**OFA Bylaws Review**

**Issues List**

| **#** | **Issue & Section** | **OFA Comment** | **BLPC Response/Resolution** |
| --- | --- | --- | --- |
|  | DBA (Section 1.1) | Unsure as to whether there is a current DBA for OpenFabrics Alliance in the applicable county in CA.  | This is a low priority as the associated risk is quite remote, but it is worth considering filing for a DBA in an applicable county for “OpenFabrics Alliance” as the official corporate name of the Corporation is OpenFabrics Inc. and does not include the term “Alliance”.  |
|  | Good standing of membership (Section 2.1) | The concept of “Good Standing” by the Member Organization seems to have been replaced by 2.8 Membership Terminations. Why?  Note that we define good standing for the organization differently than we define good standing of the individual director for purposes of participating in Board meetings, but we tie the Director’s ability to participate to his organization being in good standing. | The original draft tied the concept of “Good Standing” was tied to Promoter members only, and did not describe how membership might be terminated or suspended. We attempted to clarify this with the revisions to Section 2.8 where, we returned to the preferred terminology of ‘good standing’ for the section header, and made OFA’s ability to terminate or suspend a membership more clear, rather than reserving the matter for the membership agreement.  |
|  | Identity of members | In our original draft, we intended to make it clear that the “member” is the organization, and not the individual representing the member. We created the construct of a “Member Organization” for this purpose, and distinguished it from a potential Individual Membership class. Are those concepts carried forward in your draft? Are they unnecessary? In the original draft, we went to some trouble to describe the characteristics of a “member” (generally an organization, while still preserving the idea of an individual member, if the need arises) and to identify the Promoter Members as being the only defined class of membership.  We retained the Board’s ability to create new classes of membership via *policy*in Section 2.4.  The notion of creating a membership policy, along with a fee structure, seems gone. | Section 2.1 states that voting & statutory member are ‘entities’ listed on OFA’s Promoter Membership List. It also gives OFA the ability to designate additional OFA participants (and to refer to them as “members” if desired), who will only have the rights provided in the associated policies as decided by the Board, but no voting rights. We have added language clarifying that such participants may be individuals, entities, etc. and reverted to the language regarding “policies” vs. “resolutions of the Board. The idea is to retain flexibility, but also clearly distinguish in the bylaws the difference between statutory members who have certain voting rights prescribed by law vs. other OFA participants who only have the rights and obligations set forth in applicable policies for their participant type, but may be referred to as “members”.  |
|  | Types of non-voting & non-statutory members (Section 2.1) | Prefer to reword this clause so it doesn’t make reference to “Adopters” or “Supporters”, because those are vestiges of the past.  | Have revised in draft.  |
|  | Establishing non-statutory members’ rights and privileges (Section 2.1) – “Members will have the rights and privileges specifically given to them by the resolutions adopted by the Board” | Where is this resolution process described? | ‘Board resolutions’ are a legal term of art to describe board decisions, but we have reverted this draft to reflect the policy terminology from OFA’s draft.  |
|  | Explanatory language on IPR (Section 2.3)“The intellectual property rights policy may cover multiple different areas of intellectual property rights, including but not limited to copyrights and licensing terms for software, marketing assets and written materials, trademarks, and fair use.” | The Bylaws team included it as a harmless recitation in order to clarify that “copyright” includes software and any other work product of the OFA (e.g. marketing materials, specifications, etc). If it’s truly harmless, we prefer to keep it in place as a clarification.  | Understood & retained.  |
|  | Promoter Member Approval Rights (Section 2.6 & 2.7) | Why is this limited only to changes in membership policies? What about matters that are not mandated by CNMBL or other applicable law? There are several areas where we expect votes – e.g. election of officers, creation/dissolution of working groups, appointment of working group chairs, approval of annual budgets etc etc etc.Sec 2.10 – Why is this section not part of Section 3, as it was in our original draft?  Keep in mind that “Promoter Members” == Board of Directors. | This section deals with votes by statutory members as opposed to those matters that will be managed by the board of directors. We understand that in practice those will be made by the same entities/their employees. However, when Promoter Members vote as members, they do so as representatives of their organization’s interests. When Promoter Directors vote as directors, they are subject to fiduciary duties and bound to act in the best interest of OFA (not their employer). We propose to limit the number of *statutory member* votes to those matters required by law, and defer to the board as to the general management of OFA.  |
|  | Promoter Member Good Standing (Section 2.6) | Should there be a forward reference to our definition of “good standing”? | Section 2.8 does clarify that suspended or terminated organizations will not be considered in good standing, so we don’t believe there needs to be an additional reference but happy to discuss.  |
|  | Termination of Members (Section 2.8) | Our original version had provisions to allow a majority of Promoter Members to vote a misbehaving member off the island. What happened to that? | We have added that back in explicitly here in 2.10(e), but would recommend also including it in the membership agreement or membership policy.  |
|  | Change in Control (Section 2.8(d)): As to the question of the impact of corporate transactions on membership, I propose to include those details in the Membership Agreement (so that to the extent further amendments are necessary, those do will not require an amendment of the Corporation’s bylaws. I would suggest something like the following (but certainly open to input!):All changes in control are be deemed assignments of the membership agreement, which require OFA’s consent.Members undergoing a change in control should provide notice to OFA of the transaction no later than 30 days prior to the transaction.Absent OFA’s express consent, the membership agreement (and hence member status) will terminate 30 days after the transaction. | We can discuss, but I think we need something more rigorous. We are trying to proactively prevent a single Promoter Member from controlling two or more votes through acquisition, as has happened twice this fall (Cray and RedHat). | TBD after discussion. We have proposed to include a new Article 6 with respect to affiliate participation in OFA, but want to confirm that it matches OFA’s intent for participation in WG’s or Committees, as well as Board representation. OFA could also include terms in the membership agreement would terminate a membership automatically upon a change in control absent OFA’s explicit consent, rather than 30 days later as we had originally suggested. *19FEB20: To be refined after additional consideration by OFA.*  |
|  | Member Voting (Section 2.10 | Sec 2.10 – Why is this section not part of Section 3, as it was in our original draft?  Keep in mind that “Promoter Members” == Board of Directors. | See discussion above as to the legal distinction between Promoter Member votes and votes of the Board.  |
|  | Promoter Member meetings (Section 2.10(b)) | Other than those actions requiring a statutory vote, is there an enumeration of the items requiring a vote in the following sections? | As per the above, we have tried to limit the matters requiring a statutory member vote to those required by law. All other matters regarding management of the corporation will be handled by the board, no specific enumeration is needed as general powers of the board are set forth in Section 3.1.  |
|  | Organization of Directors Article (Article 3) | In reviewing the original draft, it’s clear that some of the organization of the section was wrong; it looks like it’s gotten worse.  Here is our suggestion for how Article 3 should be organized:3.1 Powers3.2 Board Composition (no need for separate Number of Directors)3.3 Promoter Directors3.3.1 Alternates3.3.2 Good Standing3.3.3 Removal3.4 At-Large Directors3.5 Compensation3.6 Transactions with Interested Parties (if necessary)3.7 Meetings3.7.1 Location…3.7.2 Regular Meetings3.7.3 Special Meetings3.7.4 Notices3.7.5 Quorum3.7.6 Action by the Board (see the note below, and the comments in the draft)3.7.7. Action by Email3.7.8 Conduct of Meetings | To facilitate the review of changes to this draft, we have retained the current organization of this section, but understand that the concepts of “Alternates” & “Good Standing” in this Section only apply to Promoter Directors (vs. Alternate Directors) so can move those to subsections regarding Promoter Directors.  |
|  | Number of Directors (Section 3.3(a))Whether there should be a firm limit on the number of directors.  | The original draft was crisp in this area. Is there a reason why that crispness has been lost? | We reinserted the preferred language regarding overall board composition from the original draft, and understand from the comment that there is no desire to add a limit to the total number of possible directors/require a fixed number/odd number, etc.  |
|  | Promoter Directors voting off bad actors (Section 3.3(a)) | Again, we used to have provisions to vote a bad actor off the island to be replaced by a different Director from the same Promoter Member company. | Covered in section on removal (Section 3.7).  |
|  | Promoter Membership Agreement (Section 3.3(a)) | When and how is a Promoter Membership Agreement “accepted” by the Corporation? | This would be reflected by the Corporation’s countersignature of the applicable Membership Agreement. We have clarified that in the draft.  |
|  | Director Replacement (Section 3.3(a) | Why is written notice required? We have no such requirement at present. | The original draft required posting notice to a appropriate mailing list, but we proposed to simply require written notice in case there are operational changes that might require an amendment to the bylaws to avoid petty complaints of evidence that the Board doesn’t strictly comply with the Bylaws. The requirement that notice be in writing is intended to help protect the Corporation from any confusion (or reliance on an oral statement that is not otherwise reflected in writing). Let’s discuss what works best for OFA.  |
|  | Expectations of Permanence (Section 3.3(a)) | Where is the informative text describing the OFA’s expectations that Directors are ‘permanent’? We felt that text, even though informative, cast significant light.  | Included back in.  |
|  | At-Large Director Elections (Section 3.3(b) | At-Large Directors are elected by the community we serve, using the Annual Meeting (held in conjunction with the workshop) as the forum for conducting the election.Historically, we have held a “members meeting” during our annual workshop (March/April) but that is a holdover from the days when the affairs of the corporation were directed by a vote of all members. That was never a workable situation and has been dispensed with. However, we still want to elect ‘At Large Directors” during the workshop since that is the only time when we can count on a large attendance by outsiders, who the At-Large Directors are intended to represent. | Reflected our understanding of the election process in the revised draft, need to confirm that this is accurate.  |
|  | Annual Meeting (Section 3.3(b)) | See above | See above |
|  | At Large Director Membership (Section 3.3(b)) | We were trying to assign the gratis membership to the At-Large Director directly, and not to his/her employer. | Revised in draft.  |
|  | Alternates (Section 3.4) | Why is this not 3.3b? (even though we had it in a separate section in the original draft) | Section 3.3 was meant to describe overall composition of the board (Promoter Directors and At-Large Directors). This section deals with alternate directors and clarifies the process for Promoter Directors and that At Large Directors are not entitled to any alternates. We will move each of those clarifications to the Sections on Promoter Directors and At Large Directors Section 3.3 and Section 3.4 respectively.  |
|  | Alternates (Section 3.4) | Again, informative text describing the intention is now missing. | We added back in the informative text as requested in the introduction to this Section.  |
|  | Alternates (Section 3.4) | Such a being does not exist. Other than At-Large Directors, all Promoter Directors are required to be associated with a Promoter Member. | Our intent was to make clear that At Large Directors may not designate alternates unless the Board adopts policy to that effect. We have clarified in the draft. |
|  | Alternates (Section 3.4). Additional information text  | As you have seen, there are a few places where informative explanations were included in order to clarify intent. | Retained.  |
|  | Elections (Section 3.5). Confirming process and timing for At Large Director elections.  | Correct. But strangely, the voting is not limited to Directors, or even Members! It seems strange, but voters are self-selecting by their participation at the annual Workshop. | Ah ha, thanks for the clarification! We propose to delete that section and rely on Section 3.3.  |
|  | Promoter Director good standing (Section 3.6) – required meeting participation.  | This is exactly what we are trying to prevent. A Promoter Member who flies by out of the blue and votes on a subject without the relevant background. So I don’t understand this phrase. | Understood. We had assumed that Promoter Members’ Directors would be able to participate upon arrival (as opposed to those Promoter Directors who have been on the board but failed to participate).We now understand that the intent is that Promoter Directors of new Promoter Members may not vote until they have participated in 3 meetings?*19FEB20: Amended to clarify that new Promoter Members’ directors may participate in the first 5 meetings.*  |
|  | Removal (Section 3.7) | The clause about the newly appointed director inheriting the standing of the removed director is missing. | See last sentence of Section 3.6 relating to a director’s standing.  |
|  | Transactions with Interested Parties (Section 3.9) | We would like to explore with you both the necessity for this article, and whether we can dispense with it altogether | These requirements apply by matter of law ([CA Corp Code § 7233),](https://leginfo.legislature.ca.gov/faces/codes_displaySection.xhtml?lawCode=CORP&sectionNum=7233.) While the statute does not require its inclusion in the bylaws per se, it might serve as a helpful description of the applicable legal requirement. Let’s discuss OFA’s preference as to how to communicate this requirement to participants on the Board. *19FEB20: Amended to reflect general compliance with related legal requirements – additional detail to be provided to directors for in fact compliance.*  |
|  | Regular and special meetings (3.10(b) | The purpose behind putting Regular Meetings and Special Meetings in distinct sections was to make it easy to give notice of regular meetings via the OFA Calendar. Instead, you’ve given us “communicated to all Directors”.The original draft defined the method and timing of notice for meetings.Missing from your draft is the idea of limiting topics to be addressed by the Board at its meeting (“Action by the Board”.  This is an important concept for us, since it is used to prevent rogue members from introducing motions without sufficient notice to other Board members. | Let’s discuss. The intent here was to provide flexibility for the Board to change the tools and method of scheduling meetings in the future without having to amend the bylaws. We reinserted the reference to the calendar in the draft, while retaining the Board’s ability to change the method of notice. We have bracketed other sections that refer to mailing list postings explicitly as well for discussion. Action by the Board: We had kept the binding references from the original draft (see Section 3.10(b) last sentence: “*Before the Board can take action on any proposal at a meeting, such a proposal must have been posted to the appropriate mailing list not less than 72 hours prior to the commencement of the meeting (“the 72 Hour Rule”).”* We understand that OFA strongly prefers to keep informational text in its bylaws, and as such, we have inserted the additional explanation in the revised draft.However, per the below we are cautious about including this rule in the bylaws (vs. a board policy) to avoid having to formally amend the bylaws if the board finds that the current process could be improved or requires additional flexibility. |
|  | 72 Hour Rule Recommendation. Consider removing 72 hour rule requirement from the bylaws themselves and instead including the following statement to allow for the Board to adopt such internal policies, but be able to amend them without having to change the bylaws themselves: “The Board will establish policies from time to time, consistent with applicable law, regarding the creation of agendas and actions to be taken at Board meetings” | We can consider this. The so-called 72 hour rule is necessary to prevent surprises being visited on the Board and to ensure adequate time to consider motions prior to the meeting. But at the same time, we don’t want to limit our ability to act quickly, when needed. | We completely understand the intent and the value of the general principle of this rule. We are just wary of the potential for over-rigidity in practice and the administrative hassle of amendments to the bylaws in the event the board desires to amend its operational practices or preferences down the line. A board policy can still embody this rule, but allows the board to amend and refine the policy more easily in light of its experiences.  |
|  | Section 3.10(b) | Our original section, “Action by the Board” is completely missing. This is an important element for the OFA, since it is used to prevent Members from introducing disruptive motions during Board meetings, or without sufficient notice | See #31 above.  |
|  | Disinterested Directors (Section 3.10(d)) | What constitutes a disinterested Promoter Director? | Any Promoter Director that isn’t conflicted from participating due to conflict of interest or being the subject of the vote him or her self (ie. a Director shouldn’t be able to veto his or her own removal). The term “interested” Director is a statutorily defined term (see CA Corp Code § [7211](https://leginfo.legislature.ca.gov/faces/codes_displaySection.xhtml?lawCode=CORP&sectionNum=7211.)) |
|  | Removal of Directors and Officers (Section 3.10(d)) | This was intended to apply to Directors, not to Officers. Nevertheless, it may be a good idea to give the Board an opportunity to dispose of bad performing officer. | To confirm, is OFA’s preference that removal of officers require a simple majority, a 2/3 vote or unanimous vote of the Board? |
|  | Meeting chair (Section 3.10(e)) | Any reason not to follow the hierarchy described in our draft? Chair 🡪 Vice Chair 🡪 Secretary 🡪 Treasurer? Why was this section moved from Article 4 where it used to reside? | This was meant to simplify the process to delegate the role of chair of board meetings, but as OFA wishes to retain the stricter hierarchy, we have revised the text accordingly. We included this in the “Meetings” Section, as it relates to the management of conduct during meetings.  |
|  | Action without a Meeting (Section 3.11) | This seems to be substantially different from our original draft. Also, there is no provision for voting by proxy, or for excused absences. Our intention was to clearly define the circumstances when an electronic vote may be used., specifically to prevent any Director from willy-nilly proposing an action and calling for a vote, which is what this clause seems to promote.Your section 3.11 is overly loose.  We were specifically trying to avoid the ‘Wild West’ where members submit motions willy-nilly via email.  Instead, all actions must originate with a motion during a properly noticed Board meeting.  But we also wanted to allow a vote, once motioned and seconded, to be conducted by email to allow representatives to caucus internally before voting | Let’s discuss the reasons behind the revisions, which reflect applicable legal restrictions. CA law requires unanimity to take a Board action without a meeting and does not allow board directors to vote by proxy. (CA Corp Code [7211 (b) and (c)](https://leginfo.legislature.ca.gov/faces/codes_displaySection.xhtml?lawCode=CORP&sectionNum=7211.)). If OFA wishes to add additional requirements in its bylaws for taking actions by the board without a meeting, we can embody those – but in our experience such limitations can prove to be painful for organizations faced with a straightforward decision in a short time frame. We would again propose that OFA reflect its intent and general principles in a separate board policy.  |
|  | Officers (Section 4.1) | What happens if we don’t have all four? It’s the very devil to get someone elected to e.g. the role of Treasurer. | CA law requires that a Corporation have a President/Chair, Secretary & Treasurer (See CA Corp Code [7213](https://leginfo.legislature.ca.gov/faces/codes_displaySection.xhtml?lawCode=CORP&sectionNum=7213.)). We could remove the office of Vice Chair and provide for a different succession mechanism if preferred.  |
|  | Timing for Nominations (Section 4.3)While we noted that the Board intends for this to happen in April of each year, we are weary of being too specific in Bylaws as that creates a risk of petty ultra vires acts that could come be the source of a complaint from a D&O insurer or complaining member as evidence that the Board isn’t meeting its duties | I need to review the original draft. As I recall, a key tenet we were trying to achieve was to close nominations one month prior to the vote to give time for members to vet the nominees. | We have clarified that officer nominations must be received at least a month before the intended vote.  |
|  | Executive Director | The ED is not envisioned as an officer. There doesn’t seem to be a need to describe the ED in the Bylaws. | We can delete if so desired, but would then suggest clearly documenting any ED’s role and scope of responsibilities very clearly upon hiring/appointment.  |
|  | Working Groups (Section 5.1)Have left this purposefully fairly open, so that the board can specify WG procedures such as those set forth in the draft bylaws in separate policies so that amending those procedures is possible without requiring a full amendment of the bylaws. | The original draft had some text (section 1.5) about the structure of the organization, but that’s now pushed into Section 5.  The details governing the formation, governance, dissolution, and review of working groups are gone.  The important point was that working groups are reviewed annually.  I suppose we could hide all that in a separate policy, but at this rate we’re likely to have a large number of policies, which seems cumbersome. | Many of our clients have valued being able to amend WG policies without requiring an amendment of the bylaws document itself to reflect learnings, adopt operational improvements or clarify and expand the related terms. Also, targeted policies are often easier to access and reference for WG participants. However, we certainly understand that too many policies can be cumbersome, so if OFA is comfortable with the higher threshold for changes (2/3 vote of the board and formal amendment of the bylaws), we can add those provisions back here.  |
|  | Insurance (Section 7.2) | Empty comment from PG. JR: Point taken. We’ve talked about such insurance and have generally appreciated the value of this. For whatever reason, we haven’t acted on this, possibly my failing as Acting Treasurer. Hope the directional statement is clear. | We have retained this provision as it is not a complete obligation, but does reflect a strong recommendation.  |

Also to be discussed: from original November email:

Member Vote: The current OFA bylaws make it clear that there are 5 categories of members (Promoters, Adopters, Supporters, Academic and Individual) which are all "statutory members" of the Corporation - see Section 4.1 of the current bylaws. While Promoter and Adopters have certain additional rights, all members are noted as having the right to vote on membership matters. This means that pursuant to California law and OFA's current governance documents, all current OFA members in those classes of membership, have the right to vote on any changes to the bylaws that "materially and adversely affect the rights of members". As the proposed bylaws reflect a single class of statutory members (Promoter Members) - which better reflects the intent and operational reality of OFA's governance structure, the adoption of new bylaws will require a vote by all members as set forth in the current bylaws (which can be done through a meeting but also by sending written ballots to all members asking for approval of the revisions to bylaws - subject to a quorum and majority vote). While this is an unfortunate and inconvenient administrative burden, I hope that the number of current members (of all types) is reasonable enough for the exercise to be somewhat reasonable.