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DISSOLVING CALIFORNIA NONPROFIT CORPORATIONS

The procedures to dissolve a California nonprofit public benefit corporation differ in several respects from the procedure to dissolve a California for-profit corporation. This bulletin summarizes the steps necessary to dissolve a California nonprofit public benefit corporation.

Good Standing. A corporation¹ that is suspended by the California Franchise Tax Board cannot dissolve until it has been “revived.”²

¹ In this bulletin, “corporation” means a California nonprofit public benefit corporation. I have assumed that the corporation has obtained exemptions from federal and California income tax under Section 501(c)(3) of the Internal Revenue Code and Section 23701d of the California Revenue and Taxation Code.

² California Secretary of State’s instructions to its form of Domestic Nonprofit Corporation Certificate of Election to Wind Up and Dissolve, page 1 at

http://bpd.cdn.sos.ca.gov/corp/pdf/dissolutions/corp_npdis.pdf

. Regarding reviving suspended corporations, see my bulletin *Suspended and Forfeited Corporations – Revivor, Restoration and Relief from Contract Voidability* at

http://www.staley.com/images/Reviving_Suspended_Corporations_-_18191.pdf.

Decide Whether a Court Action is Necessary to Begin the Dissolution Process. In limited situations, persons other than a majority of the board of directors and the members can force a nonprofit corporation into a court-supervised dissolution.³ The Attorney General can always do this, with prop-

³ Cal. Corp. Code § 6510. This is referred to in California corporate law as an “involuntary dissolution,” as compared to a “voluntary dissolution” initiated by majorities of board of directors and members. This is something of a misnomer, because there can be good reasons for the board of directors to seek court supervision of the dissolution process, as permitted by Cal. Corp. Code §§ 66614, 6617. This bulletin does not cover *involuntary* dissolution, which is rare. Cal. Corp. Code §§ 6510 to 6519.

er grounds.⁴ *If the California Attorney General's office initiates an action or investigation, the directors and officers of the corporation should seek legal counsel before responding or settling.* In a court-supervised dissolution, the court has the power to take management of the corporation away from the directors and officers and install a court-appointed receiver “to take over and manage the affairs of the corporation and to preserve its property “ while the process is pending.⁵ This Bulletin mostly covers a dissolution process that is not supervised by the court. However, in a “voluntary” dissolution, those managing the corporation should be aware of the possibility of dissenters asking a court to supervise the process, in effect turning a

“voluntary” dissolution into an “involuntary” proceeding.⁶

Elect Directors. A California nonprofit corporation cannot be dissolved by the incorporator.⁷ In a voluntary proceeding, it must be dissolved by the directors.⁸ An incorporator who wants to dissolve a California nonprofit corporation must first elect a director. If there is any uncertainty about whether the directors were properly elected or designated, this is a good time to fix any problems, especially if the corporation has assets to distribute.⁹ Also, the directors must make declarations under penalty of perjury, so they should be as sure as possible that they are really directors.¹⁰

⁴ Cal. Corp. Code § 6610(a)(5). The “proper grounds” are listed in Cal. Corp. Code §§ 5250 and 6610(b). The Governor can direct the Attorney General “to inquire into the affairs or management of any [California] corporation.” Cal. Gov. Code § 12014. So the inquiry can be precipitated by bad press, possibly triggered by a whistleblower. The Attorney General has broad powers over nonprofit corporations and their managers. Cal. Gov. Code §§ 12588, 12589, 12591.1, 12598.

⁵ Cal. Corp. Code § 6513.

⁶ Cal. Corp. Code § 6614.

⁷ Cal. Corp. Code §§ 6510 (involuntary) 6610 (voluntary). There is no provision in the Nonprofit Corporation Law corresponding to Section 1900.5 of the General Corporation Law allowing an incorporator to dissolve a corporation.

⁸ Cal. Corp. Code § 6615(a).

⁹ Cal. Corp. Code §§ 6711 (filling vacancies), 6712 (court procedure to determine who is entitled to be a director or to appoint directors).

¹⁰ Cal. Corp. Code §§ 5076(b) (“verified” means signed “under penalty of per-

Identify Recipient Organization(s). The next step is to determine whether the corporation will have any assets left after it satisfies its remaining liabilities and payables. If so, it must determine how to dispose of those assets. The choices are limited.

Read Gift Acceptance Letters and Grant Applications. The corporation might hold assets that it is required to return or to transfer to a specific organization if the corporation dissolves. The corporation must comply with these directives.¹¹ These specific directives trump general directives in the articles of incorporation.¹²

Read the Dissolution Clause. Review the “dissolution” clause at the end of the articles of incorporation to

see what it requires. The direction in the clause must be followed.¹³

Identify the Purpose of the Corporation. The specific purpose of the corporation is usually set forth in the articles of incorporation. If not, look on the first page of the bylaws.

Identify One or More Recipients of the Remaining Assets. Subject to specific directives for particular assets and to the instructions in the dissolution clause, the corporation must transfer its remaining assets to organizations that have the same purpose as the corporation, but in each case only to other Section 501(c)(3) organizations. The California Attorney General’s office will not permit the dissolution to proceed unless these requirements are satisfied.¹⁴ If the re-

(footnote continued from preceding column)

jury”), 6711(b) (certificate of election to dissolve, if required, must be verified), 6615 (certificate of dissolution must be verified).

¹¹ Cal. Corp. Code § 6715. These directives would typically be found in the “gift acceptance letter” that the corporation sent to its donor to specify any limits on the corporation’s use of the donation.

¹² Cal. Corp. Code § 6716(a).

¹³ *Id.* A dissolution clause is required to obtain a tax exemption under Cal. Rev. & Tax. Code § 23701d.

¹⁴ It is a good idea to check IRS Publication 78 (now called “Select Check and available online at <http://www.irs.gov/app/pub-78/>) to be sure that the proposed transferee organization is still exempt, and that the name in the IRS records is the same as the name used in the corporate resolutions approving the dissolution and transfer of assets. The Attor-

recipient corporation is active in California, things will probably go most smoothly with the Attorney General's office if the recipient has complied with its obligations to the Attorney General.¹⁵

At this point the recipients should be identified, but the assets should *not* be transferred.¹⁶

Elect Officers. The board of directors should elect officers, even if

(footnote continued from preceding column)

ney General's office will probably check here, too.

¹⁵ Check by looking up the recipient in the Attorney General's database at <http://rct.doj.ca.gov/Verification/Web/>.

¹⁶ For transfers to create an endowment at the recipient organization or to name a building, the dissolving corporation should obtain a "**gift acceptance letter**" from the recipient organization. The gift acceptance letter should be presented to the Attorney General's office. The recipient organization should sign the letter. The dissolving corporation should *not* counter sign the gift acceptance letter until the Attorney General's office approves it. If for some reason the officers of the dissolving corporation feel compelled to counter sign the letter sooner, the letter should expressly condition the asset transfer to the recipient organization on prior written approval of the transfer by the Attorney General.

the same persons continue in the same offices. If the new slate of officers differs from the slate reported in the last completed Statement of Information filed with the Secretary of State, a new Statement of Information should be filed.¹⁷ This is because these people will serve forever as "ghost" officers of the "ghost" corporation that survives after the dissolution.¹⁸

Elect to Dissolve. If the corporation has members, they must approve the dissolution.¹⁹ If there are no

¹⁷ Cal. Corp. Code § 6210(d). This Statement will remain a public record after the corporation dissolves.

¹⁸ Cal. Corp. Code §§ 6720 (continued existence of dissolved corporation for very limited purposes), 6710 (powers and duties of directors and officers during the dissolution process).

¹⁹ Cal. Corp. Code § 6610(a). Corporations that have not kept track of their members and have memberships that do not expire after a specified term might not be able to dissolve because they can't get a enough members to approve the dissolution. This is a good reason to avoid having voting members.

members, the Board of Directors can approve the dissolution.²⁰

The resolutions approving the dissolution should identify the proposed recipients(s) of the corporation's assets and should quantify the approximate amount of those assets.

The corporate Secretary should sign a Certificate of Secretary attesting to the validity of the resolutions.²¹

After the corporation elects to dissolve, it must wind up its affairs. It cannot continue business as usual, except as necessary to preserve the value of its assets.²²

When the resolutions are approved, the directors should sign (*but not date*) a Certificate of Dissolution.²³

Certificate of Election to Wind Up and Dissolve. If less than all of the member vote to dissolve, or if there are no members and less than all of the directors vote to dissolve, the corporation must file with the Secretary of State a Certificate of Election to Wind Up and Dissolve.²⁴

Notices to Creditors. The officers must give notice of the election to dissolve to all known creditors and to the Attorney General.²⁵ The notice to

²⁰ Cal. Corp. Code § 6610(b)(3). There are other situations in which the Board can elect to dissolve, even if many of the Board seats are empty or there is only one director in office. Cal. Corp. Code § 6610(b), (c). The election to dissolve can be revoked. Cal. Corp. Code § 6612.

²¹ This is delivered to the Attorney General.

²² Cal. Corp. Code § 6613(c).

²³ Cal. Corp. Code § 6615. The Attorney General will want to see a copy of the signed Certificate of Dissolution, but it can't be dated until the Attorney General approves the distribution and the assets are actually distributed.

²⁴ Cal. Corp. Code § 6611(c). If all of the member or, if there are no members, all of the directors vote to dissolve, the *certificate of dissolution* must say so, to explain why no *certificate of election to wind up and dissolve* was filed. *Id.*

²⁵ Cal. Corp. Code § 6613(c). If there is any doubt that all creditors will be paid in full and on time, consider using the procedures in Cal. Corp. Code § 6517 and obtaining a court-ordered dissolution and discharge of the directors.

creditors must include specific information if the intent is to have claims barred by the dissolution.²⁶

Notices must also be given to members (if any) who did not vote to dissolve.²⁷

Because the notice to creditors can have important consequences later,²⁸ it is helpful to have a secretary's certificate listing the creditors to whom notice was given, their addresses and the mailing date, plus a copy of the notice mailed. This certificate should be signed by the secretary in the presence of a notary, notarized and inserted into the corporation's minute book.

Court Decree Authorizing Distribution. The general rule is that the corporation must obtain a court decree directing the corporation to transfer its assets to particular organizations. The Attorney General must receive notice of the court proceedings, and can initiate it.²⁹ However, if the Attorney General waives any objection to the

proposed distribution, it is not necessary to go to court at all.³⁰ Most dissolving corporations ask for this waiver and do not go to court.

Request for Attorney General Approval. Before the officers transfer the assets of the corporation remaining after its debts are paid, they should obtain the approval of the California Attorney General (to avoid the need to ask a court to approve the distribution).³¹ Even if the corporation has no assets to distribute to another organization, it must obtain a letter from the Attorney General confirming that the corporation has no assets.³² Generally, the corporation's attorney asks the

²⁶ Cal. Corp. Code § 6618.

²⁷ *Id.*

²⁸ See "Claims Against the Corporation" below.

²⁹ Cal. Corp. Code § 6716(b).

³⁰ Cal. Corp. Code § 6716(c).

³¹ Cal. Corp. Code §§ 5913 (general requirement to obtain the Attorney General's approval for a transfer of substantially all of the corporation's assets), 6716(c). Regarding transactions that require the Attorney General's approval, see *Nonprofit Transactions Requiring Notice Or Attorney General Approval*, on the Publications page of the Attorney General's website: <http://ag.ca.gov/charities/publications.php>.

³² Cal. Corp. Code § 6715(b)(2). The letter is required before the Secretary of State will file a certificate of dissolution. Cal. Corp. Code § 6715(c).

Attorney General's office for the appropriate letter.³³

If the corporation has obtained a gift acceptance letter for an endowment to be created at another organization with the corporation's remaining assets,³⁴ the letter should be submitted to the Attorney General's office.

It usually takes six weeks for the Attorney General's office to respond to the request, with either the requested letter or the Attorney General's request for more info.

When the Attorney General's office provides the waiver letter or the "no assets" letter, that office will also provide a copy to the Secretary of State.

It is not necessary to obtain the approval of the IRS or the California Franchise Tax Board before making final distributions or dissolving the corporation.

Payment of Creditors and Distribution of Assets. When the corporation receives a waiver letter from the Attorney General's office, the corporation can distribute its assets remaining after satisfying its debts. The corporation can "provide for payment" of a debt or liability by having the recipient organization or another person or entity assume or guaranty the liability, or by escheating to the state the amount due and notifying the creditor.³⁵

The assets must be distributed exactly as the corporation proposed to the Attorney General's office. The corporation's officers should obtain a receipt from each recipient organization so that the officers can demonstrate to the Attorney General's office, if asked, that the distributions were actually made as proposed in the corporation's letter to the Attorney General. The distribution must be made as soon as possible after receiving the waiver letter from the Attorney General's office.³⁶

If creditors or recipient organizations required by the corporation's ar-

³³ See *General Guide for Dissolving California nonprofit Corporations*, available from the Publications page of the Attorney General's website. See footnote 31 above for the website address.

³⁴ See footnote 16 above.

³⁵ Cal. Corp. Code §§ 6714, 6718.

³⁶ Cal. Corp. Code § 6717.

ticles of incorporation cannot be found, the funds escheat to the state.³⁷

Often at this point the corporation will make “fixed fee” arrangements and prepay its accountant and attorney for the remaining services that they will need to perform for the corporation and for the filing fees to file the certificate of dissolution with the Secretary of State.

Tax Clearance Certificate. Until 2006 it was necessary to request and obtain a “tax clearance certificate” from the Franchise Tax Board before submitting the certificate of dissolution to the Secretary of State. This step is no longer required.

Filing the Certificate of Dissolution. After the Attorney General’s office has issued a waiver or “no assets” letter and, if there were assets left, those assets have been properly distributed, the original certificate of dissolution is dated and filed with the Secretary of State. The Secretary of State makes this document available to the public for inspection and copying.

A copy of the certificate of dissolution file-stamped by the Secretary of

State should be sent (typically by the corporation’s attorney) to the Attorney General’s office.³⁸

The corporate existence ceases when the certificate of dissolution is filed with the Secretary of State, “except for the purpose of further winding up, if needed.”³⁹

Filing the certificate of dissolution does not stop any court action filed by or against the corporation or concerning its dissolution.⁴⁰

As noted above, if the corporation needs to do something after the certificate of dissolution is filed, it has the power to do so, as a “ghost” corporation.⁴¹ Any lawsuit in which the corporation is involved continues.

Dissolution by Court Order Instead of by Certificate of Dissolution. The Board of Directors of the

³⁷ Cal. Corp. Code §§ 6714, 6718.

³⁸ The Attorney General’s office requests this in its waiver or “no assets” letter.

³⁹ Cal. Corp. Code § 6715(c).

⁴⁰ Cal. Corp. Code § 6720(b).

⁴¹ Cal. Corp. Code § 6720. “Ghost” corporation is not a term found in the statute.

corporation can ask a court to issue an order declaring the corporation to be dissolved.⁴² Members, creditors or the Attorney General can also ask the court to supervise the dissolution process.⁴³ The Attorney General, creditors and other interested persons have an opportunity to challenge the dissolution or the proposed distribution of assets.⁴⁴ When the court is satisfied that the corporation should dissolve, it issues an order of dissolution and sends a copy to the Secretary of State.⁴⁵

Discharge of Directors. In a dissolution by court order, the court's final order includes a declaration by the court "That the accounts of the directors ... have been settled and that they are discharged from their duties and liabilities to creditors and members."⁴⁶ In a contentious situation the directors might seek a court-ordered dissolution primarily to obtain this discharge.

Claims Against the Corporation.

A claim against the corporation is *barred* if the officers give proper notice to the claimant of the pending dissolution and the claimant does *not* make demand on the corporation within 120 days after the notice to creditors is delivered. If the claimant makes the demand but the corporation rejects the demand, the claim is *barred* -- unless the claimant files a court action within 90 days after the rejection. The bar does not apply to contingent claims (presumably when the contingency has not occurred before the notice to creditors is mailed) or to claims based on events that happen after the certificate of dissolution is filed.⁴⁷

Claims against the corporation based on actions by the corporation before it dissolved can be asserted against the organization that received the corporation's assets when it dissolved. Notice must be given to the Attorney General, who can intervene in the action.⁴⁸ This gives the injured part an entity to sue so the injured par-

⁴² Cal. Corp. Code § 6617(a).

⁴³ Cal. Corp. Code § 6614.

⁴⁴ Cal. Corp. Code § 6617(b), (c).

⁴⁵ Cal. Corp. Code §§ 6518, 6519, 6617(d).

⁴⁶ Cal. Corp. Code § 6518(a)(3).

⁴⁷ Cal. Corp. Code § 6618. It is often important to assure that these claims are barred. This makes the notice to creditors a very important step in the process. See footnote 25 above.

⁴⁸ Cal. Corp. Code § 6721(a).

ty can have his day in court. However, this rule allowing the recipient organization to be sued “is procedural in nature and is not intended to determine liability.”⁴⁹ Presumably, the recipient organization could assert the corporation’s defense that the action was barred.⁵⁰

Final Tax Returns. The corporation will have a short taxable year that will end when it files its certificate of dissolution. The final federal and California tax returns are due within four months and 15 days after that filing.⁵¹ The returns should be marked as “final” returns.

Generally, filing the final returns ends the officers duties with respect to the corporation.⁵²

⁴⁹ *Id.*

⁵⁰ Cal. Corp. Code § 6618(c).

⁵¹ Treas. Reg. § 1.443-1(a)(2) (short periods), 1.6033-2(e) (filing date for exempt organizations); Cal. Rev. & Tax. Code § 23772(a).

⁵² Note that in a court-supervised dissolution, the directors can obtain a court order declaring that they are discharged from their duties to creditors and members of the corporation. Cal. Corp. Code § 6518(a)(3).

Permanent Records. The corporate Secretary should keep permanently the corporation’s minute book, receipts from recipient charities, gift acceptance letters from and to the corporation, correspondence with the Attorney General’s office, all court pleadings and orders (if any), all filings with the Secretary of State, the corporation’s exemption applications, determination letters and tax returns.⁵³

I would be pleased to discuss with you a possible dissolution of your California corporation.

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⁵³ The Attorney General has ten years to bring an action against the directors and officers. Cal. Gov. Code § 12596.