

SENATE JUDICIARY COMMITTEE
Senator Thomas Umberg, Chair
2021-2022 Regular Session

AB 663 (Chen)
Version: June 10, 2021
Hearing Date: June 29, 2021
Fiscal: Yes
Urgency: No
AWM

SUBJECT

Corporations: electronic transmissions: bylaws: emergency powers

DIGEST

This bill expands corporations' powers to act during an emergency, as defined, and expands the circumstances in which they may hold meetings via remote means.

EXECUTIVE SUMMARY

The COVID-19 pandemic rendered many traditional means of doing business – such as physical mail and in-person meetings – undesirable, if not impossible as a result of emergency orders. Current law grants corporations some authority to act during an emergency, but still places limits on electronic communications and remote meetings that impeded corporate action during the pandemic. This bill would give corporations additional flexibility in several ways: by clarifying that a corporation may take emergency action in a pandemic or epidemic, or in a state of emergency declared by the governor of this state; by authorizing corporations to take actions outside the ordinary course of the corporation's business if necessary to respond to an emergency or comply with emergency orders; and by allowing corporations to hold meetings entirely remotely where all shareholders have consented or when the board declares it necessary because of a pending emergency. As currently in print, the bill also authorizes corporations to move from an opt-in system of electronic communications with shareholders to an opt-out system; due to concerns about whether the opt-out system would provide adequate notice to shareholders who wish to do so, the author has agreed to accept amendments removing the changes to the electronic transmission statute. This analysis discusses the bill as it will be amended, without any changes being made to the requirement that shareholders affirmatively consent to electronic transmissions.

This bill is sponsored by the Business Law Section of the California Lawyers Association. There is no known opposition. This bill passed out of the Senate Banking and Financial Institutions Committee with a 9-0 vote.

PROPOSED CHANGES TO THE LAW

Existing law:

- 1) Establishes the General Corporation Law, the Nonprofit Corporation Law, and the Cooperative Corporation Law to regulate select types of corporations incorporated in California (collectively, the Corporations Laws). (Corp. Code, div. 1, §§ 100 et seq.; *id.*, div. 2, §§ 5000 et seq.; *id.*, div. 3, part 2, §§ 12200 et seq.)
- 2) Provides, within the Corporations Laws, provisions relating to corporate governance during an emergency, including:
 - a) Authorizing a corporation, nonprofit 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; but the corporation may not take any action that requires the votes of its shareholders or is outside its ordinary course of business. (Corp. Code, §§ 207, 5140, 12320.)
 - b) Authorizing a corporation, nonprofit corporation, and cooperative corporation to adopt emergency bylaws to manage and conduct the ordinary business affairs during an emergency. (Corp. Code, §§ 212, 5151, 12331.)
- 3) Defines, for purposes of the emergency governance provisions, "emergency" to mean any of the following events or circumstances as a result of which, and only so long as, a quorum of the corporation's board of directors cannot be readily convened for action:
 - 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 manmade 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 a governor or by the President. (Corp. Code, §§ 207(i)(5), 5140(n)(5), 7140(m)(5).)
- 4) Authorizes corporations to permit remote participation in meetings as follows:
 - a) For general corporations, a corporation may permit attendance at annual shareholder meetings by electronic transmission or electronic video screen communication, provided that the corporation provides remotely attending shareholders with specified notice and an opportunity to be heard, and

- maintains a record of remotely made statements (including votes). (Corp. Code, §§ 600-601.)
- b) For nonprofit and cooperative corporations, such a corporation may permit attendance at a meeting of the members by electronic transmission or electronic video screen transmission, provided that the corporation provides remotely attending members with specified notice and an opportunity to be heard, and maintains a record of remotely made statements (including votes). (Corp. Code, §§ 5510-5511, 7510-7511, 9410-9411, 12460-12461.)

Existing executive orders:

- 1) Suspend, for general corporations and in light of the COVID-19 pandemic, restrictions on virtual shareholder meetings, provided that the corporation affords shareholders a reasonable opportunity to participate, as follows:
 - a) The corporation may not impose unreasonable obligations on shareholders seeking to participate.
 - b) The corporation must provide shareholders, as closely as reasonably possible, an opportunity to participate equivalent to the ability of in-person attendees at the corporation's last in-person meeting, including any ability to vote, ask questions, be heard by other shareholders, or advance proposals.
 - c) If the meeting considers a significant business transaction, controversial proposal, counter-solicitation, or other matter of a sort not considered at the last in-person meeting, the corporation shall provide as closely as reasonably possible an equivalent ability to participate as in-person attendees at the last in-person meeting to consider such a manner. (Governor's Exec. Order No. N-40-20 (Mar. 30, 2021); Governor's Exec. Order No. N-80-20 (Sept. 23, 2020).)

This bill:

- 1) Permits a general corporation, nonprofit corporation, or cooperative corporation, in anticipation or during an emergency, to take any action that it determines to be necessary or appropriate to respond to the emergency, mitigate the effects of the emergency, or comply with lawful federal and state government orders, unless the action requires a vote of the shareholders.
 - a) The bill also expands and clarifies the definition of a qualifying emergency to include epidemic, pandemic, disease outbreak, an attack on or within the state or on the public security of its residents, or any state of emergency proclaimed by the governor of this state. The bill retains the requirement that the emergency provisions apply only as long as the emergency prevents a quorum of the directors being readily convened for action.
- 2) Permits a general corporation to hold annual shareholder meetings, and a nonprofit corporation and cooperative corporation to hold meetings, entirely via teleconference or other remote means when either (1) all shareholders consent, or (2) the board determines it is necessary to do so because of an emergency, as defined. A

corporation holding an entirely remote meeting must satisfy the existing statutory requirements for video participation and implement measures to verify that each person participating remotely is a shareholder or proxyholder.

- 3) Permits a general corporation, nonprofit corporation, and cooperative corporation to provide notice of a shareholder meeting or any report electronically if the board determines it is necessary and appropriate because of an emergency
- 4) Makes other nonsubstantive technical and conforming changes to the Corporations Code.

COMMENTS

1. Author's comment

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. This bill authorizes a corporation to hold fully remote shareholder or member meetings when all the shareholders or members have consented

Current law does not authorize a corporation to hold fully remote (i.e., without an in-person option) shareholder or member meetings. This bill gives general, nonprofit, and cooperative corporations the option to hold a fully remote annual or member meeting when *all* shareholders have consented to doing so. As it stands, a corporation must provide an in-person option even if all of the participants would prefer to attend remotely; this provision thus allows corporations to eliminate an in-person attendance option that no one will use.¹ At the same time, because the bill requires unanimous consent of the shareholders or members in order for the corporation to eliminate the in-person option, shareholders or members wishing to attend meetings will retain the right to do so.

3. This bill gives general, nonprofit, and cooperative corporations greater flexibility during an emergency

As the author notes, the COVID-19 pandemic revealed ways in which existing laws did not account for an emergency that made in-person gatherings impossible. While California's Corporations Laws provide corporations some leeway to act during a state of emergency, current law limits what steps a board may take during an emergency and does not enable corporations to shift to remote meetings during an emergency that prevents the board from meeting in person. This bill would amend the Corporations Laws to give corporations increased leeway to act in such circumstances.

First, this bill expands a corporation's existing emergency powers authorizing the board to take actions it deems necessary during an emergency to respond to the emergency, mitigate the effects of the emergency, or comply with lawful federal and state government orders, to include actions that are within the corporation's ordinary course of business. This would enable corporations to, for example, pivot to a new form of business in response to an emergency – as many of California's businesses did in the pandemic, by switching from making clothing to making masks, or from making alcoholic beverages to making hand sanitizer. The bill retains, however, the existing prohibition on acts that require a shareholder vote, thereby ensuring that shareholders' rights are not compromised during an emergency.

Next, this bill expands the definition of an emergency under which the Corporations Laws' emergency powers take effect. Currently, the Corporations Laws do not include epidemics and pandemics within the definitions of "emergency"; the Corporations Laws are also ambiguous as to which proclaimed states of emergency qualify as an emergency under the statutes. This bill adds epidemic, pandemic, and disease outbreak to the definition of emergency and clarifies that an emergency proclaimed by the governor of this state, a person serving as governor under the California Constitution

¹ Corp. Code, §§ 600, 5510, 7510, 9411, 12460.

and section 12058 of the Government Code, or the President of the United States will trigger a corporation's emergency powers. These added definitions and clarifications should ensure that corporations know when they can, and cannot, exercise emergency measures. The bill does not affect the existing protections against abuse of the emergency powers authorization, however: because the bill retains the Corporations Laws' existing limitations on emergency powers – requiring not only that an emergency is taking place, but that the emergency itself prevents a quorum of the board from readily convening – its new categories should not give overly broad discretion to board members wishing to exercise emergency powers.

Finally, this bill allows general corporations to hold annual meetings, and nonprofit and cooperative corporations to hold meetings, entirely by remote means when the board deems the remote meeting necessary in light of an emergency. This provision differs from the remote meeting provision described in Part 2 because it allows the corporation to hold a fully remote meeting even without shareholder approval under emergency circumstances. The bill keeps in place existing protections relating to providing remotely attending persons with a means to speak and preserving records of remote meetings, ensuring that, even in emergency circumstances, shareholders and members will have an opportunity to be heard.

4. Amendments

As noted above, the bill as currently drafted modifies the existing rules regarding when a corporation may communicate with shareholders and others by switching from an opt-in approach – requiring shareholders and others to affirmatively consent to electronic communications – to an opt-out approach, which would allow electronic communications unless a shareholder specifically provides a written objection. Because the opt-out approach did not contain adequate safeguards for shareholders who might not have realized that the default for corporate communications had changed to electronic transmissions, and might not have been aware of how to provide the requisite objection to receiving electronic transmissions, the author has agreed to remove this provision from the bill. The bill will thus be amended to strike the reference to Corporations Code section 20 from the title, strike the current Section 1 of the bill, and renumber the remaining sections accordingly.²

SUPPORT

California Lawyers Association, Business Law Section

OPPOSITION

None known

² These amendments may also include technical, nonsubstantive changes recommended by the Office of Legislative Counsel.

RELATED LEGISLATION

Pending Legislation: None known.

Prior Legislation:

SB 351 (Senate Banking and Financial Institutions Committee, Ch. 98, Stats. 2015) provided cooperative corporations with the same emergency authority granted to general and nonprofit corporations.

AB 491 (Torres, Ch. 255, Stats. 2013) granted general and nonprofit corporations the authority to take certain actions in emergencies.

PRIOR VOTES:

Senate Banking and Financial Institutions Committee (Ayes 9, Noes 0)

Assembly Floor (Ayes 77, Noes 0)

Assembly Appropriations Committee (Ayes 16, Noes 0)

Assembly Banking and Finance Committee (Ayes 12, Noes 0)
