

The EC-Bylaws team presented questions to OCF's legal counsel.  
The lawyer's response is in red font.

### **Clarification of determining outcome of Recall vote**

#### **Does it make a difference how a recall question is asked on the ballot?**

Should this person be recalled? yes or no versus Should this person be recalled? yes

Without another option would non-responses count as a no vote? Suppose we had 100 returned, 40 of them mark 'yes' to removing a director, and 30 of them mark 'no' to removing a director, and 30 of them did not mark an answer to that question about removing a director, we would have to count the non-votes as no votes

The action referred to as a recall is, I think, removal of a director under Oregon nonprofit law

Under ORS 65.324, a director may be removed by the members by a majority of the votes cast. If a majority of the ballots are marked "yes," then you have enough votes to remove the director. So I think a non-response counts as a "no."

Further clarification: Does the statement "The outcome of a membership vote for removal of a director will be decided by majority of the votes cast on that issue," exclude the need to count the non-votes?

Yes, I think that's a good clarification.

#### **Would adding a minimum age for voting to the Bylaws create another class of membership?**

Not necessarily. According to ORS 65.001(30), a member is any person who is entitled to exercise any of the following rights: elect directors; remove directors; vote on a change to the number of directors; vote to sell or merge the Fair; vote to dissolve the Fair; vote on an action or amendment to the Articles of Inc. if it would reduce or eliminate the member's right to vote; and inspect and copy the Fair records permitted by statute.

If youth members have the same rights as adult members regarding the above and other matters, then they should all constitute one class of members. If you want to differentiate between their rights, then doing so will create two classes of membership.

#### **Legal interpretation of the new ORS statutes as they apply to the OCF:**

##### **Which takes precedence, state laws or our Bylaws?**

I (Heidi) was under the impression that the ORS were guidance for when something is not covered by the Bylaws. Unless otherwise stated in the Bylaws, the ORS would govern.

The Oregon statute governing nonprofits (ORS chapter 65) essentially establishes default rules for a nonprofit corp. Some of those rules are mandatory and take precedence over a nonprofit's governing documents. For example, the statute says that a nonprofit must have a board of directors. You can't eliminate that requirement in the Articles or Bylaws. However, the statute says that a nonprofit may change certain default rules by providing otherwise its Articles of Incorporation or Bylaws.

The 2019 amendment to the statute is brand-new, so there is no case law interpreting it and, as usually happens with a new law, we are all just trying to understand its effect.

#### **According to the ORS changes, members do not have to give a physical address. Can we still ask for an address, primarily for absentee ballots.**

Our current absentee ballot procedure is that members have to request an absentee ballot to get one. Is it ok to request a mailing address to get an absentee ballot, if not for membership?

ORS 65.001(9) now states that a member may give a street address, mailing address, or email address for the purpose of receiving notices and other messages from the Fair. I understand that the reason for this ORS change is because a membership list must be made available for inspection by any member for purposes of communication before a meeting (ORS 65.224), and there is a desire to protect member privacy about home addresses. For that reason, I don't think you can require members to give you their street addresses if they don't want to do so. My understanding is that the rationale behind this new provision in ORS chapter 65 is to protect nonprofit members' privacy. It states that members may provide a street address, mailing address, or electronic address (whichever they prefer) at which they elect to receive notices and other messages from the nonprofit organization. I think that absentee ballots probably fall under the category of "other messages."

We already have addressed the privacy issue in our Bylaws by providing a way to communicate with other members without having to give out the addresses. Can't we put something in the Bylaws about needing a mailing address for mail in voting?

*(OCF currently does not have the technology in place for voting by email or online.)*

The Oregon nonprofit statute (ORS 65.231) says that members may vote by proxy unless the organization's Articles or Bylaws prohibit or limit proxy voting. I see that the current version of the Bylaws actually states that a member may vote by proxy "subject to such limitations and rules as may be established by the Board of Directors or the Elections Committee."

Therefore, I think you could limit absentee ballot voting in the way you've proposed. To make the rules clear to members, it would be better to put that limitation directly in the Bylaws:

**Do we need to mail an absentee ballot to everyone if we mail an absentee ballot to any one?**

Background: Conversations with David Atkin, who helped draft the new statutes, made it sound like we have to send a ballot to everyone, if we send to anyone.

I don't know of any requirement that you send absentee ballots (ie, proxies) to all members. However, since the Bylaws state that absentee ballots must be submitted on a form approved by the Elections Committee, and that they must be available for all matters on which membership votes are required, you are required to make them available on request.

The Bylaws state that absentee ballots must be personally signed by the member submitting one, will be effective only for the particular meeting for which its being given, and will specify with particularity the member's votes. If that matches your procedure, then there's no need to revise that section of the Bylaws.

*The Elections-Bylaws team is also drafting changes to have the Bylaws comply with the new ORS statutes.*