



Plowing Through The Ambiguities Of California's Record Date Statute

Posted In [Corporate Governance](#)

5/4/2011

Corporations Code Section 603(a) provides the basic authority for shareholders of California corporations to take action by written consent (unless the articles provide otherwise). Section 701 establishes the rules for determining the record date for corporate actions involving shareholders, including shareholder action by written consent. Although the mechanics of establishing a record date may seem so mundane as to warrant no special attention, the California statute is rife with ambiguity.

When the Board Fixes the Record Date

Under Section 701(a), the board of directors may fix a record date, subject to two limitations. First, the board must fix the record date in advance. Second, the record date must not be more than 60 days prior to the "action". Delaware, in contrast, provides that the record date for consents be not more than 10 days after the date upon which the board's resolution fixing the record date is adopted. DGCL § 213(b).

The reference to "action" in Section 701(a) raises the first ambiguity. What did the legislature mean by "action"? One interpretation is that "action" refers to the date of shareholder action by consent. This interpretation would parallel Section 701(a)'s requirement that a record date for a shareholder meeting be not more than 60 nor less than 10 days before the meeting. However, the date of shareholder action by consent may itself be subject to debate – is it the date when the statutorily requisite number of consents are signed or when those consents are provided to the corporation? Another interpretation of "action" might be that the statute is intended to refer to the date of the action being authorized by the shareholders. A problem with both of these interpretations is that the board may not know when the "action" will occur and thus whether the date fixed is within the 60-day period prescribed by the statute. I don't think "action" can refer to the board's action (ala Delaware) because Section 701(a) requires that the record date be fixed in advance.

Please contact [Keith Paul Bishop](#) at Allen Matkins for more information kbishop@allenmatkins.com

When the Board Does Not Fix a Record Date

If the board fails to fix a record date, Section 701(b)(2) provides that the record date for determining shareholders entitled to give consent to corporate action is the day on which the first written consent is “given”. This rule applies when “no prior action by the board has been taken”. Presumably, the legislature intended this phrase to mean when the board has not taken prior action to fix a record date rather than when the board has not taken prior action on the same matter on which the shareholders are taking action. Delaware’s statute avoids this ambiguity because its scheme is based on whether “prior action by the board of directors is required by this chapter”. DGCL § 213(b).

The reference to “given” in Section 701(b)(2) is also ambiguous. The most reasonable interpretation (at least to me) seems to be that a consent is “given” when it is delivered to the corporation rather than when it is dated. This would be consistent with the 2004 amendment to Section 603(a) which substituted “provided by the holders” rather than “signed by the holders”. [Stats. 2004, c. 254 \(SB 1306\)](#). (For the legislative intent with respect to the 2004 legislation, one must read Section 1 of the legislation which was not codified.) This interpretation would also be consistent with the Delaware’s approach which fixes the record date based on the date of delivery when no prior board action is required.

Remarkably, Section 701(b)(2) does not impose any time limitation on the record date when the board doesn’t fix the record date. For example, a shareholder might give a written consent on January 1 with the remaining written consents being given over an extended period of weeks, months or even years. Delaware to some extent addresses this problem in DGCL § 228(c) which provides that no written consent will be effective unless a sufficient number of consents are delivered to the corporation within 60 days of the earliest dated consent.

Why Getting the Record Date Right Matters

To borrow a phrase from my good friend, [Paul Rowe](#), it may seem that I’ve put the plow in too deep in thinking about California’s record date statute. However, the purpose of any record date statute is to establish a mechanism for designating a qualifying date for shareholder action. If the record date is wrong, then the consents may be given by the wrong shareholders. As a result, the shareholder action may be invalid.

A Post Scriptum on Delaware’s Scheme

Although Delaware’s scheme is clearer in some respects, I’ve been a long-time critic of it as well. In fact, I wrote an article two decades ago entitled “Delaware’s Inadequate Protection of Shareholders When Action is Taken by Consent”. You can find it in the May/June 1991 issue of the American Bar Association’s *The Business Lawyer Update*.

Please contact [Keith Paul Bishop](#) at Allen Matkins for more information kbishop@allenmatkins.com

<http://www.calcorporatelaw.com/>