



California Corporate & Securities Law

Will the “Real” Directors Please Take Your Seats?

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As discussed in this earlier [post](#), the Securities and Exchange Commission’s new proxy access requirements will likely bring attention to director qualification requirements. The California General Corporation Law does not require that a person satisfy any particular qualification requirements to hold office as a director. The bylaws may, however, impose qualification requirements. Cal. Corp. Code § 212(b)(4). These qualifications should be upheld if they (1) are reasonable; and (2) do not contravene the corporation’s articles of incorporation or California law. *Olinco v. Merle Norman Cosmetics, Inc.* 200 Cal. App. 2d 260, 266–67 (1962) (case involving a Nevada corporation). Even if valid, questions are likely to arise concerning when and how these qualifications should be met.

My view is that qualification requirements should generally be determined at the time of election because post election determinations beg the question of who will be making the determination. This is illustrated in the following example:

A corporation’s bylaws impose a director qualification requirement. At the annual meeting of shareholders, two slates of candidates are nominated. One slate is comprised of incumbent directors and the other slate is comprised of nominees by a dissident shareholder. After the vote, the inspector of elections certifies that each of the shareholder’s nominees has achieved a plurality vote. However, the incumbent directors then challenge the election of the stockholder’s nominees on the basis that each failed to meet the qualifications specified in the bylaws. Who makes the call on which slate is seated?

The incumbent directors will argue that they should make the determination because they continue in office until their successors have not been elected *and qualified*. Cal. Corp. Code § 301(b). The shareholder’s nominees, however, will argue that they should make the determination because they meet the qualifications and the term of the incumbent directors has ended.

While some might observe that this is an extreme example of the entire board being replaced, the purported election of even a single nominee creates a chicken and egg problem as well. If that nominee is elected and meets the corporation’s qualification requirements, then the nominee’s term has begun and she should be given notice of, and allowed to participate in, any board meeting in which candidates’ qualifications are determined. On the other hand, if she isn’t qualified, she has no right to be at that meeting.

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