CHANGES TO OREGON NONPROFIT LAW

The 2019 legislature amended the Oregon nonprofit corporation statute in a number of places, changing some of the information provided by *The Oregon Nonprofit Corporation Handbook*, 5th edition. The statute went into effect January 1, 2020. Below is a discussion of the changes most likely to affect Oregon nonprofit corporations. The changes concern corporate officers; Boards of Directors, including Board voting by email; Board meetings and other voting matters; Board committees; conflicts of interest; removal of Directors; voting membership corporations; major changes to your corporation; provisions related to corporate documents and records, and special corporate issues.

Many of these changes are technical, but you need to check your Bylaws (and possibly Articles of Incorporation), because these documents likely incorporated provisions from the prior statute. If you want to be governed by provisions allowed by the new statute, you may need to amend your Bylaws or Articles.

Officers

The prior law required that an Oregon nonprofit corporation had at least two officers: a President and a Secretary. Those officers could be called by other names and could be the same person.

The new statute requires at least three officers: President, Secretary, and Treasurer. Public benefit corporations must have at least two different people holding these offices and (as under the prior statute) you can use other names for an office. Mutual benefit and religious corporation can (as under the prior statute) allow the same person to hold all three offices and (as now) you can use other names for an office. If you don't know which kind of corporation you are, go to the Secretary of State's website at https://sos.oregon.gov/business/Pages/nonprofit.aspx to see how you have registered with the state. Even if you were incorporated before January 1, 2020, you have to comply with this new law.

TO DO: Check your Bylaws (or Board minutes) to be sure you name at least three officer positions and, if you are a public benefit nonprofit corporation, that at least two different people hold these offices.

Board of Directors

The revised statute adds new provisions allowing the Board to vote by email if done properly. It also changes or clarifies the current law with respect to meetings/voting, Board committees, and conflicts of interest involving Board members or officers.

Vote by Email

The prior statute seemed to authorize Board voting by electronic means but was not specific about how this could legally occur. One of the most important changes the current statute makes is to clarify how Boards can vote by email or other electronic means. Under the prior statute, Board work occurs in a meeting, which is a setting in which everyone is in the same place or

everyone is part of a communication in which the Directors can *simultaneously* communicate with each other (usually by telephone or computer). Boards can also take action by consent in any setting (in person or electronically), as long as 100% of the Board members agree in writing.

The new statute allows the Board to vote by electronic means, including email. The statute in effect envisions at least a 48 hour meeting period to give Directors a chance to read and respond to their emails. In order to conduct a valid vote by electronic means, you must meet ALL of the following requirements:

- ALL Directors have provided an email address and be sent a notice of the electronic action;
- The electronic notice of the action being considered must clearly state the action being voted on and when it will be effective;
- The electronic notice must specify a deadline not less than 48 hours after the electronic action is sent to vote;
- A Director can change their vote any time during the voting period;
- An affirmative vote of a majority of Directors in office (not just the ones responding to the electronic notice) is needed to pass the action, unless your Articles of Incorporation or Bylaws require a greater vote. (In other words, when you calculate whether you have the votes required to pass the action, assume that every Director on the board was at the "meeting," even if they never responded to the email.).

You must file the electronic action in your minutes book or a document book of Board actions.

If you do choose to allow vote by email or other electronic means, remember that email addresses tend to change more frequently than physical addresses. Be sure that the Board Secretary verifies all email addresses of all Board members at the beginning of each Board year. You might also consider requiring each Director to sign an agreement when they join the Board in which they provide their email address and state that they will notify the Secretary in writing if their email address changes. This may provide protection to your nonprofit if a Director later claims that an email did not reach them at a new email address that they failed to provide.

Another consideration for Board voting by electronic means is whether your corporation has members *and* your Bylaws (or other document) gives members the right to attend Board meetings. The language in the new statute on electronic means states that this is an action "without a meeting." However, members with the right to attend Board meetings may argue that the "vote by electronic means" provision might be seen as a kind of Board meeting in which the Board discussion takes place by email or other electronic means. If members have a right to attend Board meetings, arguably they have the right to attend this one.

TO DO: If you are a membership corporation and your members have the right to attend Board meeting, you should consider whether you need a clear resolution of the issue raised above. You can either amend your Bylaws to provide that vote-by-email is an action without a meeting and the members' right to attend Board meetings does not apply to cases where the Board chooses to vote by electronic means, or, alternatively, make provisions for members to be copied on the Board discussion and decision. Unless your Bylaws allow the members the opportunity to

participate in Board discussion, you can be clear in your communication that members are not allowed to comment during the Board discussion. Our recommendation is that you get legal advice on this.

While the new statute does allow voting by email and other electronic means, your Board should consider when, if ever, it wants to use this method. In cases where the action is uncontroversial, the Board may want to consider a vote by email instead of an action by consent as a means to pass an action when not all Board members are available for an action by consent (e.g., trekking in the Himalayas or too sick in the hospital). Your Board will need to make a judgment call about whether to vote by email when there is disagreement about an issue. Some people find it easier to express themselves by email when they've had time to think over the input of others or are shy and more likely to offer their input online. Others may prefer the more simultaneous give-and-take of in-person conversations or find the "talking over" feature of email discussions confusing. If your Board does not want to authorize vote-by-electronic means, you can specifically exclude it in your Bylaws or simply not use it.

TO DO: Check your Bylaws to see how your meetings are held. The new statute authorizes voting by electronic means "unless a corporation's articles of incorporation or Bylaws provide otherwise." This suggests that if your current Articles and Bylaws do not exclude electronic voting, you can use it. However, some may argue that if you have a specific listing in your Articles or Bylaws of how meetings are held and you have not included electronic voting, that specific listing could be interpreted to mean that your list is the only way you can hold meetings. In order to avoid controversy on this issue, you may want to add something like the following to your current provisions related to how you hold meetings:

"The Board of Directors may, without a meeting, use electronic mail or other electronic means to take an action. In order to conduct a valid vote by electronic means, the Board must meet all of the following requirements:

- All Directors have provided an electronic address and be sent a notice of the electronic action;
- Electronic notice of the action being considered must clearly state the action being voted on and when it will be effective;
- The electronic notice must specify a deadline not less than 48 hours after the electronic notice is sent to vote;
- A Director can change their vote any time during the voting period;
- An affirmative vote of a majority of Directors in office (not just the ones responding to the electronic notice) is needed to pass the action, unless your Articles of Incorporation or Bylaws require a greater vote.
- The Board must file the electronic action in its minutes book or a document book of Board actions."

Meetings/Voting

Generally, most Board business is conducted in meetings. The new statute makes changes, some of them technical, in how meetings are legally conducted.

Quorum

A quorum is the number of Directors that must be at a Board meeting in order for the meeting to do business. Under the prior statute, if the Board has a **fixed** number of Directors, the quorum was calculated based on that number, regardless of how many Directors are in office at the start of the meeting. For example, if the Bylaws require a majority of the Board for a quorum and state that the Board has 9 Directors, but only 7 are in office at the start of the meeting, the quorum is 5. Under the prior statute, if the Board has a **variable** number of Directors (e.g., 5-9), the quorum is calculated based on the number of Directors in office immediately before the meeting.

Under the new statute, the quorum is calculated based on the number of Directors in office immediately before the meeting, whether the number of Directors is fixed or variable. For Boards with a fixed number of Directors, this is a new rule. For Boards with a variable number of Directors, this rule has the same result as the prior statute.

TO DO: If your Bylaws provide for a fixed number of Directors and you want to adopt this new rule, revise your Bylaws to provide that "the quorum is based on the number of Directors in office immediately before the meeting" or words to this effect. Delete any language that says that the quorum is "a majority of the number of Directors prescribed by the Board," or words to that effect.

Regularly Scheduled Meetings

The former statute referred to "regularly" scheduled meetings. The current statute clarifies that this means that the meeting is scheduled in a manner that informs all Directors of the time and place without additional notice. This clarifies that meetings set, for example, on the first Tuesday of the month from September through June are regular meetings, even though the date varies each month.

Supermajority Voting Requirements

In numerous places throughout the nonprofit statute, when the Board was contemplating major changes to the organization, the prior statute required a supermajority vote in order for the Board to take action. These rules sometimes constituted a trap for nonprofits, who are generally used to operating by majority vote. In addition, questions were raised about whether it was realistic or healthy to force a nonprofit, a majority of whose Board voted to merge or dissolve, for example, to stay in business. Unless a nonprofit's Articles or Bylaws provide for a greater majority, most of these supermajority requirements have been removed, primarily for public benefit and religious corporations, including:

- an amendment by the Board to the Articles of Incorporation in nonmembership corporations;
- an amendment by members to a public benefit or religious corporation of the Articles of Incorporation;
- mergers in nonmembership corporations by the Board;
- mergers in membership corporations by the members of public benefit or religious

corporations;
- dissolutions in membership corporations by the members of public benefit or religious corporations;
- disposal of all assets by the members of a public benefit or religious corporation.

TO DO: If you want to operate by majority vote as much as possible, review your Articles and Bylaws to see if you have supermajority requirement. Consider amending your Bylaws where allowed to remove the supermajority requirements.

Actions by Consent Are Meeting Votes

An action by consent is one in which every Director consents in writing to the action, so a meeting is not necessary under the law. The new statute clarifies that actions taken by consent can be described as a "meeting vote" in any document, even though no meeting took place. This is most likely to be useful, for example, when institutions like banks require a certification that there was a Board meeting vote to authorize a bank action, like opening an account or signing on a loan.

Proxy Voting

Proxy voting occurs when a person with the right to vote gives their right to another to cast their vote for them. With reference to voting by the Board, the new statute clarifies what was assumed in the old statute: Board members cannot give their right to vote to another Board member or anyone else to vote by proxy. (Under both prior law and the new law, membership nonprofits can allow proxy voting by their members in connection with membership (not Board) meetings).

Board Committees

Under prior law and the current statute, unless the Articles or Bylaws provide otherwise, non-Board members can sit on Board committees if the Board authorizes it. The new statute clarifies what was assumed in the old statute, that only a Director can serve as a *voting* member on a committee that is authorized to take Board action (usually this is an Executive Committee, authorized to act between Board meetings). Those who are not Directors who sit on a committee authorized to take Board action can participate but cannot vote.

TO DO: If you have non-Board members on a Board committee authorized to take Board action, check your Bylaws and your practices to be sure that those members do not vote.

Conflicts of Interest

Oregon nonprofit law provides that decisions made by the Board in which one or more Board members has a conflict of interest must be made following certain rules. The prior Oregon nonprofit statute stated that a transaction between the nonprofit corporation and one of its Board members was a conflict of interest if it was a transaction in which the Director had a direct or indirect interest. A "direct interest" was one in which the Director was a party to the transaction. (For example, the corporation was paying the Director to provide goods to or perform a service

for the corporation.) An "indirect interest" meant, among other things, that the Director had a "material interest" in an entity that was a party to the transaction. (For example, the nonprofit was hiring a catering company in which a Director owned 40% of the stock to cater a fundraising event.)

The new statute retains the language about "material" interest and adds to the definition of an "indirect interest" a person who is a party to the transaction who is "related" to the Director or a "business associate" of the Director.

The problem with all of these descriptions—"material interest," "indirect interest," and "business associate"—is that they are very vague terms. Enforcement is left up to a governmental agency, the Oregon Department of Justice, which oversees public benefit nonprofits, to determine what these terms mean. There is a potential Constitutional due process/fundamental fairness claim that the statute is unconstitutional because the vagueness of these terms leaves nonprofits with no reasonably definite way to know what behavior is noncompliant and encourages case-by-case enforcement by the government. The Oregon Department of Justice could solve this problem by issuing administrative regulations or an interpretive ruling defining the terms specifically enough that they pass Constitutional muster.

TO DO: Check with the Oregon DOJ Charitable Activities section if your nonprofit engages in transactions with one or more of your Directors that may implicate one of the vague descriptors above to see if the DOJ has issued more specific guidance on what constitutes a "material interest," an "indirect interest," and a "business associate." If your nonprofit is challenged on these grounds, you should discuss this with an attorney.

Note that the conflicts of interest described above apply to Oregon nonprofit corporations. If your corporation is exempt from federal income tax under Section 501(c)(3) of the federal Internal Revenue Code, you are subject to an additional set of conflicts rules. Those rules are very specific about when a conflict of interest occurs and are not vague. Consult *The Oregon Nonprofit Corporation Handbook* for more information on these. Occasionally, a funder, especially a government funder, may impose its own conflicts rules. You must follow all of these.

Other Provisions Related to Directors

Director's Right to Inspection

The new law adds a provision that a single Director has the right to inspect certain listed corporate records. The idea is that a Director should have access to information in order to determine if the corporation is operating properly.

One requirement on the list that the Director can inspect is that the corporation keep "appropriate accounting records." This provision raises issues if a single Director wants access to accounting records that might reveal confidential information (e.g., financial records that disclose confidential HIPPA information) or information that is sensitive (e.g., staff salaries, confidential or private donor information), is making demands on an overworked staff that take them away

from their other duties, or is demoralizing staff. If your nonprofit finds itself with these issues, you will need to discuss this with an attorney.

Directors as Trustees

The prior statute included a specific provision acknowledging that Directors were not trustees with respect to the corporation or its property. Trustees are held to a higher standard than Directors are to protect trust property. This provision was included in the prior statute because some case law in other states held that Directors were trustees and most Directors do not intend to assume this higher level of responsibility. The current statute removes this protection. We do not know what effect the removal of this protection will have on the liability of Directors in Oregon or on the cost of Directors and Officers liability coverage.

TO DO: If this concerns you, you can keep an eye on your Directors & Officers insurance to see if the cost of your coverage increases to cover this potentially greater risk.

Removal of Directors

Directors Elected by Members

Under the prior statute, members could remove a Director elected by them with or without cause unless the Articles provided that a Director could only be removed for cause. The new statute allows the Bylaws as well as the Articles to require that a Director elected by members could only be removed for cause.

TO DO: If your corporation wants to provide for the possibility of removing a Director elected by members, you can amend your Bylaws to provide for this.

Directors Elected by Members or by a Class, Chapter, or Region or Other Organizational or Geographical Unit

Under the prior statute, Directors elected by these groups could only be removed if the number of votes cast to remove the Director would have been sufficient to elect that Director. The new statute simplifies this by providing that these Directors can be removed by the majority of the votes cast.

Directors Elected by Board to Fill Vacancy of Directors Elected by Members

Under both statutes, the Board can elect a Director to fill the seat of a Director elected by the members if the seat became vacant. The prior statute provided that such director could only be removed by the members. The current statute allows the Director to be removed by the members or by the Board.

Appointed Directors

The prior statute provided that an appointed director could only be removed by the person who appointed him. The new law also allows the Board to remove an appointed Director. The person removing an appointed Director must give notice to the Director and, in some cases, to the corporation.

Designated Directors

The new statute added a provision to provide for designated Directors. A designated Director is a Director that the Articles or Bylaws of the corporation designates as a Director in a manner that identifies a specific individual or group of individuals. If the position of a designated Director becomes vacant and there is no provision in the Articles or Bylaws for how to fill the vacancy, the Board cannot fill the vacancy.

TO DO: Check your Bylaws to see if they are more restrictive than the law allows on any of the issues above. Amend them if you want more flexibility.

Voting Membership Corporations

Introduction

Many people think that membership corporations are those nonprofit corporation that have members who agree to be members and usually pay dues. Oregon law has a different definition of membership corporations. Oregon membership corporations are corporations with members who have the right to vote more than once for the people on the Board of Directors. If your members do not vote for the Board, then you should register as a nonmembership corporation, even though you have members for other purposes. Both membership and nonmembership corporations may be Public Benefit, Religious, or Mutual Benefit nonprofit corporations. The new statute updates the old statute and addresses some problems in the prior statute for membership corporations (again, those whose members vote for the Board). This section describes the most important of those updates.

TO DO: Many groups are unaware of Oregon's odd definition of membership and incorporate incorrectly. Some change from membership to nonmembership over time without realizing they need to amend their Articles. Check your Articles of Incorporation and any amendments or the Oregon Corporation Division website at https://sos.oregon.gov/business/Pages/nonprofit.aspx to see if your registration correctly reflects your membership status. Your Bylaws are not enough; your Articles or Amendments to Articles need to show your status correctly. If you are not correctly registered with the state, you will need to correct it. Check Chapter 18 in the *Oregon Nonprofit Corporation Handbook*, 5th edition. Note that one of the changes to Oregon nonprofit law (described below) offers some help if you incorporated as a membership corporation but no longer have members. If this information does not answer your questions, you may need legal help to do this correctly.

Use of Electronic Media for Members and Directors

The new statute broadens ways that membership corporations can communicate with their members and Directors. Under the prior statute, membership corporations had to maintain an address for each of its members. If notice was given by other than first class mail, the nonprofit had to send notice to its members between 30 and 60 days before the meeting.

Now membership corporations must maintain "contact information." Such information includes a street address, mailing address, or electronic address in which the member or Director elects to receive notices and other information. The corporation must give notice in a "fair and reasonable" manner. Notices to members may be communicated electronically. Electronic notice is effective at the earlier of when it is received, or two days after it is sent. Members can waive notice by email.

Termination of Membership

The prior statute required that a member of a public benefit or mutual benefit corporation could not be suspended, terminated, or expelled except in accordance with a procedure that was fair and reasonable and carried out in good faith. The new statute clarifies that members can be suspended, terminated, or expelled without a hearing for nonpayment of dues.

Public benefit and mutual benefit corporations are voluntary membership organizations, generally composed of members who choose to join. Arguably, a nonprofit that consists of people who have voluntarily joined should ultimately be free to suspend, terminate, or expel a member that it finds undesirable. Members who want something different can always start their own nonprofit. Both the prior and new statutes give a member who the nonprofit wants to suspend, terminate, or expel the right to a hearing, so that the members' views could be considered. The prior statute could be read to allow a judge to overrule the decision by the nonprofit to suspend, terminate, or expel a member after a hearing by making an outside judgment based on all of the relevant facts and circumstances.

The new statute appears to clarify that if the Bylaws set forth a procedure that gives the member at least 15 days' notice before the expulsion, suspension, or termination, states the reasons for the action in the notice, and provides a hearing for the member to be heard orally or in writing by the nonprofit not less than 5 days before the termination, then any expulsion, suspension, or termination will be upheld. In other words, the nonprofit, and not an outside judge, can ultimately determine who the nonprofit's members are.

TO DO: If you are a public benefit or mutual benefit corporation with members, consider whether your Bylaws have a procedure for suspending, terminating, and expelling members and whether you want it to comply with the procedure described above to lessen the chance of outside interference by a judge. Organizations have a wide range of opinions about how to balance member vs. organizational interests, so find and describe what your group wants. Consider getting legal advice on this issue.

Relief for Public Benefit Membership Corporations with No Members

Occasionally, a nonprofit corporation that was formed as a membership corporation gradually loses all of its members, but the Board continued to operate by electing its Directors, without realizing that the corporation was still a membership corporation and members should be electing at least part of its Board. Because not one of the current Directors was elected by the members, the Board has no authority to act for the corporation, not even to amend its Articles to reflect its true status as a nonmembership nonprofit corporation.

The new law offers a fix for public benefit membership nonprofit corporations. If the public benefit corporation has not conducted a membership meeting in at least three years and the members have not actively participated in the nonprofit's affairs for at least three years, the Board is empowered to amend the Articles of Incorporation to state that the corporation does not have members, if: (1) the Board notifies known members of its proposed amendment; (2) the Board posts notice of the proposed amendment on its website or gives comparable notice of the amendment to the public; and (3) the Board does not receive an objection from any members within 30 days.

The new law also includes a procedure in which any public benefit or mutual benefit nonprofit corporation can contact the Oregon Attorney General office to petition the court for instructions for how to proceed. Your nonprofit will probably need legal help and incur other expenses in doing this.

TO DO: If you are a public benefit nonprofit corporation, especially with any longevity, check your original Articles of Incorporation (and any subsequent amendments) to see whether you filed with the state as a membership corporation. Do not assume that what people believe is what actually happened. Check your original document. Most of these cases arise from nonprofits that incorporated decades ago and the current Board is usually astonished to find that the corporation was formed as a membership corporation.

Demand for Special Meeting by a Member

Under the prior statute, certain designated people in a membership corporation have the power to demand a special membership meeting by submitting a demand to the Secretary of the corporation for a meeting. There was no remedy in the statute if the corporation failed to act or was extremely slow to act. A provision in the new statute allows the people making the demand to set a membership meeting, if the date that the corporation sets is not within 30 days of the date of the notice to set a meeting.

Voting by Email by Members

The new statute allows members to vote by electronic means, unless the Articles or Bylaws specify that a members' meeting is necessary to take an action. The corporation must comply with the same requirements that the Board must comply with (described above) in holding a meeting by electronic means.

TO DO: Check your Articles and Bylaws. If your provision about membership voting is fairly

specific, this may be read to imply that the Bylaw provision is intended to be a complete description of how membership voting must occur. Even though your Bylaws don't exclude electronic means, the absence of a provision about electronic means may then be read to mean it is not included, especially in older Bylaws when no one thought about this. You should amend your Bylaws to add membership voting by electronic means if it is not specifically included and this is something you want. Consider getting legal advice on this.

Membership Meetings by Consent

The prior statute allowed members to vote by written ballot. Under the current statute, corporate members can also take action by consent, unless a corporation's Articles or Bylaws specify that a members' meeting is necessary to take an action. If, in taking an action by consent, the corporation complies with the meeting-by-email rules described above, the requirement that all members entitled to vote must vote to get consent do not apply. Rather, all members voting must consent. This in effect means that nonvoting members are deemed to consent.

TO DO: If you are interested in allowing your members to act as described above, check your Articles and Bylaws to see if a membership meeting is required. If so, amend them to allow actions by consent as described above.

Special Note: The provision that all voting members, and not all members, must consent to an action by consent may be a drafting error, so check in if you want to use this. If you have enough votes to pass an action even if the nonvoting members' votes were assumed to be "no," your Board may want to declare that the action passed in accordance with your majority voting rule, rather than to declare it an action by consent.

Annual Meeting of Members

Both the prior and current statutes require Oregon nonprofit membership corporations to hold an annual meeting at a time stated or fixed in accordance with the Bylaws. At that meeting, the President or other officer the board designates reports on the activities and financial condition of the corporation and members can act on any matter for which proper notice has been given. Prior to the advent of modern communications, the most likely matter was the election of the Board of Directors. With more modern communication methods, many membership corporations elect their Directors by ballot or email and keep their members updated about the activities and financial condition of the corporation by electronic means, often at fundraising time!

In the absence of notice from a member about an item for membership action, nonprofits that elect their Board of Directors by mail or email may be tempted to forego the time and expense of the annual meeting, but the statute still requires this. If you want to minimize this time and expense, you may want to plan how to wrap this around your fundraising or other promotional efforts. If you vote by mail or email, you may want to plan the vote so that you can announce the results at the annual meeting.

TO DO: If you are a membership Oregon nonprofit corporation, be sure that you hold an annual meeting.

Notice of Membership Meetings

The prior law required the corporation to give notice to members of membership meetings in a fair and reasonable manner that complied with any provisions in the bylaws. The statute assumed that notice was fair and reasonable if it described the place, date, and time of the meeting and was provided at least seven days before the meeting or, if mailed by other than first class registered mail, at least 30 and no more than 60 days before the meeting. The new law adds that notice can be given by email in accordance with the rules for notice by email, if the email notice is delivered at least seven day before the meeting. This change recognized that many membership organizations are using electronic mail.

Action by Written Ballot

Members in many membership organizations vote by written ballot. The prior statute was unclear about how to calculate if a quorum was met when voting by written ballot. The new law clarifies that if the number of members who attend a meeting constitute a quorum, then the number of votes cast by ballot constitutes a quorum.

Maintaining a List of Members

Under the prior statute, a membership corporation had to maintain an alphabetical list of the names, addresses, and membership dates of all of its members. At the time of any membership meeting, the corporation had to prepare a current list of additional members eligible to vote that were not on the main list. This law was probably mostly honored in the breach.

The new law eliminates the requirement of an alphabetized list and replaces the word "addresses" with "contact information." It also eliminates the requirement of producing an updated list at the time of each membership meeting. If your nonprofit anticipates a close vote, it may want to produce an updated list so that the result can be announced at the meeting.

Special Rules for Membership in More Than One Name

In some membership organizations, a membership may be held in more than one name. For example, a nonprofit mobile home park will often allot one membership vote to each home. Some homes will have two or more adult residents. The prior law had no rules for how to allocate votes when a membership was in more than one name when the nonprofit's Articles or Bylaws did not provide for this. Under the new statute, unless the Articles or Bylaws provide otherwise, if only one person votes, that vote binds all persons in whose name the membership is held. If more than one person votes, the votes are divided on a pro rata basis among the membership names.

Cumulative Voting

Some nonprofits with members allow members to vote cumulatively. Cumulative voting means that, in elections for Directors, a member can cumulate the votes the member is entitled to cast

and to cast them for one candidate. For example, if there are 5 vacant spots on the Board, the member could cast one vote for each position or could cumulate the member's vote and place five votes for one candidate. The prior and current statutes allow this.

The prior and current statutes also allow removal of a Director by cumulative voting. However, the prior statute was unclear about how to interpret the votes for removal. The new statute fixes this. Essentially, the new statute provides that removal fails if the number of votes against removal would be sufficient to elect the Director.

Changing Your Corporation

The prior statute generally required a super-majority vote to make changes in your corporate structure. The new law allows you to change your corporate structure by a majority vote of those voting in many cases, described below. Your Articles or Bylaws can over-ride the statutory provisions to require a greater vote in most cases.

Amendments to Articles of Incorporation

Under the prior statute, a corporation amended its Articles of Incorporation by a majority vote of all Directors in office, if there was a quorum. Now the corporation amends its Articles of Incorporation by a majority of the Directors voting, if there is a quorum, unless its own Articles or Bylaws require a greater vote.

If a membership vote is required to amend the Articles of Incorporation, public benefit and religious corporations under the prior law needed a vote of approval by 2/3 of the members entitled to vote. Under the new statute, public benefit and religious corporations need a majority of members entitled to vote on the Articles to amend the Articles.

TO DO: If you are a nonprofit corporation that want a super-majority vote by the Board or your members to act in making Amendments to your Articles and this act changes what you want, you can amend your Articles or Bylaws to require a greater vote.

Restatement of Articles of Incorporation

The rules for restating Articles of Incorporation under the new statute are the same as the rules for amendments to the Articles above.

Mergers

Mutual Benefit Corporations. The rules for mutual benefit corporations who merge are the same under both statutes: the merger must be approved by the board and by the members by at least 2/3 of the votes cast or a majority of the voting power, whichever is less.

Mergers by Public Benefit and Religious Corporations. These rules have changed. Public benefit and religious corporations can now merge by a majority of the votes cast.
Mergers When the Corporation Does Not Have Members: The former statute required the

approval of the majority of Directors in office at the time to approve a merger. The new statute allows the Board to approve the merger in accordance with its normal voting rules.

The new statute contains some other complexities about mergers. If you are considering a merger, you should get legal advice.

Disposal of All or Substantially All of Assets

Mutual Benefit Corporations. The rules for the membership vote are the same as in the old statute. For nonmembership corporations, the former requirement that the Board must approve the transaction by a majority of Directors in office at the time of the approval has been reduced to approval by the Board.

Public Benefit and Religious Corporations. The prior rule that members of these corporations had to approve a disposition of assets by at least 2/3 of the votes cast or a majority of the voting power has been reduced. The members must now approve by a majority of the votes cast. The former requirement that the Board must approve the transaction by a majority of Directors in office at the time of the approval has been reduced to approval by the Board. The new statute also gives public benefit and religious corporations 30 days, instead of the 20 days required by the former statute, to file its notice to the state Attorney Generals' office of the corporate action in disposing of its property.

Dissolutions

Mutual Benefit Corporations. The rules for the membership vote on dissolution are the same as in the old statute. For nonmembership corporations, the former requirement that the Board must approve the transaction by a majority of Directors in office at the time of the approval has been reduced to approval by the Board.

Public Benefit and Religious Corporations. The prior statute required the members to approve dissolution by at least 2/3 of the votes cast. The new statute requires approval by a majority of the votes cast.

All Corporations. The new law adds a provision that, if the corporation does not have members, the Board is required to approve the dissolution and can do so even if the Board does not have a quorum.

Under the prior statute, the dissolved corporation had to publish notice of its dissolution in a newspaper. The new statute allows the corporation, as an alternative, to publish notice of dissolution on its website or at another location where the dissolved corporation maintains an electronic presence, as long as the notice will remain accessible to the public for at least 30 days.

Documents and Records

The new nonprofit statute has modernized its descriptions of and requirements about documents and records, as follows:

- "Documents" has been redefined to include "electronic mediums." This clarifies that minutes and other corporate documents can be kept electronically.
- "Signatures" can include electronic signatures.
- Waiver of notice of meetings can be by email.
- The new statute eliminates a requirement in the old statute that a nonprofit corporation must keep all versions of its Articles, Restated Articles and discarded Amendments no longer in effect. The new statute now requires that the corporation keep a copy of its "Articles currently in effect." Anyone who wants to see older versions can go to the Oregon Corporation Division for copies.

Special Corporate Issues

Mutual Benefit Corporations Redefined

Under the prior statute, mutual benefit corporations were a catch-all category that included any nonprofit corporation that was not a public benefit or religious nonprofit corporation. The current statute redefines mutual benefit nonprofit corporations as nonprofit corporations organized and operated primarily to serve the mutual interests of a group of persons. Now there is no "catch-all" provision. You must fit your corporation within one of these categories. If none of the categories is an obvious fit for your organization, you should consult with an attorney knowledgeable about nonprofits for assistance.

TO DO: If you are a Mutual Benefit Corporation that does not exist to serve the mutual interests of a group of persons, you should consult an attorney to see if this change affects you.

Right of Corporation to Assign Board Powers

The prior statute allowed the Articles of Incorporation of an Oregon nonprofit corporation to authorize a person or persons to exercise some or all of the powers of the Board. This provision was eliminated in the current statute. It is not clear whether this change invalidates corporations that made such provisions before 2020. This provision was rarely used, probably most often by religious corporations whose spiritual beliefs required that a spiritual leader have ultimate control of the nonprofit.

TO DO: If your Articles of Incorporation authorized a person or entity to exercise some or all of Board powers, you need to consult an attorney for an opinion about whether the new statue invalidates this arrangement. If it is invalid, talk to your attorney about other solutions.