

Date of Hearing: April 8, 2013

ASSEMBLY COMMITTEE ON BANKING AND FINANCE  
Roger Dickinson, Chair  
AB 491 (Torres) – As Introduced: February 19, 2013

SUBJECT: Corporations: bylaws.

SUMMARY: Allows a corporation to take actions necessary to conduct the corporation's ordinary business during an emergency. Specifically, this bill:

- 1) Actions taken in advance of, or during an emergency can include:
  - a) Modifying lines of succession to accommodate the incapacity of any director, officer, employee, or agent resulting from the emergency;
  - b) Relocating the principal office;
  - c) Giving notice to a director or directors in any practical manner under the circumstances, including, but not limited to, by publication and radio;
  - d) Deeming that one or more officers of the corporation present at a board meeting is a director, as necessary to achieve a quorum;
- 2) Prohibits the board during an emergency from taking any action that requires the vote of the shareholders or an action that is outside the corporation's ordinary course of business, unless the required voted was obtained prior to the emergency.
- 3) Provides any action taken in good faith during an emergency binds the corporation and may not be used to impose liability on a corporate director, office, employee, or agent.
- 4) Defines "emergency" as any of the following:
  - a) A natural catastrophe, including, but not limited to, a hurricane, tornado, storm, high water, wind-driven water, tidal wave, tsunami, earthquake, volcanic eruption, landslide, mudslide, snowstorm, or drought, or; regardless of cause, any fire, flood, or explosion.
  - b) An attack on this state or nation by an enemy of the United States of America, or upon receipt by this state of a warning from the federal government indicating that an enemy attack is probable or imminent.
  - c) An act of terrorism or other man-made disaster that results in extraordinary levels of casualties or damage or disruption severely affecting the infrastructure, environment, economy, government functions, or population, including, but not limited to, mass evacuations.
  - d) A state of emergency proclaimed by the Governor.

- 5) Authorizes a corporation to adopt bylaws to further direct the operations of the corporation during an emergency.

#### EXISTING LAW

- 1) Establishes the Corporations Code to provide the fundamental terms and provisions for the governance of corporations. Section 200-213 relates to corporations organization and bylaws.
- 2) Defines three conditions or degrees of emergency:
  - a) "State of war emergency" means the condition which exists immediately, with or without a proclamation thereof by the Governor, whenever this state or nation is attacked by an enemy of the United States, or upon receipt by the state of a warning from the federal government indicating that such an enemy attack is probable or imminent.
  - b) "State of emergency" means the duly proclaimed existence of conditions of disaster or of extreme peril to the safety of persons and property within the state caused by such conditions as air pollution, fire, flood, storm, epidemic, riot, drought, sudden and severe energy shortage, plant or animal infestation or disease, the Governor's warning of an earthquake or volcanic prediction, or an earthquake, or other conditions, other than conditions resulting from a labor controversy or conditions causing a "state of war emergency," which, by reason of their magnitude, are or are likely to be beyond the control of the services, personnel, equipment, and facilities of any single county, city and county, or city and require the combined forces of a mutual aid region or regions to combat, or with respect to regulated energy utilities, a sudden and severe energy shortage requires extraordinary measures beyond the authority vested in the California Public Utilities Commission.
  - c) "Local emergency" means the duly proclaimed existence of conditions of disaster or of extreme peril to the safety of persons and property within the territorial limits of a county, city and county, or city, caused by such conditions as air pollution, fire, flood, storm, epidemic, riot, drought, sudden and severe energy shortage, plant or animal infestation or disease, the Governor's warning of an earthquake or volcanic prediction, or an earthquake, or other conditions, other than conditions resulting from a labor controversy, which are or are likely to be beyond the control of the services, personnel, equipment, and facilities of that political subdivision and require the combined forces of other political subdivisions to combat, or with respect to regulated energy utilities, a sudden and severe energy shortage requires extraordinary measures beyond the authority vested in the California Public Utilities Commission. (Government Code, Section 8558)

FISCAL EFFECT: None.

#### COMMENTS:

According to the sponsor, State Bar of California, Business Law Section, Corporations Committee, "Although there is no ready example of a corporation facing managerial setbacks because of an emergency, the possibility of catastrophic events effectively disabling boards cannot be ignored. Recent acts of terrorism, earthquakes, tsunamis and nuclear disasters are

timely reminders of the vulnerability of the ordinary course of business in the face of large-scale emergencies."

AB 491 would enact two provisions in California's Corporations Code, one implementing emergency powers and one implementing emergency bylaws. Currently, California corporations do not have any emergency provisions in place. In case of an emergency, this bill would allow corporations to take certain actions it might not otherwise be able to take, as well as, adopt provisions not conflicting with the articles necessary to manage business.

AB 491 is based off the Model Business Corporation Act (MBCA) which contains both a provision on emergency bylaws and emergency powers. The MBCA is a model set of laws prepared by the Committee on Corporate Laws of the Section of Business Law of the American Bar Association (ABA). This bill closely mirrors both provisions of the MBCA sections 2.07, emergency bylaws, and sections 3.03, emergency powers. AB 491 did stray from the MBCA in terms of the emergency definition but the definition in the bill combines elements from California Emergencies Services Act, Government Code 8558 and federal National Emergencies Act, 50 U.S.C. 1601.

Thirty-eight of 52 U.S. jurisdictions have adopted emergency powers provisions for for-profit corporations. Twenty-eight jurisdictions have adopted both an emergency powers provision and emergency bylaws provisions.

An example of California law that expanded authority during a disaster can be seen through domestic insurers. Under Insurance Code 688, "the Legislature declares that it is desirable for the general welfare and in particular for the welfare of insurance beneficiaries, policyholders, injured claimants and others that the business of domestic insurers be continued notwithstanding the event of a national emergency."

Since California corporations seem to have functioned appropriately without these statutes during a number of known California emergencies including earthquakes, mudslides, tsunamis, etc., the current need for the bill is unclear. The better question may be, if enacted, do these provisions carry any drawbacks or consequences? In addition, considering most states have enacted provisions to ensure corporations can conduct necessary business during a catastrophe, why has California lagged behind in implementing what seems like important provisions?

The sponsor states, "Without emergency powers and/or bylaws, a corporation may be unable to continue its business or risk a challenge to any actions taken with a lesser quorum, during an emergency. Additionally, an emergency could prevent the officers from conducting the corporation's ordinary business operations. Providing the board with the necessary powers to act in lieu of the officers or to elect temporary officers to act would be critical."

#### RECOMMENDED AMENDMENTS:

The non-profit committee of the California State Bar would like to see the bill expanded to include non-profits; therefore, the language in the bill will also be included in Corporation Code Sections, 5140, 7140 and 9140, and Sections 5151, 7151 and 9151.

This expansion seems reasonable and a number of states also provide these provisions for non-profits. Should the bill move forward, including non-profits is a positive move.

REGISTERED SUPPORT / OPPOSITION:

Support

State Bar of California, Business Law Section, Corporations Committee

Opposition

None on file.

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