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Amendment to California Law Enables California Corporations to Take Full Advantage of New Federal E-Proxy Rules

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by [William D. Sherman](#)

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Executive Summary

Background.

California companies have, as a practical matter, been unable to take advantage of the time and cost savings of the SEC's new electronic proxy delivery rules. California law has historically required a California company to mail a hard copy of its annual report to each of its shareholders unless the company has received consent from the shareholder to deliver the annual report in electronic form. Securing these shareholder consents has proven to be expensive and impractical for companies. As a result, even though the proxy materials themselves could be delivered electronically to shareholders of California companies, the requirement of a separate mailing of a hard copy of the annual report, which must precede or accompany the proxy materials for annual meetings (or special meetings in lieu of annual meetings), has rendered illusory the time and cost savings from electronic delivery of the other shareholder meeting materials.

What Changed.

On July 22, 2008, for companies with an outstanding class of securities registered under the Securities Exchange Act of 1934 that comply with the federal e-proxy rules, the California legislature eliminated the requirement of shareholder consent necessary to provide an electronic copy of a company's annual report to shareholders. As a result, these California companies can now take full advantage of the time and cost savings of the federal e-proxy rules.

Discussion

Pursuant to the SEC's amended proxy rules (SEC Release No. 34-56135 adopted July 26, 2007, <http://www.sec.gov/rules/final/2007/34-56135.pdf>), all public companies are now required to post their proxy materials on a website and to provide their shareholders with notice of the availability of the materials on that website. Large accelerated filers, not including registered investment companies, have been required to comply with the new federal e-proxy rules since January 1, 2008. Registered investment companies, issuers that are not large accelerated filers, and soliciting persons other than issuers must comply with the rules on or after January 1, 2009, but may comply with them prior to that date.

The California Problem

The SEC has made concerted efforts to modernize the proxy delivery process by, among other things, eliminating the need for shareholder consents to electronic delivery of proxy materials. California corporations, as well as non-California corporations that have their principal executive offices in California or customarily hold meetings of their boards of directors in California, have been unable to take full advantage of the more permissive federal electronic proxy delivery rules until the July 22, 2008 amendment to California Corporations Code §1501(a).

Prior to its recent amendment, the California Corporations Code required that companies subject to §1501 that sent electronic copies of annual reports (and any accompanying material) to

shareholders must comply with California Corporations Code §20, which, unlike the federal rules, requires “informed consent” prior to use of electronic communications. This more restrictive California procedure created a conflict for those California companies choosing to fully avail themselves of the “notice and access” model permitted by the new federal rules.

On July 22, 2008, California’s legislature resolved this conflict by amending §1501(a) to provide that California companies are no longer required to fulfill the requirements of §20 when electronically delivering their annual reports to shareholders. Specifically, public companies governed by §1501 (a) are no longer required to receive an unrevoked consent from their shareholders, nor are they required to comply with the federal E-SIGN Act (15 U.S.C. §7001(c)) prior to delivering electronic, rather than written, annual reports to their shareholders via the SEC’s “notice and access” model so long as such companies comply with the federal e-proxy rules.

Hard Copy Notice Still Required.

In addition to sending a notice of website availability of the annual report or other proxy materials, companies subject to California Corporations Code §601 continue to be required to mail a paper notice to shareholders regarding any forthcoming shareholders’ meeting. The §601 notice may be incorporated with, or sent along with, the notice of website availability required by the federal e-proxy rules. Though shareholders may receive the notice of website availability via email, companies will only be permitted to deliver the §601 notice of a shareholder meeting electronically if the §20 requirements, including unrevoked consent and compliance with the federal E-SIGN Act, are fulfilled by these companies prior to their electronic transmissions of such notices. As a result, most companies will continue to send the short written notice of shareholder meetings to shareholders.