

RESOLUTION 08-01-2007

DIGEST

Corporate Documents: Elimination of Substantive Review by the Secretary of State

Amends Corporation Code sections 109, 110, 202, 401, 912, 1103, 1110, and 1113 and adds section 1161 to eliminate substantive review of corporate documents by the Secretary of State.

**RESOLUTIONS COMMITTEE RECOMMENDATION
DISAPPROVE**

History:

No similar resolutions found.

Reasons:

This resolution amends Corporation Code sections 109, 110, 202, 401, 912, 1103, 1110, and 1113 and adds Section 1161 to eliminate substantive review of corporate documents by the Secretary of State. This resolution should be disapproved because it would eliminate an important function of the Secretary of State that protects the very individuals for whom these sections were intended.

This resolution attempts to circumvent the Secretary of State’s “substantive review process” which is designed to adequately protect the public. The resolution should focus on addressing the arcane language it contends delays the approval of corporate documents instead of trying to limit the scope of review by the Secretary of State.

While there is no similar substantive review requirement of documents filed by California limited liability companies, general partnerships, limited partnerships, or limited liability partnerships, the legislature has apparently determined that independent substantive review for corporations is appropriate due to the more complex structure and benefits afforded incorporation status in California.

TEXT OF RESOLUTION

RESOLVED, that the Conference of Delegates of California Bar Associations recommends that legislation be sponsored to amend Corporations Code Sections 109, 110, 202, 401, 912, 1103, 1110, and 1113 and to add a Section 1161, to read as follows:

- 1 §109
- 2 (a) Any agreement, certificate or other instrument relating to a domestic or foreign
- 3 corporation filed pursuant to this division may be corrected with respect to any misstatement
- 4 of fact contained therein, any defect in the execution thereof or any other error or defect
- 5 contained therein, by filing a certificate of correction entitled "Certificate of Correction of
- 6 _____ (insert here the title of the agreement, certificate or other instrument to be corrected
- 7 and name(s) of corporation or corporations)"; provided, however, that no such certificate of
- 8 correction shall alter the wording of any resolution or written consent which was in fact
- 9 adopted by the board or the shareholders or effect a corrected amendment of articles which

10 amendment as so corrected would not in all respects have complied with the requirements of
11 this division at the time of filing of the agreement, certificate, or other instrument being
12 corrected.

13 (b) If the certificate of correction corrects original articles, the certificate of
14 correction shall be either an officers' certificate or a certificate signed and verified by the
15 incorporators, or a majority of them. If the certificate of correction corrects an agreement of
16 merger or an officers' certificate accompanying an agreement of merger, the certificate of
17 correction shall be an officers' certificate of the surviving corporation only. In all other
18 instances, the certificate of correction shall be either an officer's certificate or a certificate
19 signed and verified as provided in this division with respect to the agreement, certificate or
20 other instrument being corrected.

21 (c) A certificate of correction shall set forth the following:

22 (1) The name or names of the corporation or corporations.

23 (2) The date the agreement, certificate or other instrument being corrected was filed.

24 (3) The provision in the agreement, certificate or other instrument as corrected and, if
25 the execution was defective, wherein it was defective.

26 (4) If applicable, that the certificate does not alter the wording of any resolution or
27 written consent which was in fact adopted by the board or the shareholders.

28 (d) A provision of the articles, amended articles, restated articles, or certificate of
29 determination being corrected by a certificate of correction shall be identified in the
30 certificate of correction in accordance with subdivision (a) of Section 907.

31 (e) The filing of the certificate of correction shall not alter the effective time of the
32 agreement, certificate or instrument being corrected, which shall remain as its original
33 effective time, and such filing shall not affect any right or liability accrued or incurred
34 before such filing, except that any right or liability accrued or incurred by reason of the error
35 or defect being corrected shall be extinguished by such filing if the person having that right
36 has not detrimentally relied on the original instrument.

37 (f) A certificate of correction that conforms to the requirements of this Section
38 conforms to law for the purposes of Section 110.

39
40 §110

41 (a) Upon receipt of any instrument by the Secretary of State for filing pursuant to this
42 division, if it conforms to law, it shall be filed by, and in the office of, the Secretary of State
43 and the date of filing endorsed thereon. Except for instruments filed pursuant to Section
44 1502, the date of filing shall be the date the instrument is received by the Secretary of State
45 unless withheld from filing for a period of time pursuant to a request by the party submitting
46 it for filing or unless in the judgment of the Secretary of State the filing is intended to be
47 coordinated with the filing of some other corporate document which cannot be filed. The
48 Secretary of State shall file a document as of any requested future date not more than 90
49 days after its receipt, including a Saturday, Sunday, or legal holiday, if the document is
50 received in the Secretary of State's office at least one business day prior to the requested
51 date of filing. An instrument does not fail to conform to law because it is not accompanied
52 by the full filing fee if the unpaid portion of the fee does not exceed the limits established by
53 the policy of the Secretary of State for extending credit in these cases.

54 (b) If the Secretary of State determines that an instrument submitted for filing or
55 otherwise submitted does not conform to law and returns it to the person submitting it, the
56 instrument may be resubmitted accompanied by a written opinion of the member of the State
57 Bar of California submitting the instrument, or representing the person submitting it, to the
58 effect that the specific provision of the instrument objected to by the Secretary of State does
59 conform to law and stating the points and authorities upon which the opinion is based. The
60 Secretary of State shall ~~rely find~~, with respect to any disputed point of law (other than the
61 application of Sections 201, 2101, and 2106), ~~upon that addressed in the~~ written opinion ~~in~~
62 ~~determining whether that~~ the instrument conforms to law. The date of filing in that case
63 shall be the date the instrument is received on resubmission.

64 (c) Any instrument filed with respect to a corporation (other than original articles)
65 may provide that it is to become effective not more than 90 days subsequent to its filing
66 date. In case such a delayed effective date is specified, the instrument may be prevented
67 from becoming effective by a certificate stating that by appropriate corporate action it has
68 been revoked and is null and void, executed in the same manner as the original instrument
69 and filed before the specified effective date. In the case of a merger agreement, the
70 certificate revoking the earlier filing need only be executed on behalf of one of the
71 constituent corporations. If no revocation certificate is filed, the instrument becomes
72 effective on the date specified.

73
74 §202

75 The articles of incorporation shall set forth:

76 (a) The name of the corporation; provided, however, that in order for the corporation
77 to be subject to the provisions of this division applicable to a close corporation (Section
78 158), the name of the corporation must contain the word "corporation", "incorporated" or
79 "limited" or an abbreviation of one of such words.

80 (b) (1) The applicable one of the following statements:

81 (i) The purpose of the corporation is to engage in any lawful act or activity for which
82 a corporation may be organized under the General Corporation Law of California other than
83 the banking business, the trust company business or the practice of a profession permitted to
84 be incorporated by the California Corporations Code; or

85 (ii) The purpose of the corporation is to engage in the profession of ____ (with the
86 insertion of a profession permitted to be incorporated by the California Corporations Code)
87 and any other lawful activities (other than the banking or trust company business) not
88 prohibited to a corporation engaging in such profession by applicable laws and regulations.

89 (2) In case the corporation is a corporation subject to the Banking Law, the articles
90 shall set forth a statement of purpose which is prescribed in the applicable provision of the
91 Banking Law.

92 (3) In case the corporation is a corporation subject to the Insurance Code as an
93 insurer, the articles shall additionally state that the business of the corporation is to be an
94 insurer.

95 (4) If the corporation is intended to be a "professional corporation" within the
96 meaning of the Moscone-Knox Professional Corporation Act (Part 4 (commencing with
97 Section 13400) of Division 3), the articles shall additionally contain the statement required
98 by Section 13404.

99 The articles shall not set forth any further or additional statement with respect to the
100 purposes or powers of the corporation, except by way of limitation or except as expressly
101 required by any law of this state other than this division or any federal or other statute or
102 regulation (including the Internal Revenue Code and regulations thereunder as a condition of
103 acquiring or maintaining a particular status for tax purposes).

104 (c) The name and address in this state of the corporation's initial agent for service of
105 process in accordance with subdivision (b) of Section 1502.

106 (d) If the corporation is authorized to issue only one class of shares, the total number
107 of shares which the corporation is authorized to issue.

108 (e) If the corporation is authorized to issue more than one class of shares, or if any
109 class of shares is to have two or more series:

110 (1) The total number of shares of each class the corporation is authorized to issue,
111 and the total number of shares of each series which the corporation is authorized to issue or
112 that the board is authorized to fix the number of shares of any such series;

113 (2) The designation of each class, and the designation of each series or that the board
114 may determine the designation of any such series; and

115 (3) The rights, preferences, privileges and restrictions granted to or imposed upon the
116 respective classes or series of shares or the holders thereof, or that the board, within any
117 limits and restrictions stated, may determine or alter the rights, preferences, privileges and
118 restrictions granted to or imposed upon any wholly unissued class of shares or any wholly
119 unissued series of any class of shares. As to any series the number of shares of which is
120 authorized to be fixed by the board, the articles may also authorize the board, within the
121 limits and restrictions stated therein or stated in any resolution or resolutions of the board
122 originally fixing the number of shares constituting any series, to increase or decrease (but
123 not below the number of shares of such series then outstanding) the number of shares of any
124 such series subsequent to the issue of shares of that series. In case the number of shares of
125 any series shall be so decreased, the shares constituting such decrease shall resume the status
126 which they had prior to the adoption of the resolution originally fixing the number of shares
127 of such series.

128 (f) Articles that conform to the requirements of subdivisions (a) through (d) and
129 paragraphs (1) and (2) of subdivision (e) of this Section conform to law for the purposes of
130 Section 110

131
132 §401

133 (a) Before any corporation issues any shares of any class or series of which the
134 rights, preferences, privileges, and restrictions, or any of them, or the number of shares
135 constituting any series or the designation of the series, are not set forth in its articles but are
136 fixed in a resolution adopted by the board pursuant to authority given by its articles, an
137 officers' certificate shall be executed and filed, setting forth: (1) a copy of the resolution;
138 (2) the number of shares of the class or series; and (3) that none of the shares of the class or
139 series has been issued.

140 (b) After any certificate of determination has been filed, but before the corporation
141 issues any shares of the class or series covered thereby, the board may alter or revoke any
142 right, preference, privilege, or restriction fixed or determined by the resolution set forth
143 therein by the adoption of another resolution appropriate for that purpose and the execution

144 and filing of an officers' certificate setting forth a copy of the resolution, and stating that
145 none of the shares of the class or the series affected has been issued.

146 (c) After any certificate of determination has been filed, the board may, if authorized
147 in the articles pursuant to subdivision (e) of Section 202, increase or decrease the number of
148 shares constituting any series, by the adoption of another resolution appropriate for that
149 purpose and the execution and filing of an officers' certificate setting forth a copy of the
150 resolution, the number of shares of the series then outstanding and the increase or decrease
151 in the number of shares constituting the series. If any certificate of determination has been
152 incorporated in restated articles filed pursuant to Section 910, the action authorized by this
153 subdivision may, notwithstanding Section 902, be accomplished by an amendment of the
154 articles approved by the board alone.

155 (d) After shares of a class or series have been issued, the provisions of the resolution
156 set forth in a certificate of determination may be amended only by the adoption and approval
157 of an amendment in accordance with Section 902, 903, or 904 and the filing of a certificate
158 of amendment in accordance with Sections 905 and 908. Notwithstanding the preceding
159 sentence, a certificate to increase or decrease the number of shares of a series also may be
160 filed as permitted by subdivision (c).

161 (e) A provision in a certificate of determination being amended pursuant to
162 subdivision (b), (c), or (d) shall be identified in the amendment in accordance with
163 subdivision (a) of Section 907.

164 (f) If a certificate is filed pursuant to subdivision (c) to decrease the number of shares
165 of a series to zero, the certificate of determination whereby the series was established is
166 thereupon no longer in force and the series is no longer an authorized series of the
167 corporation.

168 (g) If the rights, preferences, privileges, and restrictions of the class or series contain
169 a supermajority vote provision, as defined in subdivision (b) of Section 710, subject to
170 Section 710, the officers' certificate shall also state that the provision has been approved by
171 the shareholders in accordance with subdivision (c) of Section 710.

172 (h) A certificate that conforms to the requirements of this Section conforms to law
173 for the purposes of Section 110.

174 §912

175 A certificate that conforms to the requirements of this Chapter conforms to law for
176 the purposes of Section 110.

177

178 §1103

179 After approval of a merger by the board and any approval of the outstanding shares
180 (Section 152) required by Chapter 12 (commencing with Section 1200), the surviving
181 corporation shall file a copy of the agreement of merger with an officers' certificate of each
182 constituent corporation attached stating the total number of outstanding shares of each class
183 entitled to vote on the merger, that the principal terms of the agreement in the form attached
184 were approved by that corporation by a vote of a number of shares of each class which
185 equaled or exceeded the vote required, specifying each class entitled to vote and the
186 percentage vote required of each class, or that the merger agreement was entitled to be and
187 was approved by the board alone under the provisions of Section 1201. If equity securities
188 of a parent of a constituent corporation are to be issued in the merger, the officers' certificate

189 of that constituent corporation shall state either that no vote of the shareholders of the parent
190 was required or that the required vote was obtained. A certificate that conforms to the
191 requirements of this Section conforms to law for the purposes of Section 110. The merger
192 and any amendment of the articles of the surviving corporation contained in the merger
193 agreement shall thereupon be effective (subject to subdivision (c) of Section 110 and subject
194 to the provisions of Section 1108) and the several parties thereto shall be one corporation.
195 The Secretary of State may certify a copy of the merger agreement separate from the
196 officers' certificates attached thereto.

197
198 §1110

199 (a) If a domestic corporation owns all the outstanding shares, or owns less than all
200 the outstanding shares but at least 90 percent of the outstanding shares of each class, of a
201 corporation or corporations, domestic or foreign, the merger of the subsidiary corporation or
202 corporations into the parent corporation or the merger into the subsidiary corporation of the
203 parent corporation and any other subsidiary corporation or corporations, may be effected by
204 a resolution or plan of merger adopted and approved by the board of the parent corporation
205 and the filing of a certificate of ownership as provided in subdivision (e). The resolution or
206 plan of merger shall provide for the merger and shall provide that the surviving corporation
207 assumes all the liabilities of each disappearing corporation and shall include any other
208 provisions required by this section.

209 (b) If the parent corporation owns less than all the outstanding shares but at least 90
210 percent of the outstanding shares of each class of the subsidiary corporation that is a party to
211 the merger, the resolution or plan of merger also shall set forth the securities, cash, property,
212 or rights to be issued, paid, delivered, or granted upon surrender of each outstanding share of
213 the subsidiary corporation not owned by the parent corporation and the entire resolution or
214 plan of merger as well as the consideration to be received for each share of the subsidiary
215 corporation not owned by the parent corporation, shall be approved by the board of that
216 subsidiary corporation.

217 (c) If the parent corporation is to be merged into one of its subsidiary corporations,
218 the resolution or plan of merger also shall provide for the pro rata conversion of the
219 outstanding shares of the parent corporation into shares of the surviving subsidiary
220 corporation. In this case, the entire resolution or plan of merger shall be approved by the
221 board of the surviving subsidiary corporation and, if the merger, but for the operation of this
222 section, would be a merger reorganization (Section 181) the principal terms of which would
223 be required to be approved by the outstanding shares (Section 152) of any class of the parent
224 corporation pursuant to subdivision (d) of Section 1201, the principal terms of the resolution
225 or plan of merger shall be approved by the outstanding shares (Section 152) of that same
226 class of the parent corporation.

227 (d) In any merger pursuant to this section, the resolution or plan of merger may
228 provide for the amendment of the articles of the surviving corporation to change its name,
229 subject to Section 201, regardless of whether the name so adopted is the same as or similar
230 to that of one of the disappearing corporations. The provision shall establish the wording of
231 the amendment pursuant to paragraph (2) of subdivision (a) of Section 907 and the
232 resolution or plan of merger shall not provide for the amendment of the articles of the
233 surviving corporation other than to change its name.

234 (e) After the required approval or approvals of the resolution or plan of merger, a
235 certificate of ownership consisting of an officers' certificate of the parent corporation shall
236 be filed, and a copy thereof for each domestic subsidiary corporation and qualified foreign
237 disappearing subsidiary corporation which is a party to the merger shall also be filed. The
238 certificate of ownership shall:

239 (1) Identify the parent and subsidiary corporation or corporations.

240 (2) Set forth the share ownership by the parent corporation of each subsidiary
241 corporation as 100 percent of the outstanding shares or as at least 90 percent of the
242 outstanding shares of each class, as the case may be.

243 (3) Set forth the resolution or plan of merger.

244 (4) Set forth approval of the resolution or plan of merger by the board of the parent
245 corporation.

246 (5) Set forth other approvals of the resolution or plan of merger as required under
247 subdivision (b) or (c), if applicable. A certificate that conforms to the requirements of this
248 subdivision conforms to law for the purposes of Section 110.

249 (f) Upon the filing of the certificate of ownership, the merger shall be effective and
250 any amendment of the articles of the surviving corporation set forth in the certificate shall be
251 effective.

252 (g) A merger pursuant to this section may be effected if the parent corporation is a
253 foreign corporation and if at least one subsidiary corporation is a domestic corporation but in
254 such a case the certificate of ownership prepared as in subdivision (e) or the document
255 required by subdivision (d) of Section 1108 shall be filed as to each domestic and qualified
256 foreign subsidiary corporation, but no filing shall be made as to the foreign parent
257 corporation. No merger into or with a foreign corporation may be effected as provided by
258 this section unless the laws of the state or place of its incorporation permit that action.

259 (h) In the event all of the outstanding shares of a subsidiary domestic corporation
260 party to a merger effected under this section are not owned by the parent corporation
261 immediately prior to the merger, the parent corporation shall, at least 20 days before the
262 effective date of the merger, give notice to each shareholder of such subsidiary corporation
263 that the merger will become effective on or after a specified date. The notice shall contain a
264 copy of the resolution or plan of merger and the information required by subdivision (a) of
265 Section 1301. The notice shall be sent by mail addressed to the shareholder at the address of
266 the shareholder as it appears on the records of the corporation. The shareholder shall have
267 the right to demand payment of cash for the shares of the shareholder pursuant to Chapter 13
268 (commencing with Section 1300).

269 (i) If an agreement of merger is entered into between a parent corporation and one or
270 more of its subsidiary corporations and the share ownership requirements of subdivision (a)
271 are met, the agreement of merger may be filed as a plan of merger with a certificate of
272 ownership in accordance with the requirements of this section, in which case Sections 1101,
273 1102, 1103, 1200, 1201, and 1202 shall not apply; or the agreement of merger may be filed
274 pursuant to Section 1103, in which case this section shall not apply.

275
276 §1113

277 (a) Any one or more corporations may merge with one or more other business
278 entities (Section 174.5). One or more domestic corporations (Section 167) not organized

279 under this division and one or more foreign corporations (Section 171) may be parties to the
280 merger. Notwithstanding the provisions of this section, the merger of any number of
281 corporations with any number of other business entities may be effected only if:

282 (1) In a merger in which a domestic corporation not organized under this division or
283 a domestic other business entity is a party, it is authorized by the laws under which it is
284 organized to effect the merger.

285 (2) In a merger in which a foreign corporation is a party, it is authorized by the laws
286 under which it is organized to effect the merger.

287 (3) In a merger in which a foreign other business entity is a party, it is authorized by
288 the laws under which it is organized to effect the merger.

289 (b) Each corporation and each other party which desires to merge shall approve, and
290 shall be a party to, an agreement of merger. Other persons, including a parent party (Section
291 1200), may be parties to the agreement of merger. The board of each corporation which
292 desires to merge, and, if required the shareholders, shall approve the agreement of merger.
293 The agreement of merger shall be approved on behalf of each party by those persons
294 required to approve the merger by the laws under which it is organized. The agreement of
295 merger shall state:

296 (1) The terms and conditions of the merger.

297 (2) The name and place of incorporation or organization of each party to the merger
298 and the identity of the surviving party.

299 (3) The amendments, if any, subject to Sections 900 and 907, to the articles of the
300 surviving corporation, if applicable, to be effected by the merger. If any amendment changes
301 the name of the surviving corporation, if applicable, the new name may be, subject to
302 subdivision (b) of Section 201, the same as or similar to the name of a disappearing party to
303 the merger.

304 (4) The manner of converting the shares of each constituent corporation into shares,
305 interests, or other securities of the surviving party. If any shares of any constituent
306 corporation are not to be converted solely into shares, interests or other securities of the
307 surviving party, the agreement of merger shall state (i) the cash, rights, securities, or other
308 property which the holders of those shares are to receive in exchange for the shares, which
309 cash, rights, securities, or other property may be in addition to or in lieu of shares, interests
310 or other securities of the surviving party, or (ii) that the shares are canceled without
311 consideration.

312 (5) Any other details or provisions required by the laws under which any party to the
313 merger is organized, including, if a public benefit corporation or a religious corporation is a
314 party to the merger, Section 6019.1, or, if a mutual benefit corporation is a party to the
315 merger, Section 8019.1, or, if a consumer cooperative corporation is a party to the merger,
316 Section 12540.1, or, if a domestic limited partnership is a party to the merger, Section
317 15678.2 or 15911.12, or, if a domestic partnership is a party to the merger, Section 16911,
318 or, if a domestic limited liability company is a party to the merger, Section 17551.

319 (6) Any other details or provisions as are desired, including, without limitation, a
320 provision for the payment of cash in lieu of fractional shares or for any other arrangement
321 with respect thereto consistent with the provisions of Section 407.

322 (c) Each share of the same class or series of any constituent corporation (other than
323 the cancellation of shares held by a party to the merger or its parent, or a wholly owned

324 subsidiary of either, in another constituent corporation) shall, unless all shareholders of the
325 class or series consent and except as provided in Section 407, be treated equally with respect
326 to any distribution of cash, rights, securities, or other property. Notwithstanding paragraph
327 (4) of subdivision (b), the unredeemable common shares of a constituent corporation may be
328 converted only into unredeemable common shares of a surviving corporation or a parent
329 party (Section 1200) or unredeemable equity securities of a surviving party other than a
330 corporation if another party to the merger or its parent owns, directly or indirectly, prior to
331 the merger shares of that corporation representing more than 50 percent of the voting power
332 of that corporation, unless all of the shareholders of the class consent and except as provided
333 in Section 407.

334 (d) Notwithstanding its prior approval, an agreement of merger may be amended
335 prior to the filing of the agreement of merger or the certificate of merger, as is applicable, if
336 the amendment is approved by the board of each constituent corporation and, if the
337 amendment changes any of the principal terms of the agreement, by the outstanding shares
338 (Section 152), if required by Chapter 12 (commencing with Section 1200), in the same
339 manner as the original agreement of merger. If the agreement of merger as so amended and
340 approved is also approved by each of the other parties to the agreement of merger, the
341 agreement of merger as so amended shall then constitute the agreement of merger.

342 (e) The board of a constituent corporation may, in its discretion, abandon a merger,
343 subject to the contractual rights, if any, of third parties, including other parties to the
344 agreement of merger, without further approval by the outstanding shares (Section 152), at
345 any time before the merger is effective.

346 (f) Each constituent corporation shall sign the agreement of merger by its
347 chairperson of the board, president or a vice president and also by its secretary or an
348 assistant secretary acting on behalf of their respective corporations.

349 (g) (1) If the surviving party is a corporation or a foreign corporation, or if a public
350 benefit corporation (Section 5060), a mutual benefit corporation (Section 5059), a religious
351 corporation (Section 5061), or a corporation organized under the Consumer Cooperative
352 Corporation Law (Section 12200) is a party to the merger, after required approvals of the
353 merger by each constituent corporation through approval of the board (Section 151) and any
354 approval of the outstanding shares (Section 152) required by Chapter 12 (commencing with
355 Section 1200) and by the other parties to the merger, the surviving party shall file a copy of
356 the agreement of merger with an officers' certificate of each constituent domestic and
357 foreign corporation attached stating the total number of outstanding shares or membership
358 interests of each class entitled to vote on the merger (and identifying any other person or
359 persons whose approval is required), that the agreement of merger in the form attached or its
360 principal terms, as required, were approved by that corporation by a vote of a number of
361 shares or membership interests of each class that equaled or exceeded the vote required,
362 specifying each class entitled to vote and the percentage vote required of each class and, if
363 applicable, by that other person or persons whose approval is required, or that the merger
364 agreement was entitled to be and was approved by the board alone (as provided in Section
365 1201, in the case of corporations subject to that section). If equity securities of a parent party
366 (Section 1200) are to be issued in the merger, the officers' certificate of that controlled party
367 shall state either that no vote of the shareholders of the parent party was required or that the
368 required vote was obtained. In lieu of an officers' certificate, a certificate of merger, on a

369 form prescribed by the Secretary of State, shall be filed for each constituent other business
370 entity. The certificate of merger shall be executed and acknowledged by each domestic
371 constituent limited liability company by all managers of the limited liability company
372 (unless a lesser number is specified in its articles of organization or operating agreement)
373 and by each domestic constituent limited partnership by all general partners (unless a lesser
374 number is provided in its certificate of limited partnership or partnership agreement) and by
375 each domestic constituent general partnership by two partners (unless a lesser number is
376 provided in its partnership agreement) and by each foreign constituent limited liability
377 company by one or more managers and by each foreign constituent general partnership or
378 foreign constituent limited partnership by one or more general partners, and by each
379 constituent reciprocal insurer by the chairperson of the board, president, or vice president,
380 and by the secretary or assistant secretary, or, if a constituent reciprocal insurer has not
381 appointed those officers, by the chairperson of the board, president, or vice president, and by
382 the secretary or assistant secretary of the constituent reciprocal insurer's attorney-in-fact, and
383 by each other party to the merger by those persons required or authorized to execute the
384 certificate of merger by the laws under which that party is organized, specifying for that
385 party the provision of law or other basis for the authority of the signing persons. The
386 certificate of merger shall set forth, if a vote of the shareholders, members, partners, or other
387 holders of interests of the constituent other business entity was required, a statement setting
388 forth the total number of outstanding interests of each class entitled to vote on the merger
389 and that the agreement of merger in the form attached or its principal terms, as required,
390 were approved by a vote of the number of interests of each class that equaled or exceeded
391 the vote required, specifying each class entitled to vote and the percentage vote required of
392 each class, and any other information required to be set forth under the laws under which the
393 constituent other business entity is organized, including, if a domestic limited partnership is
394 a party to the merger, subdivision (a) of Section 15678.4 or subdivision (a) of Section
395 15911.14, if a domestic partnership is a party to the merger, subdivision (b) of Section
396 16915, and, if a domestic limited liability company is a party to the merger, subdivision (a)
397 of Section 17552. The certificate of merger for each constituent foreign other business
398 entity, if any, shall also set forth the statutory or other basis under which that foreign other
399 business entity is authorized by the laws under which it is organized to effect the merger.
400 The merger and any amendment of the articles of the surviving corporation, if applicable,
401 contained in the agreement of merger shall be effective upon filing of the agreement of
402 merger with an officer's certificate of each constituent domestic and foreign corporation and
403 a certificate of merger for each constituent other business entity, subject to subdivision (c) of
404 Section 110 and subject to the provisions of subdivision (j), and the several parties thereto
405 shall be one entity. If a domestic reciprocal insurer organized after 1974 to provide medical
406 malpractice insurance is a party to the merger, the agreement of merger or certificate of
407 merger shall not be filed until there has been filed the certificate issued by the Insurance
408 Commissioner approving the merger pursuant to Section 1555 of the Insurance Code. The
409 Secretary of State may certify a copy of the agreement of merger separate from the officers'
410 certificates and certificates of merger attached thereto.

411 (2) If the surviving entity is an other business entity, and no public benefit
412 corporation (Section 5060), mutual benefit corporation (Section 5059), religious corporation
413 (Section 5061), or corporation organized under the Consumer Cooperative Corporation Law

414 (Section 12200) is a party to the merger, after required approvals of the merger by each
415 constituent corporation through approval of the board (Section 151) and any approval of the
416 outstanding shares (Section 152) required by Chapter 12 (commencing with Section 1200)
417 and by the other parties to the merger, the parties to the merger shall file a certificate of
418 merger in the office of, and on a form prescribed by, the Secretary of State. The certificate
419 of merger shall be executed and acknowledged by each constituent domestic and foreign
420 corporation by its chairperson of the board, president or a vice president and also by its
421 secretary or an assistant secretary and by each domestic constituent limited liability
422 company by all managers of the limited liability company (unless a lesser number is
423 specified in its articles of organization or operating agreement) and by each domestic
424 constituent limited partnership by all general partners (unless a lesser number is provided in
425 its certificate of limited partnership or partnership agreement) and by each domestic
426 constituent general partnership by two partners (unless a lesser number is provided in its
427 partnership agreement) and by each foreign constituent limited liability company by one or
428 more managers and by each foreign constituent general partnership or foreign constituent
429 limited partnership by one or more general partners, and by each constituent reciprocal
430 insurer by the chairperson of the board, president, or vice president, and by the secretary or
431 assistant secretary, or, if a constituent reciprocal insurer has not appointed those officers, by
432 the chairperson of the board, president, or vice president, and by the secretary or assistant
433 secretary of the constituent reciprocal insurer's attorney-in-fact. The certificate of merger
434 shall be signed by each other party to the merger by those persons required or authorized to
435 execute the certificate of merger by the laws under which that party is organized, specifying
436 for that party the provision of law or other basis for the authority of the signing persons. The
437 certificate of merger shall set forth all of the following:

438 (A) The name, place of incorporation or organization, and the Secretary of State's file
439 number, if any, of each party to the merger, separately identifying the disappearing parties
440 and the surviving party.

441 (B) If the approval of the outstanding shares of a constituent corporation was
442 required by Chapter 12 (commencing with Section 1200), a statement setting forth the total
443 number of outstanding shares of each class entitled to vote on the merger and that the
444 principal terms of the agreement of merger were approved by a vote of the number of shares
445 of each class entitled to vote and the percentage vote required of each class.

446 (C) The future effective date or time, not more than 90 days subsequent to the date of
447 filing of the merger, if the merger is not to be effective upon the filing of the certificate of
448 merger with the office of the Secretary of State.

449 (D) A statement, by each party to the merger which is a domestic corporation not
450 organized under this division, a foreign corporation, or an other business entity, of the
451 statutory or other basis under which that party is authorized by the laws under which it is
452 organized to effect the merger.

453 (E) Any other information required to be stated in the certificate of merger by the
454 laws under which each party to the merger is organized, including, if a domestic limited
455 liability company is a party to the merger, subdivision (a) of Section 17552, if a domestic
456 partnership is a party to the merger, subdivision (b) of Section 16915, and, if a domestic
457 limited partnership is a party to the merger, subdivision (a) of Section 15678.4 or
458 subdivision (a) of Section 15911.14.

459 (F) Any other details or provisions that may be desired.

460 Unless a future effective date or time is provided in a certificate of merger, in which
461 event the merger shall be effective at that future effective date or time, a merger shall be
462 effective upon the filing of the certificate of merger in the office of the Secretary of State
463 and the several parties thereto shall be one entity. The surviving other business entity shall
464 keep a copy of the agreement of merger at its principal place of business which, for purposes
465 of this subdivision, shall be the office referred to in Section 17057 if a domestic limited
466 liability company, at the business address specified in paragraph (5) of subdivision (a) of
467 Section 17552 if a foreign limited liability company, at the office referred to in subdivision
468 (a) of Section 16403 if a domestic general partnership, at the business address specified in
469 subdivision (f) of Section 16911 if a foreign partnership, at the office referred to in
470 subdivision (a) of Section 15614 or in subdivision (a) of Section 15901.14 if a domestic
471 limited partnership, or at the business address specified in paragraph (5) of subdivision (a) of
472 Section 15678.4 or paragraph (3) of subdivision (a) of Section 15909.02 if a foreign limited
473 partnership. Upon the request of a holder of equity securities of a party to the merger, a
474 person with authority to do so on behalf of the surviving other business entity shall promptly
475 deliver to that holder, a copy of the agreement of merger. A waiver by that holder of the
476 rights provided in the foregoing sentence shall be unenforceable. If a domestic reciprocal
477 insurer organized after 1974 to provide medical malpractice insurance is a party to the
478 merger the agreement of merger or certificate of merger shall not be filed until there has
479 been filed the certificate issued by the Insurance Commissioner approving the merger in
480 accordance with Section 1555 of the Insurance Code.

481 (h) (1) A copy of an agreement of merger certified on or after the effective date by an
482 official having custody thereof has the same force in evidence as the original and, except as
483 against the state, is conclusive evidence of the performance of all conditions precedent to the
484 merger, the existence on the effective date of the surviving party to the merger and the
485 performance of the conditions necessary to the adoption of any amendment to the articles, if
486 applicable, contained in the agreement of merger.

487 (2) For all purposes for a merger in which the surviving entity is a domestic other
488 business entity and the filing of a certificate of merger is required by paragraph (2) of
489 subdivision (g), a copy of the certificate of merger duly certified by the Secretary of State is
490 conclusive evidence of the merger of the constituent corporations, either by themselves or
491 together with the other parties to the merger, into the surviving other business entity.

492 (i) (1) Upon a merger pursuant to this section, the separate existences of the
493 disappearing parties to the merger cease and the surviving party to the merger shall succeed,
494 without other transfer, to all the rights and property of each of the disappearing parties to the
495 merger and shall be subject to all the debts and liabilities of each in the same manner as if
496 the surviving party to the merger had itself incurred them.

497 (2) All rights of creditors and all liens upon the property of each of the constituent
498 corporations and other parties to the merger shall be preserved unimpaired, provided that
499 those liens upon property of a disappearing party shall be limited to the property affected
500 thereby immediately prior to the time the merger is effective.

501 (3) Any action or proceeding pending by or against any disappearing corporation or
502 disappearing party to the merger may be prosecuted to judgment, which shall bind the
503 surviving party, or the surviving party may be proceeded against or substituted in its place.

504 (4) If a limited partnership or a general partnership is a party to the merger, nothing
505 in this section is intended to affect the liability a general partner of a disappearing limited
506 partnership or general partnership may have in connection with the debts and liabilities of
507 the disappearing limited partnership or general partnership existing prior to the time the
508 merger is effective.

509 (j) (1) The merger of domestic corporations with foreign corporations or foreign
510 other business entities in a merger in which one or more other business entities is a party
511 shall comply with subdivision (a) and this subdivision.

512 (2) If the surviving party is a domestic corporation or domestic other business entity,
513 the merger proceedings with respect to that party and any domestic disappearing corporation
514 shall conform to the provisions of this section. If the surviving party is a foreign corporation
515 or foreign other business entity, then, subject to the requirements of subdivision (c), and of
516 Section 407 and Chapter 12 (commencing with Section 1200) and Chapter 13 (commencing
517 with Section 1300), and, if applicable, corresponding provisions of the Nonprofit
518 Corporation Law or the Consumer Cooperative Corporation Law, with respect to any
519 domestic constituent corporations, Chapter 13 (commencing with Section 17600) of Title
520 2.5 with respect to any domestic constituent limited liability companies, Article 6
521 (commencing with Section 16601) of Chapter 5 of Title 2 with respect to any domestic
522 constituent general partnerships, and Article 7.6 (commencing with Section 15679.1) of
523 Chapter 3, and Article 11.5 (commencing with Section 15911.20) of Chapter 5.5 of Title 2
524 with respect to any domestic constituent limited partnerships, the merger proceedings may
525 be in accordance with the laws of the state or place of incorporation or organization of the
526 surviving party.

527 (3) If the surviving party is a domestic corporation or domestic other business entity,
528 the certificate of merger or the agreement of merger with attachments shall be filed as
529 provided in subdivision (g) and thereupon, subject to subdivision (c) of Section 110 or
530 paragraph (2) of subdivision (g), as is applicable, the merger shall be effective as to each
531 domestic constituent corporation and domestic constituent other business entity.

532 (4) If the surviving party is a foreign corporation or foreign other business entity, the
533 merger shall become effective in accordance with the law of the jurisdiction in which the
534 surviving party is organized, but, except as provided in paragraph (5), the merger shall be
535 effective as to any domestic disappearing corporation as of the time of effectiveness in the
536 foreign jurisdiction upon the filing in this state of a copy of the agreement of merger with an
537 officers' certificate of each constituent foreign and domestic corporation and a certificate of
538 merger of each constituent other business entity attached, which officers' certificates and
539 certificates of merger shall conform to the requirements of paragraph (1) of subdivision (g).
540 If one or more domestic other business entities is a disappearing party in a merger pursuant
541 to this subdivision in which a foreign other business entity is the surviving entity, a
542 certificate of merger required by the laws under which that domestic other business entity is
543 organized, including subdivision (a) of Section 15678.4, subdivision (a) of Section
544 15911.14, subdivision (b) of Section 16915, or subdivision (a) of Section 17552, as is
545 applicable, shall also be filed at the same time as the filing of the agreement of merger.

546 (5) If the date of the filing in this state pursuant to this subdivision is more than six
547 months after the time of the effectiveness in the foreign jurisdiction, or if the powers of a
548 domestic disappearing corporation are suspended at the time of effectiveness in the foreign

549 jurisdiction, the merger shall be effective as to the domestic disappearing corporation as of
550 the date of filing in this state.

551 6) In a merger described in paragraph (3) or (4), each foreign disappearing
552 corporation that is qualified for the transaction of intrastate business shall by virtue of the
553 filing pursuant to this subdivision, subject to subdivision (c) of Section 110, automatically
554 surrender its right to transact intrastate business in this state. The filing of the agreement of
555 merger or certificate of merger, as is applicable, pursuant to this subdivision, by a
556 disappearing foreign other business entity registered for the transaction of intrastate business
557 in this state shall, by virtue of that filing, subject to subdivision (c) of Section 110,
558 automatically cancels the registration for that foreign other business entity, without the
559 necessity of the filing of a certificate of cancellation.

560 (k) A certificate that conforms to the requirements of this Section conforms to law
561 for the purposes of Section 110.

562

563 §1161

564 A certificate of conversion that conforms to the requirements of this Chapter
565 conforms to law for the purposes of Section 110.

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

PROPONENT: Santa Clara County Bar Association

STATEMENT OF REASONS

Existing Law: California is one of less than a handful of states that still applies a “Substantive Review” standard prior to accepting corporate documents for filing. Generally these documents are filed in connection with funding transactions (such as Venture Capital investments in California businesses) and mergers or acquisitions.

This Resolution: The proposed amendments would eliminate the substantive review process, and in one instance (Section 110) would require that the Secretary of State’s office rely on an opinion of counsel, when submitted, concerning complex or idiosyncratic legal issues.

The Problem: Companies, and their counsel spend weeks, even months crafting an agreement involving a California corporation. And then the documents are submitted to the Secretary of State for filing. And the deal stops because of unwanted, and often arcane, unpredictable changes inserted by the Secretary of State’s office under the aegis of a “substantive review”.

Substantive review of corporate filings by the Secretary of State should be eliminated because:

- substantive review is expensive and diverts scarce resources that can be put to better use, such as education;
- the securities laws adequately protect those investors who require protection, rendering substantive review redundant at best;

- the standard for substantive review is not fairness or investor protection but conformance with specific language of the Corporations Code, no matter how technical and no matter how material;
- the experience of states that do not perform substantive review, which is most if not all of them, does not demonstrate a need for substantive review;
- there is no comparable substantive review of the operating agreements of California limited liability companies;
- there is no comparable substantive review of the partnership agreements of California general partnerships, limited partnerships, and limited liability partnerships;
- there is no comparable review of the trust agreements of California business trusts;
- there is no comparable review of the shareholder agreements of California statutory close corporations;
- even with the expensive expedited filing procedures, the substantive review results in delays in closing major transactions, often for trivial reasons;
- California lawyers are often embarrassed in front of their clients when articles are rejected;
- substantive review discourages California attorneys from recommending incorporation in California, thereby thwarting many public policy choices reflected in the articles, and negatively impacting the economy;
- shareholders have the same legal remedies as partners of partnerships, members of limited liability companies, beneficiaries of business trusts, and shareholders of statutory close corporations if the articles violate material provisions of the Corporations Code.

IMPACT STATEMENT

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

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