

NONPROFIT AND UNINCORPORATED ORGANIZATIONS COMMITTEE

Legislative Update as of September 10, 2009

by Cherie Evans

cherie@evansrosen.com

AB 285 (Amended 5/12/09) -- Text below is taken from the Committee's Support Letter

Code Section 20 defines "electronic transmission by the corporation." It refers to electronic transmissions to a "recipient," including directors, shareholders and members. It then provides that any such electronic transmission by a corporation to an individual shareholder or member is not authorized unless, in addition to satisfying the other requirements of the section, it satisfies the requirements applicable to consumer consent to electronic records as set forth in the federal Electronic Signatures in Global and National Commerce Act ("E-Sign Act"). This raises several issues. First, as explained below, the E-Sign Act was drafted for "consumers," not for corporate communications to "members" or "shareholders," so providing that the electronic transmission must be in accord with the requirements of the E-Sign Act raises more questions than it answers. Second, it requires that the corporation consult not only Section 20, but also the federal E-Sign Act, and attempt to interpret provisions which are not designed for this purpose. Third, Section 20 may be interpreted to require compliance with the E-Sign Act for transmissions from a corporation to its own directors (in their capacity as directors and in the course of a meeting), just because they are also "members" or "shareholders," thus putting the legitimacy of board actions in question.

The provisions of Section 20 requiring satisfaction of the requirements of the E-Sign Act and the ambiguity as to when the E-Sign Act governs impact many of the uses of electronic transmissions by California corporations. For example, for for-profit corporations, public benefit corporations, mutual benefit corporations, and religious corporations, this would include Code Sections 307, 5211, 7211, and 9211, respectively, which allow board members to participate in a meeting through the use of electronic transmission by and to the corporation; Sections 601, 5511, 7511, and 9411, which authorize notices of member meetings by electronic transmission by the corporation; and Sections 5513, 7513, and 9413 which allow ballots and any related material to be sent by electronic transmission by the corporation.

The problem, which greatly restricts the use of these sections (which otherwise would present opportunities for efficiencies and improved communication for California corporations), is the necessity of consulting the E-Sign Act, interpreting it and ensuring that the corporation seeking to electronically communicate with its members or shareholders complies with the requirements of the E-Sign Act. The E-Sign Act actually only applies to "consumers," and that term is defined essentially as meaning persons who purchase or receive goods or services primarily for personal or household use. The problem is exacerbated by the fact that the Section 20 E-Sign Act requirement may be interpreted to apply to directors (or others), merely because they are also members or shareholders.

AB 285 would provide a workable standard in lieu of the E-Sign Act, while using it as a general guide. The constraints of the federal E-Sign Act are not quite appropriate for electronic transmissions by corporations under the Code. In fact, even if they were, it would be better if the actual requirements were in the Code rather than requiring people to go and find and then apply the federal law. The Bill also removes any ambiguity as to when the additional requirements must be met. In addition, there apparently may be some concerns that the requirements of Section 20 run afoul of the SEC's "notice and access" regulation dealing with proxy materials.

This bill was drafted by our legislative subcommittee, particularly Joel Corwin, Brad Clark, and Nancy McGlamery.

Status: Chaptered by Secretary of State on August 6, 2009. Approved by Governor on August 5. It will be effective January 1, 2010.

AB 404 (Amended 4/14/09) -- Text below is taken from the Committee's Support Letter

AB 404 requires the issuance of an acknowledgment letter by the FTB when an organization relies upon the simplified application procedure, which was not required by AB 897 and is not required under current law. Other agencies rely upon a determination of tax exemption by the FTB, but the modification of Section 23701d by AB 897 did not allow the FTB to make a determination for those applying under the new simplified procedure; the discretion required to issue a determination letter was removed by AB 897 for organizations relying upon the new simplified procedure. That the FTB has not been able to issue a determination letter when an organization relies upon its federal determination letter to obtain state exemption has caused confusion. In the interim, the FTB has been issuing an "Exempt Acknowledgment Letter" and issued FTB Notice 2008-3 that explained the purpose of the Exempt Acknowledgment Letter, but there is no statutory provision for such a letter. AB 404 codifies the mechanism for the FTB to issue an acknowledgment letter when the organization relies upon the simplified application for state tax-exemption (new FTB Form 3500A). AB 404 leaves in place the traditional method of applying for state tax-exemption (current FTB Form 3500) and obtaining a determination of the same from the Franchise Tax Board.

Although the FTB attempted to solve the problem created by the passage of AB 897 by the use of an "acknowledgment letter," because the acknowledgment letter is not expressly a public document under current law, the FTB is unable to provide a copy of the letter upon request. AB 404 amends Section 19565 to provide that any documents submitted to the FTB to verify an organization's exemption from taxation under 501(c)(3) of the IRC and the acknowledgment letter or other document issued by the FTB shall be open to public inspection. With this addition to Section 19565, the FTB will be able to provide copies of the same upon request and California agencies and members of the public will be able to obtain proof of California exemption from tax directly from the FTB.

It is unclear whether organizations exempt under federal law under a group exemption can take advantage of the simplified procedure for obtaining state tax-exemption provided by AB 897.

Because California law and federal law are not in strict conformity regarding all organizations that are recognized as exempt under federal law under a group exemption, AB 404 clarifies that an organization that is part of a federal group exemption can apply for state exemption on the basis of the federal group exemption if the central organization and all of its subordinates are Internal Revenue Code Section 501(c)(3) organizations. (The Committee plans to recommend legislation next year to expand the simplified application procedure to tax-exempt organizations recognized under other sections of the Internal Revenue Code, and will work with the Franchise Tax Board on that effort.)

Finally, it is unclear that if the FTB revokes an organization's exempt status under California law if the organization could then rely upon the simplified application procedure to reinstate its exempt status by merely submitting to the FTB a copy of its determination letter from the IRS. AB 404 makes it clear that an organization whose exempt status is revoked by the FTB must apply for exempt status under the procedure that requires a determination by the FTB and cannot seek to be reinstated by simply submitting a copy of their IRS determination letter.

This bill was drafted by our legislative subcommittee, particularly Lani Meanley Collins and Lisa Runquist.

Status: Enrolled and to the Governor at 5:15 p.m. on August 31, 2009.

AB 1233 (Amended 8/17/09)

This bill amends various Corporations Code Sections. It defines the term chair to include chairperson, chairman, and chairwoman. It clarifies that directors must have voting rights and cannot vote by proxy. It also provides for an end to designator powers, allows for the bylaws to use a formula to determine the authorized number of directors, allows for the quorum requirement to include the presence of a specified director, clarifies the meaning of board committees, clarifies who the board can rely upon, allows for the treasurer to be considered CFO, allows for dissolution without a quorum, extends private foundation requirements to religious corporations, requires only liability insurance applicable to the claim for nonliability of volunteer officers and directors, and allows for unincorporated nonprofit associations to merge with nonprofit corporations.

This bill was drafted by our legislative subcommittee, particularly Nancy McGlamery, Brad Clark, Elizabeth Bluestein, Lisa Runquist, Lani Meanley Collins, Pat Whaley, Martin Trupiano, Bill Webster, and Gary Wolberg.

The amendment amended Section 5220 and parallel sections to substitute "designator" for "person or persons" and to delete language regarding the election of directors after the designator dies or ceases to exist. Similarly, Section 5222 is amended to use the word "designator" and to delete language regarding who succeeds to the right to remove.

Status: Enrolled and to the Governor at 4:15 p.m. on September 2, 2009.

SB 200 (Amended 7/7/09)

This bill would amend Penal Code Section 320.5 to delete the prohibition on advertising a raffle over the internet and to specify the information about a raffle that may be included on a website. The first amendment deleted a provision allowing photographs or video of the raffle's draw to be placed on a website. It was amended again to specify that raffle entry forms could not be submitted through the internet.

Status: Chaptered by Secretary of State on August 6, 2009.

SB 218 (Amended 9/2/09)

The California Public Records Act ("CPRA") requires state and local agencies to make their records available for public inspection and to make copies available on request unless those records are exempt from disclosure. This bill would amend the Education Code and Government Code to revise the definition of "local agency" and "state agency". The definition of local agency is expanded to include community college student body associations and auxiliary organizations established for the purpose of providing support services and specialized programs for the general benefit of a community college. The definition of state agency is amended to include California State University auxiliary organizations, University of California auxiliary organizations, and other specified entities. The bill would exempt from disclosure under the CPRA the names of individuals who donate to specified entities if those individuals request anonymity.

The bill also states that it rejects the court's interpretation of state law regarding the application of the CPRA to auxiliary organizations, such as the CSU Fresno Association at issue in *California State University, Fresno Assn., Inc. v. Superior Court* (2001) 90 Cal. App.4th 810. In this case, California State University, Fresno proposed a \$103 million multipurpose arena on its campus to be funded primarily by private donations and operated by a University-affiliated, nonprofit auxiliary corporation, California State University, Fresno Association, Inc. The court held that a nongovernmental auxiliary organization was not a "state agency" for purposes of the CPRA. The court reasoned that the words "state body" and "state agency" simply do not include a nongovernmental organization.

Status: To enrollment on September 8, 2009.

Please see <http://www.calbar.ca.gov/calbar/legislation/State%20Bar%20Bill%20Tracking-Sections.html> for more information on these bills and other pending legislation.