



BUSINESS LAW SECTION

NONPROFIT ORGANIZATIONS COMMITTEE
THE STATE BAR OF CALIFORNIA
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DEFINITION OF A DIRECTOR UNDER CALIFORNIA CORPORATIONS CODE SECTION 5047

LEGISLATIVE PROPOSAL (BLS-2014-02)

TO: Office of Governmental Affairs
FROM: Joel S. Corwin, Chair, and Robert L. Schuchard, Vice Chair Legislation, Nonprofit Organizations Committee (the "Committee"), Business Law Section (the "Section")
DATE: April 20, 2013
RE: Proposal to Amend Section 5407 of the California Corporations Code

SECTION ACTION AND CONTACTS

Date of Approval by Section Executive Committee (the "Executive Committee"): July 12, 2013
Approval Vote:

For: 13 Against: 0

Executive Committee Contact:	Committee Contact:
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HISTORY, DIGEST, AND PURPOSE

The purpose of this Proposal is to further clarify the definition of a director under Corporations Code (the "Code") Section 5047 for purposes of the California Nonprofit Corporation Law.

History.

Several years ago, Section 5047 was amended in legislation sponsored by the Committee in order to clarify the definition of a director under the California Nonprofit Corporation Law (AB 1233, Stats. 2009, ch. 631, § 2). However, despite those changes, questions have remained regarding the definition under this Section.

Proposal and Reasons for the Proposal.

Section 5047 does not specify with sufficient clarity that, as was the intent of the statute, (i) a person is only a director as defined in the statute if that person has the right to vote as a member of the governing body, and (ii) a person who is a director by virtue of occupying a specific position within or outside the corporation (an *ex officio* director) can only be a director if that person has the right to vote as a member of the governing body.

The Proposal clarifies both of these points by doing the following:

- 1) It reverses the order of the second and third sentences of Section 5047; there are no changes to the first sentence.
- 2) It changes the new second sentence to make it clear that an *ex officio* director, whose voting rights were not limited, is a director with all attendant rights and obligations (presumably a reference to the fiduciary duties of care and loyalty). From a practical standpoint, a reference to an *ex officio* board position means that person has the right to vote, unless specified to the contrary.
- 3) The new third sentence makes it clear that someone without voting rights on the board is not a director. Such person could be an invitee to board meetings, but would not be bound by all of a director's fiduciary duties. Previously the language turned on a person's ability to "act" as a director. The Committee considers such language to be confusing, and proposes to revise it by limiting it to the act of voting.
- 4) It drops the "however" at the beginning of the new second sentence as unnecessary.

APPLICATION

If enacted, the proposed amendments to Section 5047 would become effective on January 1, 2015.

PENDING LITIGATION

As of the date submitted, the Committee is unaware of any pending litigation that is relevant to this Proposal.

LIKELY SUPPORT AND OPPOSITION

The Committee anticipates support from organizations that are subject to the California Nonprofit Corporation Law, which this change would impact. The Committee is unaware of any specific segments that might oppose this Proposal.

FISCAL IMPACT

None.

GERMANENESS

The subject matter of the proposed revisions of Section 5047 is one in which the members of the Section (and, in particular, the members of the Committee) have special expertise because they are called upon to interpret provisions of the Code and provide guidance on California nonprofit organizations law matters. The subject matter requires the special knowledge, training, experience and technical expertise of the Section.

DISCLAIMER

This position is only that of the Nonprofit Organizations Committee of the Business Law Section of the State Bar of California. This position has not been adopted by the State Bar's Board of Trustees or overall membership, and is not to be construed as representing the position of the State Bar of California.

Membership in the Nonprofit Organizations Committee and in the Business Law Section is voluntary and funding for their activities, including all legislative activities, is obtained entirely from voluntary sources.

TEXT OF PROPOSAL

SECTION 1. Section 5047 of the Corporations Code is amended to read:

5047. Except where otherwise expressly provided, "directors" means natural persons, designated in the articles or bylaws or elected by the incorporators, and their successors and natural persons designated, elected or appointed by any other name or title to act as members of the governing body of the corporation. ~~[Deleted text begins] A person who does not have authority to act as a member of the governing body of the corporation, including through voting rights as a member of the governing body, is not a director as that term is used in this division regardless of title. However, if~~ ~~[Deleted text ends]~~ [Inserted text begins] If [Inserted text ends] the articles or bylaws designate that a natural person is a director or a member of the governing body of the corporation by reason of occupying a specified position within or outside the corporation, [Inserted text begins] without limiting that person's right to vote as a member of the governing body, [Inserted text ends] that person shall be a director for all purposes and shall have the same rights and obligations, including voting rights, as the other directors. [Inserted text begins] A person who does not have authority to vote as a member of the governing body of

the corporation, is not a director as that term is used in this division regardless of title. [Inserted text ends]