BUSINESS LAW SECTION

CORPORATIONS COMMITTEE
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TO: Office of Governmental Affairs

FROM: Corporations Committee of the Business Law Section of the State Bar of California

RE: S.B. 1409 Senator Ackerman

DATE: April 7, 2008

Committee Position:

☒ Support

Date position recommended: April 4, 2008

Corporations Committee vote: 16 in favor none opposed.

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I. Statement of Position

The Corporations Committee (the "Committee") of the Business Law Section of the State Bar of California (the "Section") welcomes this opportunity to comment upon SB 1409 (the "Bill"). This is the first statement of position that the Committee has submitted on this matter. We appreciate having had the opportunity to work with Senator Ackerman's office on the text of the Bill pursuant to approval procedures of the State Bar for submission of legislative proposals.

A. Description of SB 1409.

The proposed revisions to Section 1501(a) of the California Corporations Code (the "Code") would permit a corporation that has an outstanding class of securities registered under Section 12 of the Securities Exchange Act of 1934, as amended (the "Exchange Act") to satisfy the obligation to send an

annual report to shareholders of record under Section 1501 of the Code by complying with Rule 14a-16 of the Exchange Act. The proposed revisions would not affect the contents of the annual report or otherwise change the requirements of Section 1501.

B. The Committee's Position.

The Committee fully supports SB 1409 for the following reasons.

On July 26, 2007, the Securities and Exchange Commission (the "SEC") adopted amendments to the proxy rules under the Exchange Act that provide an alternative method for corporations to furnish materials relating to meetings of shareholders (referred to as "proxy materials"), including the proxy statement, proxy card and annual report, to shareholders by posting them on an internet website and providing shareholders with written notice of the availability of the proxy materials at least 40 calendar days before the meeting date. Under this "notice and access" system, corporations are required to make copies of the proxy materials available to shareholders on request, at no charge to shareholders within three business days after receiving the request, even if the request is made after the date of the shareholder meeting or corporate action to which the proxy materials relate. The obligation of a corporation to furnish the proxy materials extends for one year after the conclusion of the meeting or corporate action.

The SEC's recently amended proxy rules allow corporations to benefit from technological advancements by providing shareholders with access to proxy materials electronically. However, the existing provisions of Sections 1501(a) and 20 of the Code significantly limit the ability of a corporation to take advantage of the new SEC rules by requiring a corporation to obtain an unrevoked consent from a shareholder of record for the electronic receipt of materials and to comply with the requirements applicable to consumer consent to electronic records under the Electronic Signatures in Global and National Commerce Act (15 U.S.C. Sec. 7001(c)(1)). These additional requirements of obtaining an unrevoked consent and complying with the Electronic Signatures in Global and National Commerce Act have the practical effect of causing corporations subject to Section 1501 to deliver their proxy materials to shareholders of record by traditional hard copy mailings.

Since adoption of the new SEC proxy rules, Section 1501(a) of the Code, when read together with Section 20 of the Code, has been frequently cited by practitioners as an impediment to transacting business by corporations subject to it. The existing requirement for the use of an electronic transmission by a corporation of an annual report under Section1501(a) will make it impractical for corporations to fully avail themselves of the new SEC rules. As a result, California corporations and corporations headquartered in California will not be able to take full advantage of technological improvements that corporations in other states will be. In 2004, California was at the forefront of technological advancements with the adoption of Section 20 and amendment of Section1501(a) to permit electronic transmissions of the annual reports. However, absent the proposed amendment to Section1501(a), California will fall behind other states in its promotion and use of technology as a means to communicate with shareholders.

In addition, corporations that are subject to by Section1501(a) of the Code will be unable to achieve the cost savings afforded by the new SEC proxy rules. A recent illustration prepared by Morrow & Co., Inc., and posted by The Corporate Counsel estimated that potential annual savings from corporations taking advantage of the new SEC proxy rules would be approximately $76,000 a year beginning in only the second year of adoption[1]. The inconsistency between California law and federal law

[1] Based on an assumption of 100,000 total shareholders and current costs of $455,000 per year.

will place California corporations at a competitive disadvantage and may discourage corporations from incorporating in California or remaining incorporated in California and it may discourage foreign corporations from establishing their headquarters in California or motivate foreign corporations to move their headquarters out of California.

II. GERMANENESS

The Committee believes that its members have the special knowledge, training, experience and technical expertise to provide helpful comments on the Bill and that the positions advocated herein are in the best interests of listed companies and their shareholders.

III. CAVEAT

This statement is that only of the Committee, as authorized through approval procedures of the State Bar. The positions expressed herein have not been adopted by the Section or its overall membership or by the State Bar's Board of Governors or its overall membership, and are not to be construed as representing the position of the State Bar of California. There are currently more than 8,800 members of the Section. Membership in the Section is voluntary and funding for its activities, including all legislative activities, is obtained entirely from voluntary sources.

cc: Steven K. Hazen
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