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Allen Matkins

Corporate and Securities



[Keith Paul Bishop](#)

Partner

Orange County
(949) 851-5428

kbishop@allenmatkins.com



[James E. McCormick III](#)

Of Counsel

Orange County
(949) 851-5478

kmccormick@allenmatkins.com

About Allen Matkins

Allen Matkins Leck Gamble Mallory & Natsis LLP is a California law firm with more than 230 attorneys practicing out of seven offices in Los Angeles, Century City, Orange County, Del Mar Heights, San Diego, San Francisco and Walnut Creek. The firm's broad based areas of focus include corporate, real estate, construction, real estate finance, business litigation, employment and labor law, taxation, land use, bankruptcy and creditors' rights, intellectual property and environmental.

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California Simplifies Requirements for Electronic Communications to Shareholders and Corporate Members

The popularity of email and other forms of electronic communication may give the impression that these are unconditionally acceptable ways for corporations to communicate to their shareholders and directors. In fact, a California corporation's ability to use email to communicate to shareholders and directors is subject to significant limitations. In the case of communications to individual shareholders, these limitations are quite burdensome. This summer, Governor Schwarzenegger signed into law a bill, AB 285, that is intended to alleviate some of the more problematical limitations on email and other forms of electronic communications by California corporations to their shareholders.

This new law will take effect on January 1, 2010.

California law currently authorizes a California corporation to communicate to its shareholders or members by email and other forms of electronic communications such as facsimile transmissions provided the electronic transmission creates a record that is capable of retention, retrieval, and review and that may be rendered into clearly legible and tangible form. However, these electronic communications by the corporation must be made to recipients who have provided their unrevoked consent to the means of transmission. If the recipient is an individual shareholder or member, electronic communication by the corporation is not authorized unless the communication satisfies the requirements for consumer consent to electronic records under the federal Electronic Signatures in Global and National Commerce Act (aka the "E-Sign Act"). The E-Sign Act's requirements for consent are numerous and specific. For example, before giving consent, a shareholder must be provided with a statement of the hardware and software requirements to access the electronic communication.

This alert applies to California for-profit and non-profit corporations.

While it is certainly possible to obtain shareholder consents in compliance with the E-Sign Act requirements, some California corporations may have found California's incorporation of federal consumer consent requirements confusing while others may have ignored them entirely. The E-Sign Act standards were originally intended to apply to commercial transactions between businesses and consumers.

Beginning next year, AB 285 will eliminate compliance with the E-Sign Act requirement for individual shareholder consent to electronic communications by a California corporation. The consent of shareholders to receiving electronic communications by the corporation will still be required. However, the consent need only be preceded or include a clear written statement to the recipient concerning:

- Any right of the recipient to have the communication provided or made available in paper or other non-electronic form;
- Whether the consent applies only to the particular communication, to specified categories of communications, or to all communications from the corporation; and
- the procedures that must be used to withdraw consent.

Often a director or officer will also be a shareholder. The bill clarifies that the above requirements only apply to communications by the corporation to a director or officer in her capacity as shareholder. For example, an electronic notice of a board of directors meeting given to a member of the board of directors who is also a shareholder would not be required to include the written statement described above. However, other statutory requirements governing electronic notices, such as the requirement of consent, would apply.

AB 285 applies to California for-profit and non-profit corporations. Although the amended statute refers to "members", it does so because non-profit corporations may have members. The reference should not be understood to include members of limited liability companies or limited partnerships. Both the California Limited Liability Company Act and the Limited Partnership Act have statutory provisions governing electronic transmissions that were not amended by AB 285.

Although AB 285 will not take effect for several months, California for-profit and non-profit corporations should take the opportunity to review and update, if necessary, their bylaw provisions regarding notice. If they have not already done so, they should also consider

implementing procedures for obtaining consents from shareholders and directors for the receipt of electronic communications by the corporation. For example, corporations may consider providing the requisite notice and obtaining consent when shareholders initially acquire their shares and obtaining consent from directors when they are initially nominated.

If you are interested in learning more about how to properly handle electronic communications, please call any member of the Allen Matkins Corporate Group.

Allen Matkins Corporate and Securities Attorneys

Keith P. Bishop	Orange County	Los Angeles
Joe M. Davidson	(949) 553-1313	(213) 622-5555
Matthew J. Ertman		
Debra Dison Hall	San Diego	San Francisco
Brian C. Leck	(619) 233-1155	(415) 837-1515
Clark H. Libenson		
James E. McCormick	Century City	Del Mar Heights
Daniel G. McIntosh	(310) 788-2400	(858) 481-5055
Roger S. Mertz		
Geoffrey E. Perusse	Walnut Creek	
Roberta V. Romberg	(925) 943-5551	
D. Stanley Rowland		
Philip C. Schroeder		
Nick M. Unkovic		

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