

Date of Hearing: April 15, 2021

ASSEMBLY COMMITTEE ON BANKING AND FINANCE

Timothy Grayson, Chair

AB 663 (Chen) – As Amended April 7, 2021

**SUBJECT:** Corporations: electronic transmissions: bylaws: emergency powers

**SUMMARY:** This bill updates corporate governance provisions in the General Corporation Law, Nonprofit Corporation Law, and Cooperative Cooperation Law related to governance operations during an emergency and remote participation during shareholder meetings.

Specifically, **this bill:**

- 1) Modifies the definition of “electronic transmission by the corporation” to allow the communication to be sent to a recipient who has not provided a written objection to its use, rather than a recipient who has provided an unrevoked consent to its use.
- 2) Authorizes a corporate board, in anticipation of an emergency or during an emergency, to take any action it determines to be necessary to respond to an emergency, mitigate the effects of the emergency, or comply with lawful federal and state government orders, and includes in the existing definition of “emergency” an epidemic, pandemic, and disease outbreak. Removes the prohibition that a corporate board cannot, in anticipation of an emergency or during an emergency, take action that is not in the ordinary course of business.
- 3) Allows for a shareholder meeting to be conducted solely by electronic transmission if all of the shareholders consent or if the board determines it is necessary or appropriate because of an emergency.
- 4) Applies #2 and #3 described above to similar provisions in Nonprofit Corporation Law and Cooperative Corporation Law.

**EXISTING LAW:**

- 1) Defines “electronic transmission by the corporation” as communication that is (a) delivered by facsimile or other electronic means, or is posted on an electronic message board or network designated by the corporation for those communications, together with a separate notice to the recipient of the posting; or other means of electronic communication and (b) sent to a recipient who has provided an unrevoked consent to the use of those means of transmission for communications (Corp. Code Sec. 20).
- 2) General Corporations Law, Nonprofit Corporation Law, and Cooperative Corporation Law contain the following provisions related to corporate governance during an emergency:
  - a) Authorizes a corporation, nonprofit mutual benefit corporation, and cooperative corporation, in anticipation of or during an emergency, as defined, to take specified actions necessary to conduct the corporation’s ordinary business and affairs. However, a board cannot take any action that require the votes of the shareholders or is outside the ordinary course of business (Corp Code Sec. 207, Corp Code Sec. 5140 and Corp. Code Sec. 12320).

- b) Authorizes a corporation, nonprofit mutual benefit corporation, and cooperative corporation to adopt emergency bylaws to manage and conduct the ordinary business affairs during an emergency (Corp Code Sec. 212, Corp Code Sec. 5151, and Corp. Code Sec. 12331).
- 3) General Corporations Law, Nonprofit Corporation Law, and Cooperative Corporation Law contain the following provisions related to remote participation in the annual shareholder meeting or a meeting with members:
- a) Authorizes a corporation to conduct an annual shareholder meeting by electronic transmission or electronic video screen communication if specified requirements are met (Corp Code Sec. 600).
  - b) Authorizes a nonprofit mutual benefit corporation or cooperative corporation to conduct a meeting of members by electronic transmission or electronic video screen communication if specified requirements are met (Corp. Code Sec. 5510, Corp. Code Sec. 7510, Corp Code Sec. 9410).
  - c) Requires the mandated notice of a shareholder meeting to include the means of electronic mission or electronic video screen communication (Corp Code Sec. 601).
  - d) Requires the mandated notice of a member meeting to include the means of electronic mission or electronic video screen communication (Corp. Code Sec. 5511, Corp. Code Sec. 7511, Corp Code Sec. 9410).

**FISCAL EFFECT:** Unknown. This bill is keyed fiscal by Legislative Counsel.

**COMMENTS:**

1) PURPOSE

According to the author:

Restrictions imposed on group and travel activity as a result of the COVID-19 pandemic have revealed that certain provisions of the Corporations Code relating to the governance of California corporations have not kept up with technological advances, even in the absence of an emergency.

Challenges arising in the current situation have also demonstrated that existing provisions that provide flexibility to the board of directors of a California corporation during an emergency do not adequately recognize that such emergency could challenge the ability of the corporation to conduct business within the confines of “ordinary business operations.”

The amendments to the General Corporation Law, Nonprofit Corporation Law and Cooperative Corporation Law would clarify that the flexibility provided to the board of directors in an emergency extends to actions and circumstances outside the ordinary course of business as long as any such change in its operations and governance does not require shareholder or member approval.

Additionally, AB 663 would allow California corporations to utilize electronic means for holding “virtual” meetings of the shareholders or members in normal circumstances as long as it also provides a physical location for those shareholders or members wishing to participate in person and would address emergency situations that could limit, restrict, or prevent the ability of shareholders or members to meet and take action in person

## 2) BACKGROUND: ELECTRONIC COMMUNICATION BETWEEN CORPORATIONS AND SHAREHOLDERS

Current law sets the rules for the use of electronic communications between corporations and their shareholders and members. While a corporation may use electronic transmission to communicate with shareholders, it must currently receive affirmative consent of its shareholders for that communication to be valid, and the author argues this is not in line with how the parties communicate today. With the continued improvement and availability of online communication, shareholder-corporation communication has shifted to be primarily online.

## 3) BACKGROUND: EMERGENCY POWERS

AB 491 (Torres), Chapter 255, Statutes of 2013, granted California corporations additional flexibility to continue governance during times of emergency. AB 491 was part of a larger effort to enact model legislation across the country to give for-profit corporations additional, but limited, emergency powers. AB 491, which this bill builds upon, provided two key emergency powers:

- A) *Emergency bylaws.* A corporation may develop separate “emergency bylaws” that help it manage and conduct its ordinary business affairs (such as procedures for calling a board meeting and determining quorum requirements). These bylaws do not allow the corporation to take any action that requires the vote of the shareholders or is otherwise not in the “ordinary course of business.”
- B) *Emergency powers.* AB 491 also grants a corporation limited emergency powers to allow it to conduct ordinary business in anticipation of or during an emergency. Those powers are discretely defined, and a corporation may not take action that requires the vote of the shareholders or is otherwise not in the “ordinary course of business.”

The author argues that both these emergency powers, while important, are limited and at odds with the presence of an emergency. A corporation can only take any action that is the ordinary course of business, but an emergency may require a corporation to do activities beyond the scope of such business. The author gives an example of a car manufacturer shifting to produce ventilators during the COVID-19 pandemic as an example of an emergency decision outside the scope of ordinary business.

## 4) BACKGROUND: REMOTE SHAREHOLDER MEETINGS

The annual shareholder meeting is a key mechanism through which shareholders can shape the direction of a company. At this meeting, which is required under state law, a shareholder can vote on a range of issues, including board appointments, executive compensation, and dividend payments.

State law and a corporation's bylaws shape the specific meeting requirements for corporations. In California, the corporation's bylaws can specify where and when that meeting takes place, for example, but the meeting must adhere to certain standards around notification and participation. A corporation must provide a written notice of the meeting at least 10 days before the meeting (but not more than 60 days before) and include specific information including the place, time, and means of participation.

Current law permits remote participation in shareholder meetings as long as the corporation adheres to certain process rules and shareholders consent to this type of participation. For example, the corporation must implement "reasonable measures" to provide shareholders or their proxy the opportunity to participate in the meeting and to vote on matters, and the corporation must record the vote or action taken by a shareholder who is participating remotely.

The author argues that current rules around the availability of remote annual shareholder meetings are too rigid and provide little flexibility. The author notes that all shareholders must provide consent for a fully remote shareholder meeting, and there is little wiggle room for how a corporation can conduct a shareholder meeting in an emergency.

## 5) CORPORATE GOVERNANCE AND COVID-19

The COVID-19 crisis presented practical and logistical challenges for companies complying with laws and rules around remote participation in shareholder meetings. When the COVID-19 crisis emerged in late February 2020 and it became widely understood that social distancing and remote work would be key to combatting the virus, some corporations had already issued their shareholder notices on the location, time, and method of participation. Current rules around notification timelines and shareholder approval of remote participation meant that companies had little flexibility to pivot away from in-person meetings.

In response to this dilemma, the Governor issued Executive Order (EO) N-40-20 to, among many of its provisions, ease requirements around in-person shareholder meetings. The EO specifically states:

For any shareholder meetings that already have been scheduled, or must occur before June 30, 2020, the requirements in Corporations Code sections 20 and 600 to request and receive the consent of shareholders for meetings of shareholders to be held by electronic transmission or by electronic video screen communication are hereby suspended, and the requirement in Corporations Code section 601 to provide written notice of such meetings is hereby suspended, to the extent that a corporation has provided notice to its shareholders that a meeting will occur at a physical location and subsequently provides notice by a press release, website posting and other means reasonably designed to inform shareholders that the meeting will occur by electronic transmission or by electronic video screen communications.

## **REGISTERED SUPPORT / OPPOSITION:**

### **Support**

None

**Opposition**

None

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