



BUSINESS LAW SECTION

NONPROFIT & UNINCORPORATED ORGANIZATIONS COMMITTEE
THE STATE BAR OF CALIFORNIA
180 Howard Street
San Francisco, CA 94105-1639
<http://www.calbar.org/buslaw/nonprofits/>

ELECTRONIC TRANSMISSION

LEGISLATIVE PROPOSAL (BLS-2009-03)

TO: Office of Governmental Affairs
FROM: Lisa A. Runquist, Chair
Business Law Section (the "Section") Nonprofit & Unincorporated Organizations
Committee (the "Committee")
DATE: July 16, 2008
RE: Proposal to amend California Corporations Code Section 20

SECTION ACTION AND CONTACTS

Date of Approval by Section Executive Committee (the "Executive Committee"): June 6, 2008
Approval Vote:

For: 16 Against: 0

Date of Approval by Legislative Subcommittee of the Executive Committee: July 9, 2008
Approval Vote:

For: 6 Against: 0

Date of Approval by the Committee: May 2, 2008
Approval Vote:

For: 9 Against: 0

Date of Approval by Legislative Subcommittee of the Committee: May 30, 2008
Approval Vote:

For: 7 Against: 0

Executive Committee Contact:¹	Committee Contact:¹
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¹ Contact information is as of the date submitted. Contact information for the 2008-09 State Bar year is contained in the Supplemental Contacts Information sheet at the end of this document.

HISTORY, DIGEST AND PURPOSE

This Proposal amends Corporations Code Section 20 to allow corporations to use electronic means of communication with greater ease.

History

Section 20 of the Corporations Code, effective as of January 1, 2005, defines “electronic transmission by the corporation” and concludes with the following sentence:

However, an electronic transmission by a corporation to an individual shareholder or member under this code is not authorized unless, in addition to satisfying the requirements of this section, the transmission satisfies the requirements applicable to consumer consent to electronic records as set forth in the Electronic Signatures in Global and National Commerce Act (15 U.S.C. Sec. 7001(c)(1)) [E-Sign Act].

In addition, as of January 1, 2005, Corporations Code Section 5079 defines “written” or “in writing” to include “facsimile, telegraphic, and other electronic communication as authorized by this code, including an electronic transmission by a corporation that satisfies the requirements of Section 20.”

Proposal and Reasons for the Proposal

Corporations Code Section 20, requiring satisfaction of the requirements applicable to consumer consent to electronic records as set forth in the E-Sign Act, impacts many of the uses of the changes relating to electronic transmissions. For example, for mutual benefit corporations, this would include Section 7211, which allows board members to participate in a meeting through the use of electronic transmission by and to the corporation; Section 7511, which authorizes notices of member meetings by electronic transmission by the corporation; and Section 7513, which allows ballots and any related material to be sent by electronic transmission by the corporation. The concluding sentence of Section 20 also similarly impacts public benefit and religious corporations to the extent that they have members, as well as for-profit corporations.

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 thicket of 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 constraints of the federal E-Sign Act are not quite appropriate for electronic transmissions by corporations under the California Corporations Code. In fact, even if they were,

it would be better if the actual requirements were in the Corporations Code rather than requiring people to go and find and then apply the federal law. 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. As a result, the Proposal would provide a workable standard in lieu of the E-Sign Act, while using it as a general guide.

The reasoning for the specific changes made by the Proposal includes the following:

1. The final sentence of Section 20 would now apply to all members and shareholders other than officers and directors (rather than just to individual shareholders and members). At the same time, in order to make it clear that officers and directors of the transmitting corporation are not subject to the additional requirements of the final sentence of the section (presumably because they are "insiders" or are more closely identified with management of the corporation than ordinary shareholders or members), the Proposal adds appropriate parentheticals to that effect in both the first sentence and the final sentence.

2. The final sentence now refers to providing a "clear statement" (from the E-Sign Act) but leaves out the term "conspicuous" from the E-Sign Act because it may be considered redundant or not susceptible of an easy definition.

3. Items (i), (ii) and (iii) added in the final sentence are essentially compilations of the significant and practical E-Sign Act requirements in an easy to understand format.

4. The Proposal adds "written" between "unrevoked" and "consent" in (b) of the first sentence because we believe it should be a requirement. Corporations Code Sections 8 and 5079 (quoted in the History section) provide definitions of "writing" or "in writing" and "written."

APPLICATION

If enacted, the proposed legislation would become effective in 2010.

PENDING LITIGATION

We are not aware of any specific pending litigation that would be affected by this Proposal.

LIKELY SUPPORT AND OPPOSITION

We anticipate support from corporations organized under the laws of California but have not taken any steps to assess the potential for such support, much less solicit it. We are unaware of any specific segments that might oppose this Proposal.

FISCAL IMPACT

None.

GERMANENESS

The matters addressed in this Proposal require the special knowledge, training, experience or technical expertise of the Section and of members of the Committee, specifically as the provisions of Section 20 of the Corporations Code require modification in order for them to be readily usable by nonprofit corporations. The Committee has also consulted with the Corporations Committee of the Section as to the impact that such changes would have on general corporations for which its members have special knowledge, training, experience, and technical expertise. The position advanced would promote clarity, consistency, and comprehensiveness in the law.

TEXT OF PROPOSAL

SECTION 1. Section 20 of the Corporations Code is amended to read:

§ 20. “Electronic transmission by the corporation” means a communication (a) delivered by (1) facsimile telecommunication or electronic mail when directed to the facsimile number or electronic mail address, respectively, for that recipient on record with the corporation, (2) posting on an electronic message board or network which the corporation has designated for those communications, together with a separate notice to the recipient of the posting, which transmission shall be validly delivered upon the later of the posting or delivery of the separate notice thereof, or (3) other means of electronic communication, (b) to a recipient who has provided an unrevoked consent to the use of those means of transmission for communications under or pursuant to this code, and (c) that creates a record that is capable of retention, retrieval, and review, and that may thereafter be rendered into clearly legible tangible form. However, an electronic transmission *under this code* by a corporation to an individual shareholder or member *who is a natural person (and if an officer or director of the corporation, only if communicated to such person in that person’s capacity as a shareholder or member)* ~~under this code~~ is not authorized unless, in addition to satisfying the requirements of this section, the transmission *has been preceded by or includes a clear written statement to the recipient as to (i) any right of the recipient to have the record provided or made available on paper or in nonelectronic form, (ii) whether the consent applies only to that transmission, to identified categories of communications or to all communications from the corporation, and (iii) the procedures the recipient must use to withdraw consent* ~~satisfies the requirements applicable to consumer consent to electronic records as set forth in the Electronic Signatures in Global and National Commerce Act (15 U.S.C. Sec. 7001(c)(1)) [E-Sign Act].~~

SUPPLEMENTAL CONTACTS INFORMATION
(2008-09 STATE BAR YEAR)

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