

RESOLUTION 2-01-2002

DIGEST

Corporations: Contracts with Directors

Amends Corporations Code section 310 to permit transactions or contracts between a corporation and one or more of its directors to be approved by unanimous written consent of the board or committee.

RESOLUTIONS COMMITTEE RECOMMENDATION DISAPPROVE

Reasons:

Amends Corporations Code section 310 to permit transactions or contracts between a corporation and one or more of its directors to be approved by unanimous written consent of the board or committee. This resolution should be disapproved because it is unnecessary.

So long as the board or committee is fully informed of the material facts of the transaction and of the director's interest in it, Corporations Code section 310 authorizes a board of directors or a committee to approve a contract between the corporation and one of its directors. "An action required or permitted to be taken by the board may be taken without a meeting, if all members of the board shall individually or collectively consent in writing to that action." (Corp. Code, § 307, subd. (b).) The same rule applies to a committee of a board of directors. (*Id.*, subd. (c).)

Accordingly, the Corporations Code already provides that a contract between a corporation and an interested director may be approved by written consent rather than at a meeting. The proposed amendment to section 310 adds nothing.

TEXT OF RESOLUTION

RESOLVED that the Conference of Delegates recommends that legislation be sponsored to amend Corporations Code section 310 to read as follows:

- 1 §310
- 2 (a) No contract or other transaction between a corporation and one or more of its
- 3 directors, or between a corporation and any corporation, firm or association in which one or
- 4 more of its directors has a material financial interest, is either void or voidable because such
- 5 director or directors or such other corporation, firm or association are parties or because
- 6 such director or directors are present at the meeting of the board or a committee thereof
- 7 which authorizes, approves or ratifies the contract or transaction if
- 8 (1) The material facts as to the transaction and as to such director's interest are fully
- 9 disclosed or known to the shareholders and such contract or transaction is approved by the
- 10 shareholders (Section 153) in good faith, with the shares owned by the interested director or
- 11 directors not being entitled to vote thereon, or
- 12 (2) The material facts as to the transaction and as to such director's interest are fully
- 13 disclosed or known to the board or committee, and the board or committee authorizes,

14 approves or ratifies the contract or transaction in good faith by (A) a vote sufficient without
15 counting the vote of the interested director or directors or (B) the written consent of all
16 members of the board or committee, including the interested member or members of the
17 board or committee and in either case the contract or transaction is just and reasonable as to
18 the corporation at the time it is authorized, approved or ratified, or
19 (3) As to contracts or transactions not approved as provided in paragraph (1) or (2) of this
20 subdivision, the person asserting the validity of the contract or transaction sustains the
21 burden of proving that the contract or transaction was just and reasonable as to the
22 corporation at the time it was authorized, approved or ratified. A mere common directorship
23 does not constitute a material financial interest within the meaning of this subdivision. A
24 director is not interested within the meaning of this subdivision in a resolution fixing the
25 compensation of another director as a director, officer or employee of the corporation,
26 notwithstanding the fact that the first director is also receiving compensation from the
27 corporation.
28 (b) No contract or other transaction between a corporation and any corporation or
29 association of which one or more of its directors are directors is either void or voidable
30 because such director or directors are present at the meeting of the board or a committee
31 thereof which authorizes, approves or ratifies the contract or transaction, if
32 (1) The material facts as to the transaction and as to such director's other
33 directorship are fully disclosed or known to the board or committee, and the board or
34 committee authorizes, approves or ratifies the contract or transaction in good faith by a vote
35 sufficient without counting the vote of the common director or directors or the contract or
36 transaction is approved by the shareholders (Section 153) in good faith, or
37 (2) As to contracts or transactions not approved as provided in paragraph (1) of this
38 subdivision, the contract or transaction is just and reasonable as to the corporation at the
39 time it is authorized, approved or ratified.
40 This subdivision does not apply to contracts or transactions covered by subdivision (a).
41 (c) Interested or common directors may be counted in determining the presence of a
42 quorum at a meeting of the board or a committee thereof which authorizes, approves or
43 ratifies a contract or transaction.

(Proposed new language underlined; language to be deleted stricken.)

PROPONENT: Santa Clara County Bar Association

STATEMENT OF REASONS

Existing Law: California Corporations Code Section 310(a) sets forth the requirements for approving by means of a vote of the members of the board of directors, a committee of the board of directors or shareholders a contract or transaction between a corporation and one or more of its directors.

This Resolution: Would set forth the requirements for approving such a contract or transaction by the board of directors or a committee of the board of directors by the unanimous written consent of the board or committee members.

The Problem: Section 310(a) permits a contract or other transaction between a corporation and one or more of its directors to be approved by a vote of the directors, members of a committee of the board or the shareholders of the corporation. It is often convenient for a board of directors or a committee of the board to approve a contract or transaction by written consent, but Section 310(a) does not authorize such approval where the contract or transaction is between the corporation and one or more of its directors. This resolution would permit approval of such contracts and transactions by written consent in addition to the existing methods.

IMPACT STATEMENT

This proposed resolution does not affect any other law, statute or rule.

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COUNTERARGUMENTS

SACRAMENTO COUNTY BAR ASSOCIATION

The proposed resolution is unnecessary because the board of directors may already act by written consent in lieu of a vote taken at a meeting. California Corporations Code section 307(b) says “**Any action** required or permitted to be taken by the board maybe taken without a meeting, if all members of the board shall individually or collectively consent in writing to that action. . . . The action by written consent or consents shall have the same force and effect as a unanimous vote of the directors.” Section 307(b) places no limits or restrictions on the board’s ability to act by written consent and thus already encompasses ratification of the transactions described in Corporations Code section 310.

To the extent Corporations Code section 310 permits these contracts/transactions to be ratified by a committee of the board of directors, section 307(c) also permits action by written consent of a committee of the board in the same manor as the board of directors, mutatis mutandis.

SAN DIEGO COUNTY BAR ASSOCIATION

The conflicts of interest inherent in a transaction between a corporation and one of its directors necessitate a higher degree of scrutiny than other transactions. This amendment not only would allow contracts with directors to be approved by the unanimous written consent of the full board of directors, but also by a committee of less than the full board. Thus, it would not only make it easier to obtain the approval of the board of directors to self serving contracts by eliminating the opportunity for discussion at a meeting, but it would also permit such decisions to be made by a minority of board members without discussion. The recent Enron debacle and other similar fiascos involving boards which failed to act in the best interest of the corporation amply illustrate why a resolution which would make approval of insider transactions easier is a bad idea.