



1-1-1990

Property

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Recommended Citation

University of the Pacific; McGeorge School of Law, *Property*, 21 PAC. L. J. 889 (1990).

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Property*

Business Associations and Professions; cumulative voting and classified boards

Business and Professions Code § 301.5 (new); §§ 301, 303, 708 (amended).

AB 1929 (Epple); 1989 STAT. Ch. 534

Support: State Bar of California

Opposition: Attorney General

Under existing law, shareholders of a corporation subject to the General Corporation Law¹ are entitled to use cumulative voting when electing directors.² Chapter 534 permits a listed corporation³ to eliminate cumulative voting by amending its articles of incorporation or bylaws.⁴ An amendment eliminating cumulative voting must be approved by the board of directors and the outstanding shares⁵ voting as a single class.⁶

Prior law did not provide for staggered or classified boards of directors.⁷ Chapter 534 allows a listed corporation to divide its board of directors into two or three classes.⁸ There must be at least three

* The Board of Editors regrets the inadvertent omission of this write-up from the January issue of the *Pacific Law Journal*.

1. See generally CAL. CORP. CODE §§ 100-14182 (West 1977 & Supp. 1989) (General Corporation Law).

2. CAL. CORP. CODE § 301(a) (amended by 1989 Cal. Stat. ch. 534, sec. 1, at ____).

3. A listed corporation is a corporation listed on a national securities exchange or a corporation with at least 800 equity shareholders that is qualified for trading on the National Association of Securities Dealers Automatic Quotation System (NASDAQ). 1989 Cal. Stat. ch. 534, sec. 2, at ____ (enacting CAL. CORP. CODE § 301.5(d)). See *id.* (enacting CAL. CORP. CODE § 301.5(d)(2) (determination of number of shareholders)).

4. *Id.* (enacting CAL. CORP. CODE § 301.5(a)).

5. See CAL. CORP. CODE § 152 (West 1977) (defining approval by the outstanding shares). Cf. *Id.* § 153 (West Supp. 1989) (defining approval by the shareholders).

6. 1989 Cal. Stat. ch. 534, sec. 2, at ____ (enacting CAL. CORP. CODE § 301.5(a)).

7. 1988 Cal. Stat. ch. 495, sec. 2, at ____ (amending CAL. CORP. CODE § 301(a)) (amended by 1989 Cal. Stat. ch. 534, sec. 2, at ____).

8. 1989 Cal. Stat. ch. 534, sec. 2, at ____ (enacting CAL. CORP. CODE § 301.5(a)). Compare *id.* with DEL. CODE ANN. tit. 8, § 141(d) (1988) (providing for classified boards) and REV. MODEL BUSINESS CORP. ACT § 8.06 (staggered terms for directors).

directors in each class.⁹ The total number of authorized directors must be as evenly divided between the classes as possible.¹⁰ If the board is divided into two classes, each director must have a two-year term; if there are three classes, the directors must have three-year terms.¹¹ One class of directors must be elected at each annual shareholders' meeting.¹² If more than one class is to be elected at a single meeting where cumulative voting is used, the votes can be cumulated only within each class.¹³ Chapter 534 also permits a non-listed corporation to adopt amendments to its articles that eliminate cumulative voting or establish a classified board; however, these amendments will not become effective unless and until the corporation is listed.¹⁴ An amendment that creates a classified board must be approved by the board of directors and the outstanding shares voting as a single class.¹⁵

Existing law does not permit the removal of a director if the number of dissenting votes¹⁶ are sufficient to elect that director under cumulative voting.¹⁷ Chapter 534 enacts a similar provision to govern the removal of a director from a classified board.¹⁸

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9. 1989 Cal. Stat. ch. 534, sec. 2, at ____ (enacting CAL. CORP. CODE § 301.5(b)).

10. *Id.*

11. *Id.* Directors may be elected by class at a shareholder's meeting that approves an amendment to the articles or bylaws which permits classification of the board. *Id.*

12. *Id.*

13. *Id.* (enacting CAL. CORP. CODE § 301.5(c)).

14. *Id.* (enacting CAL. CORP. CODE § 305.1(c)).

15. 1989 Cal. Stat. ch. 534, sec. 2, at ____ (enacting CAL. CORP. CODE § 301.5(a)).

16. For purposes of this analysis, dissenting votes are votes either opposed to, or not giving written consent to, the removal of the director. See CAL. CORP. CODE § 303(a)(1) (amended by 1989 Cal. Stat. ch. 534, sec. 3, at ____).

17. *Id.*

18. 1989 Cal. Stat. ch. 534, sec. 3, at ____ (enacting CAL. CORP. CODE § 303(a)(3)). A director on a classified board cannot be removed if the dissenting votes would have been sufficient to elect that director had the removal attempt been an election for the greater of either: (a) The number of directors elected at the last annual meeting or (b) The number of directors for whom removal is sought. *Id.* This provision applies even if cumulative voting is not otherwise permitted. *Id.*