indemnification. Instances where the form bylaws could be changed to require indemnification when the law permits but does not require it are indicated in the relevant endnotes.

**Further Reading:** "Directors & Officers: Key Facts About Insurance and Legal Liability" – *www.niac.org/AMSCentral/ResourceDocuments.cfm?var_PageAction=View&var_ID=65*.

Public Counsel Memorandum on Liability of Volunteer Directors of Nonprofit Corporations – *https://publiccounsel.org/publications/now-that-youre-incorporated-summary-of-certain-legal-requirements-applicable-to-nonprofit-corporations/*

[74] **Law:** These definitions are the same as included in the law, and should not be changed.

[75] **Law:** Section 11.3 applies to lawsuits or other "proceedings" (as defined in the bylaws) brought against a director, officer, or other agent by any person other than the corporation or someone acting on its behalf. When an agent is sued by such a third party, the law permits (but does not require) the corporation to indemnify the agent upon finding that the agent has met the required standards of good faith conduct described in Section 11.3, even if the agent loses the lawsuit. *[Cal. Corp. Code § 5238(b)]* However, no indemnification is permitted if the agent is found to have breached their fiduciary duties to the corporation.

**Recommended Practice:** Although the law merely permits the corporation to indemnify an agent in cases where the agent does not successfully defend an action brought by a third party, this provision is written to allow the corporation to decide whether or not to require indemnification in such cases if the board determines that the good faith standard of conduct described in Section 11.3.2 is met. If the corporation does not want to mandate indemnification in these types of proceedings, use the permissive language in Section 11.3.1

Requiring indemnification is sometimes recommended because some nonprofits find it harder to recruit a quality board of directors without a strong indemnification policy. Also, some insurance policies will not cover expenses unless the indemnification is required, rather than permissive. However, the corporation should consider whether it can afford indemnification and insurance premiums before making this important decision. If the corporation ultimately chooses to require indemnification, it is strongly recommended the corporation purchase insurance.

[76] **Law:** Different standards of conduct are imposed for agents named in suits brought by third parties, on one hand, and for agents named in suits brought by or on behalf of the charitable corporation, suits challenging a self-dealing transaction, and suits brought by the Attorney General, on the other hand. Where an agent breaches a fiduciary duty, both standards of conduct prohibit indemnification.

For actions brought by a third-party plaintiff, a corporation may authorize indemnification for an agent only if it finds that the agent (i) acted in good faith and in a manner the agent *reasonably* believed to be in the best interests of the corporation; and (ii) in the case of a criminal proceeding, the agent had no reasonable cause to believe that their conduct was unlawful. The termination of a proceeding by judgment, order, settlement, conviction, or a plea of nolo contendere or its equivalent does not, in itself, create a presumption that the agent did not act in good faith and in the best interests of the corporation, or that the agent had reasonable cause to believe that the conduct was unlawful. *[Cal. Corp. Code § 5238(b)]* This means that even in a case where an agent settles, pleads no contest, or

is even found guilty, if the agent did not have reasonable cause to believe his conduct was unlawful, the corporation may still indemnify the agent for the expenses of the proceeding. As noted below, the standard for actions brought by or on behalf of the corporation, dealt with in Section 11.4 are stricter and allow indemnification in more limited circumstances.

**Recommended Practice:** This provision restates the standards of conduct set forth in the law and should not be altered or deleted. *[Cal. Corp. Code §5238(b)]*

[77] This section deals with actions brought "by or on behalf of the corporation." This means a suit brought by any of the following (i) the corporation, (ii) someone acting under a legal right to represent the corporation and pursue a judgment on behalf of the corporation, (iii) the Attorney General, or (iv) a person that the Attorney General grants "relator" status to sue the corporation on behalf of the public. In such actions, the law authorizes indemnification for an agent only if the corporation finds that the agent has met a certain standard of conduct as described in Section 11.4.2 and Note 79. Also, unlike in the case of proceedings by third parties as described in Section 11.3 the law prohibits indemnification in this type of lawsuit for any costs if the agent loses the lawsuit (unless the Court determines that the agent is entitled to indemnification despite the loss), for the cost of any amounts paid to settle the lawsuit, or for the cost of defending the lawsuit if it is settled without Court or Attorney General approval. *[Cal. Corp. Code § 5238(c)]* No indemnification is permitted if the agent breaches their fiduciary duties to the corporation.

[78] **Recommended Practice:** This provision follows the law by merely permitting indemnification in actions brought by or on behalf of the corporation. Similarly to indemnification in actions brought by third parties (explained in Note 75), the corporation has the option of requiring indemnification, by changing the text of Section 11.4.1 to read *"shall"* instead of *"may"*, in actions brought by or on behalf of the corporation. However, requiring indemnification in these circumstances is not recommended in this form because these actions include cases where the corporation is suing a director.

[79] **Law:** This provision deals with actions brought by or on behalf of the corporation. A higher standard of conduct is required if the action against the agent is brought by or on behalf of the corporation, as compared to the standard for indemnification when an action is brought by a third party. In these cases, the corporation has the power to indemnify an agent only if it finds that the agent acted in good faith, in a manner believed to be in the best interests of the corporation, and with the care, including reasonable inquiry that an ordinary prudent person in a like position would use. *[Cal. Corp. Code § 5238(c)]*

**Recommended Practice:** This provision restates the standards of conduct set forth in the law and should not be altered or deleted. *[Cal. Corp. Code § 5238(c)]*

[80] **Law:** The corporation must find that the agent has met the appropriate standard of care in order for the agent to qualify for indemnification. Once such a finding is made, indemnification shall only be made under the following circumstances: (i) if approved by a majority vote of a quorum consisting of directors who are not parties to the proceeding; or (ii) if approved by the court in which the proceeding is or was pending, on application by the corporation, the agent, or the attorney providing the defense. *[Cal. Corp. Code § 5238(e)]*

**Recommended Practice:** The manner of determination in these bylaws restates the law and should not be altered or deleted. *[Cal. Corp. Code § 5238(e)]*

[81] **Law:** The law that permits a corporation to indemnify its agents is subject to limitation or restriction by any contract provisions that apply to the relationship between the agent and the corporation, and to any limits in the articles and bylaws. Regardless of what the law would otherwise permit, the corporation cannot indemnify its agent (or advance defense expenses for that agent) if the indemnification or advance is prohibited or limited by (i) the articles or bylaws, (ii) an agreement that was in effect at the time when the alleged cause of action accrued (that is, when the action that is the subject of the claim against the corporate agent happened), or (iii) an express condition of a court-approved settlement. *[Cal. Corp. Code § 5238(h)]*

**Recommended Practice:** Because language written into the bylaws and articles can limit the indemnification otherwise permitted by law, it is recommended that the corporation maintain the language in Section 11.3s 11.3 and 11.4 as-is (other than making the appropriate choice between mandatory and permissive indemnification). The language in Section 11.6 recites the law, which will apply to the corporation whether or not it is included in the bylaws. As a result, any indemnification provisions in the articles will control, regardless of what the bylaws specify. In order to avoid this potential confusion and conflict, the corporation should not include indemnification provisions in its articles (see Public Counsel's annotated articles of incorporation at *https://publiccounsel.org/publications/annotated-form-of-articles-of-incorporation-for-a-california-nonprofit-public-benefit-corporation*).

[82] **Law:** The law permits, but does not require, the corporation to pay, in advance, legal fees and other expenses incurred by a director, an officer, or other corporate agent in defending an action, before final disposition of such action and without having to make a final determination on whether indemnification will be authorized. However, the agent must first agree to repay amounts advanced if it is ultimately found that indemnification is not permitted. *[Cal. Corp. Code § 5238(f)]*

**Recommended Practice:** The corporation should have the option to advance expenses to help its agents present an adequate defense that might otherwise not be possible due to high costs, especially if the board believes the agent to be innocent. However, if it is ultimately found that the agent is not entitled to indemnification, the corporation must pursue appropriate legal remedies to enforce the agent's commitment to reimburse the corporation.

*Permissive vs. Required Advancement:* Indemnification rights and rights to advancement are distinct types of legal rights. Even if a bylaw requires the corporation to indemnify an agent after finding that a certain standard of conduct is met, as the corporation may provide for in Section 11.3 and Section 11.4, it does not also require advancement of expenses. Under the law, the board still has the discretion to decide whether an advance should be made. It is recommended that the bylaws retain the discretion of the board to approve advancement of expenses on a case-by- case basis, as in this Section 11.7, rather than making advancement of expenses mandatory. If the bylaws mandate advancement, the corporation will be required to advance costs until it is "ultimately determined" that the agent is ineligible for indemnification, which might lead to advancement of expenses in cases where it is reasonably likely that indemnification will not be available. In Bergonzi v. Rite Aid Corp. (2003), a Delaware court, operating under a similar statute, held that an admission of guilt by an officer was not enough for the corporation to escape its obligation to advance expenses, even though the admission clearly disqualified him from ultimate indemnification.

In making the case-by-case decision as to whether to advance expenses to an agent, the board should consider whether the promise to repay is sufficient to protect the corporation's interest in repayment and whether, ultimately, advancement of expenses would be likely to promote the corporation's interests. Although not required by law, the board may wish to impose further requirements upon the agent, such as a written affirmation of their good-faith belief that they have met the standard of conduct necessary for indemnification, or a security agreement for the advance. These added requirements could be inserted in the bylaws so that they would always apply to such advances, or they could be imposed on a case by case basis by the board depending on the circumstances in which the advances are requested. Also, the board may impose upon itself a requirement that before advancing expenses it must determine that the facts then known do not preclude indemnification. Such methods can help to protect the corporation from making advances that would not be in its best interest.

[83] **Law:** A corporation may not provide greater indemnification rights to directors and officers by contract than what is permitted by law and in the corporation's bylaws. However, contractual rights to indemnification for non-directors and non-officers are not affected by any provision in the bylaws and/or any section of the law. Thus, if a corporation agrees by contract to indemnify a non-director/non-officer, such as an employee, volunteer or a third party that has contracted with the corporation, nothing in these bylaws or the law takes away their rights under that contract. *[Cal. Corp. Code § 5238(g)]*

**Recommended Practice:** This provision follows the language set forth in the law and should not be altered or deleted.

[84] **Law:** The corporation may purchase and maintain insurance on behalf of any agent against any liability asserted against or incurred by the agent in that capacity, whether or not the corporation is legally permitted to indemnify the agent under the standards described in Notes 75 through 81. *[Cal. Corp. Code § 5238(i)]* The insurance policy may provide more indemnification and greater protection for agents than the corporation could pay directly. However, a public benefit corporation is not permitted to insure an agent against liability for self-dealing violations (see Note 68 for a description of self-dealing).

**Recommended Practice:** The form bylaws restate the law in permitting the nonprofit corporation to purchase insurance. The law and the form bylaws do not require that a nonprofit corporation obtain such insurance, but we recommend that a nonprofit corporation purchase insurance if financially feasible, both to protect the directors and officers and to protect the corporation. Most directors expect nonprofit corporations to indemnify them against claims relating to their service as a director. Because the ability to pay indemnification depends on the financial strength of the corporation, qualified board members may be deterred from serving on a board of a corporation that has inadequate financial reserves to pay such claims, unless the corporation purchases liability insurance policies for directors and officers ("D&O" insurance) to provide additional protection. Note that if the corporation decides to alter the language in Sections 11.3 and 11.4 to require the corporation to indemnify agents in certain circumstances, it is then even more important for the corporation to ensure that it has sufficient insurance to pay its indemnification obligations so that they do not jeopardize the corporation's ability to conduct its nonprofit activities. Given that adequate insurance can often be purchased at a reasonable cost, there is little reason not to obtain such insurance.

***D&O Insurance:*** D&O insurance generally works by reimbursing the nonprofit corporation for its indemnity payments to directors and officers and paying such persons directly for personal loss. Most of the time, legal defense costs associated with a claim are also covered by D&O insurance. Often, D&O insurance also covers the direct liability of the nonprofit corporation itself and not merely its directors and officers (if it does not, the corporation should also obtain general liability insurance to cover such claims). As stated above, the law allows D&O insurance to provide greater coverage that what is permitted under the indemnification provisions (e.g., settlements in lawsuits brought by or on behalf of the corporation), subject to a few exceptions (e.g., self-dealing violations). Because forms of D&O insurance policies vary widely in coverage and price, the corporation should find a knowledgeable insurance broker. A review of any D&O insurance policy should consider the types of claims and persons covered, the timing of the coverage, the advance of expenses, settlement issues, and any exclusions.

**Further Reading:** See "Nonprofit Directors and Officers Insurance: The Good, the Bad, and the Ugly" - *https://www.lexingtoninsuranceagency.com/blog/nonprofit-directors-and-officers-insurance-the-good-the-bad-and-the-ugly* and "A Board Member's Guide to Nonprofit Insurance" - *www.blueavocado.org/content/board-members-guide- nonprofit-insurance*.

[85] **Law:** Every corporation is required to maintain minutes of its board meetings, and copies of board minutes that are certified by the corporate secretary as being correct can serve as proof of corporate actions. *[Cal. Corp. Code § 5215]* It is therefore important for the corporation to keep a minute book in which all minutes are retained in the corporation's permanent records. See discussion of minutes in Note 42. Minutes and other books and records must be kept in written form or any form that can be converted into "clearly legible tangible form" (e.g., in computer data form). *[Cal. Corp. Code § 6320(b]*

**Recommended Practice:** This provision follows the law and should not be altered or deleted. In addition to being required by law, corporate records must be properly maintained to ensure the limited liability status of the corporation and serve as evidence that directors faithfully discharged their various fiduciary duties.

There is no legal requirement for the form or design of a minute book. Leather-bound and gold-embossed minute books are available for purchase from some corporate compliance companies, but the corporation is not required to spend its funds purchasing these items. A simple three-ring binder will suffice. If the minutes are kept on the computer, make sure to have a backup copy in a safe location.

[86] **Law:** *Public Inspection:* The documents described in Section 12.3 must be available for public inspection and copying, without charge, during regular business hours at the corporation's principal office. Although the corporation may have an employee present in the room during an inspection, it must allow the individual conducting the inspection to take notes freely and photocopy the documents. The documents must also be available for inspection at any regularly maintained regional or district office of the corporation having three or more employees. *[Code § 6104(d)(1)(A)]* A site is not considered a regional or district office if (i) the only services provided there further the corporation's exempt purposes and (ii) the site does not serve as an office for management staff. *[Treas. Reg. § 310.6104(d)-1(b)(5)(ii)]* If the corporation does not maintain a permanent office, it may make the documents available for inspection at a reasonable location of its choice. *[Treas. Reg. § 301.6104(d)-1(c)(2)]*

If an individual makes a written request, the corporation generally must provide a copy within 30 days, without charge other than a reasonable fee for copying and mailing costs. If the request is made in person, the copy must be provided immediately. *[Code § 6104(d)(1)(B)]* However, a corporation is not required to comply with a request for copies of its documents if it makes the documents "widely available" by posting them on the internet, either on its own website or on a website maintained by another entity (e.g., Guidestar). Even if the documents are "widely available," the corporation must still maintain them for public inspection and must make them available for copying if they are not accessible on the Internet for any reason. *[Treas. Reg. § 301.6104(d)-2(a)-(b)]*

**Recommended Practice:** The public availability and inspection of the corporation's tax exemption application and its last three information tax returns as described in this section is required by law for all corporations that are tax exempt under section 501(c)(3) of the Code. It is recited in these form bylaws to remind the corporation's management to maintain these documents. It is now common practice to find the tax returns of tax exempt corporations on Guidestar (*www.guidestar.org*). Such posting would meet the requirement of making the tax returns "widely available" so that the corporation would not be required to bear the cost of photocopying them.

[87] **Law:** The law requires a report with the information listed in Section 12.4 to be sent to directors each year (the "annual report"). Unless prohibited by the articles or bylaws, the annual report may be sent electronically. The report must include either (i) the report of an independent accountant or (ii) a certificate of an authorized corporate officer that the report was prepared without an audit. *[Cal. Corp. Code § 6321]*

*Alternative to the Annual Report:* If the annual renewal of registration filed by the corporation with the California Attorney General's Registrar of Charitable Trusts (Form RRF-1) contains all of the information required in the annual report, then whenever the corporation is required to provide the annual report it may instead provide a copy of Form RRF-1. *[Cal. Corp. Code § 6324(a)]*

The report to the Attorney General on Form RRF-1 generally includes IRS Form 990 and Schedule A, which will likely contain all of the information that would be required in the annual report. However, if the corporation is not required to file IRS Form 990 and Schedule A (for example because the corporation's gross receipts are lower than the threshold for filing IRS Form 990), then Form RRF-1 will not satisfy the requirements of the annual report.

The corporation should be careful when using Form RRF-1 as the annual report because the annual report is due approximately fifteen days before Form RRF-1 is due. Form RRF-1 and IRS Form 990 are due four months and fifteen days after the end of the corporation's accounting period (e.g., May 15 if the corporation's tax year ends on December 31), while the annual report is due earlier, 120 days after the end of the corporation's accounting period. Therefore, if the corporation plans to use Form RRF-1 as its annual report, it must complete IRS Form 990 and file Form RRF-1 with the Attorney General a bit earlier than they would otherwise be due.

[88] **Law:** Every director has the absolute right, at any reasonable time, to inspect and copy all books, records, and documents of every kind that are maintained by the corporation and to inspect the physical property of the corporation. [*Cal. Corp. Code § 6334*]

The ability to inspect the corporation's books and records is important to enable a director to comply with their duties of care. However, a director's obligations to perform their duties in good faith and in a manner that the director believes to be in the best interests of the corporation are a constraint on directors to avoid the exercise of inspection rights for personal gain or to further interests that are contrary to the best interests of the corporation as a whole.

**Recommended Practice:** The corporation must comply with this right of directors to inspect books and records. However, a corporation must keep in mind privacy rights and conflicts of interest issues. When inspection by a director involves clear conflicts of interest, the likely disclosure of information in violation of the director's fiduciary duties to the corporation, or disclosure of privileged information relating to litigation, the board should seek the advice of its legal counsel on whether the director should be given access.

[89] **Recommended Practice:** The board should consider adopting a resolution requiring the Chief Executive or President to obtain board approval for transactions over a certain dollar amount or which entail obligations exceeding a certain time period. The board can amend these thresholds as the organization grows and its needs change.
[90]

Banks will require the board to approve certain resolutions and authorize signatures before opening an account for the corporation.

**REFERENCE MATERIALS FOR VOLUNTEER ATTORNEYS:**

Advising California Nonprofit Corporations, Continuing Education of the Bar

Ballantine & Sterling, California Corporation Law Vol. III Charitable Trusts,

LexisNexis Guidebook for Directors of Nonprofit Corporations, American Bar

Association

**Guide To Formation of a Tax-Exempt California Nonprofit Corporation**
*https://publiccounsel.org/wp-content/uploads/2021/12/Guide-to-Forming-A-Charitable-Tax-Exempt-Nonprofit-Organization-2020.pdf*

**ADDITIONAL MATERIALS AND INFORMATION:**

Public Counsel
- Resources: *https://publiccounsel.org/resources/* (choose "Nonprofit" as "Issue Area")

Internal Revenue Service
- Tax Information for Charities & Other Nonprofits: *www.irs.gov/charities*
- Tax Basics for 501(c)(3) Organizations: *www.stayexempt.org*

California Attorney General
- Guide to Charities: *https://www.oag.ca.gov/system/files/media/Guide%20for%20Charities.pdf*

Center For Nonprofit Management
- Articles and Reports About Nonprofits: *https://cnmsocal.org/resources/*

Stanford Law School Mills Legal Clinic
- Nonprofit Corporations Forms and Sample Documents: *https://nonprofitdocuments.law.stanford.edu/documents/*

Management Library
- Collection of Resources for Boards: *www.managementhelp.org/boards/boards.htm*

**FREE LEGAL ASSISTANCE FOR NEW AND EXISTING NONPROFIT ORGANIZATIONS:**

Public Counsel assists nonprofit organizations that share our mission of assisting low-income individuals and communities and addressing issues of poverty in Los Angeles County. Visit the links below to apply for free legal assistance from the Community Development Project.

*https://publiccounsel.org/services/nonprofits/*

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