



Why Section 25100(o) Certification Still Matters (Part 3); Big Whistleblower Award By OSHA

September 15, 2011 by [Keith Paul Bishop](#)

In two earlier posts, I wrote about why the Commissioner's certification of a national securities exchange pursuant to Corporations Code § 25100(o) still matters. Today, I discuss yet another reason why certification continues to be relevant. This time the issue involves dissenters' rights under the California General Corporation Law.

Dissenters' Rights

Chapter 13 of the California Corporations Code establishes the right of certain shareholders to obtain the "fair market value of its shares when the approval of the outstanding shares (§ 152) is required for a reorganization (§ 181) pursuant to § 1201(a), (b), (e) or (f). [For a discussion of the difference between "fair value" and "fair market value" see ["Fair Is Foul, And Foul Is Fair", But Are "Fair Value" And "Fair Market Value" Synonymous?](#)]

A shareholder can only obtain the fair market value by complying with Chapter 13. In particular, a shareholder's shares must be "dissenting shares" as defined in § 1300(b). With certain exceptions, shares listed on any national securities exchange certified by the Commissioner pursuant to § 25100(o) do not qualify as "dissenting shares". The rationale for the exclusion is that when shares have a ready and liquid market, there is no need for the additional protection of dissenters' rights. For a table listing the exchanges certified by the Commissioner, see [California and the Certification of Stock Exchanges](#).

New Securities Exchanges

I recently wrote that the [BATS Exchange, Inc.](#) and the [C2 Options Exchange, Incorporated](#) have separately submitted petitions to be included on the list of national securities exchanges in Rule 146(b). Inclusion in Rule 146(b) would give securities listed or authorized for listing (as well as securities of the same issuer equal or senior to those listed securities) status as "covered securities" for purposes of Section 18 of the Securities Act of 1933. As part of the National Securities Markets Improvement Act of 1996 (aka the "NSMIA"), Congress preempted state authority to require qualification or registration of "covered securities". Status as a "covered security", however, is not the same as being listed on a national securities exchange certified by the Commissioner pursuant to Section 25100(o).

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Nevada's Approach

Nevada, like California, also has a "market" exception to dissenters' rights. Under NRS 92A.390(1), there is no right to dissent with respect to "covered securities". NRS 92A.390(1). For more on Nevada's treatment of dissenters' rights, see Chapter 13 of Bishop & Zucker, *Nevada Corporations and Limited Liability Companies*.

Pseudo-Foreign Corporations

Finally, dissenters' rights aren't limited to shareholders of California corporations. A foreign corporation (Section 171) that satisfies the tests in Section 2115(a) will be subject Chapter 13, unless it has outstanding securities listed on the New York Stock Exchange, the NYSE Amex, the NASDAQ Global Market or the NASDAQ Capital Market, or all of its voting shares (other than directors' qualifying shares) are owned directly or indirectly by a corporation(s) not subject to Section 2115. Note that the exception is available with respect to exchanges listed in the statute – not exchanges certified by the Commissioner under Section 25100(o).

Big Whistleblower Award Announced By OSHA

Expectedly, a great deal of attention has been focused on the Dodd-Frank Act's whistleblower provisions and the SEC. Before Dodd-Frank, however, Congress gave the Department of Labor's [Occupational Safety and Health Administration](#) authority to enforce the whistleblower provisions of the Sarbanes-Oxley Act and a score of other statutes. Yesterday, OSHA [announced](#) that it had found Bank of America in violation of the Sarbanes-Oxley Act's whistleblower protection provisions and ordered it to reinstate a terminated employee and pay \$930,000.

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