

New Disclosure Requirements Enacted For Publicly Traded Corporations Incorporated or Qualified To Do Business In California

11.04.2002

In the wake of the federal Sarbanes-Oxley Act of 2002, the State of California has followed with its own legislation. On September 28, 2002 Governor Gray Davis signed into law the California Corporate Disclosure Act (the "Act") which imposes new disclosure requirements on publicly traded corporations incorporated or qualified to do business in California. Under the Act, publicly traded corporations will be required to disclose specified information about their auditors, their directors and officers, and certain historical events. This disclosure will be in addition to the information currently required to be filed with the California Secretary of State. The Act also requires that the California Secretary of State make all filed information publicly available through an online database. The Act becomes effective January 1, 2003.

Summary

Under current law, all companies incorporated or qualified to do business in California must file a brief information statement with the California Secretary of State every two years. Under the Act, all companies will now be required to file information statements annually and "publicly traded companies" incorporated or qualified to do business in California will be required to provide significantly more information in their filings with the Secretary of State. The Act defines "publicly traded companies" as companies with securities that are listed or admitted to trade on a national or foreign exchange, or are the subject of two-way quotations - such as both bid and asked prices - that are regularly published by one or more broker-dealers in the National Daily Quotation Service or similar services. The definition includes companies listed on the New York and American Stock Exchanges and the Nasdaq Stock Market as well as foreign companies and companies whose shares are traded on the OTC Bulletin Board or in the "pink sheets." The Act does not apply to limited liability companies, limited partnerships or general partnerships.

Disclosure Requirements

A public company subject to the provisions of the Act will be required to disclose on an annual basis the following information:

- Auditor Information: The name of the company's independent auditor and a description of any other services performed for the company during the previous 24 months by the independent auditor or its affiliates. A copy of the last report prepared for the company by the independent auditor must be attached to the filing.
- Directors' and Executive Officers' Compensation: The annual compensation paid to each director and executive officer, including stock or stock options "that were not available to other employees" of the company.

- Loans to Directors: A description of any loan made to a director at a "preferential" loan rate during the previous 24 months, including the amount and terms of the loans. The Act does not define the term "preferential."
- Bankruptcies: Whether any bankruptcy filing has been made by the company or any of its directors or executive officers within the previous 10 years.
- Fraud Convictions: Whether any director or executive officer of the company has been convicted of fraud during the previous 10 years.
- Securities Laws Violations: Whether the company violated any federal securities laws or any securities or banking provisions of California law during the previous 10 years for which the company was found liable or fined more than \$10,000.: The name of the company's independent auditor and a description of any other services performed for the company during the previous 24 months by the independent auditor or its affiliates. A copy of the last report prepared for the company by the independent auditor must be attached to the filing. : The annual compensation paid to each director and executive officer, including stock or stock options "that were not available to other employees" of the company.: A description of any loan made to a director at a "preferential" loan rate during the previous 24 months, including the amount and terms of the loans. The Act does not define the term "preferential.": Whether any bankruptcy filing has been made by the company or any of its directors or executive officers within the previous 10 years.: Whether any director or executive officer of the company has been convicted of fraud during the previous 10 years.: Whether the company violated any federal securities laws or any securities or banking provisions of California law during the previous 10 years for which the company was found liable or fined more than \$10,000.

Differences From Federal Requirements

The Act has a number of differences from comparable provisions in federal securities laws. Of particular note, the Act defines "executive officers" as the five most highly compensated officers of the company who are not also directors. This definition differs from that of the federal securities laws which defines "executive officer" to include a registrant's president, any vice president in charge of a principal business unit, division or function, any other officer who performs a policy making function, or any other person who performs similar policy making functions. Under the federal proxy rules, compensation disclosure is only required for directors and "named executive officers," which generally include the chief executive officer and the four most highly compensated executive officers other than the chief executive officer. Based on the differences between the definitions, the Act may require disclosure of compensation information for different officers than are currently provided for under the federal securities laws. The Act may also differ from federal law as to the compensation period to be covered by the report.

Filing

The information statement required under the Act must be filed by corporations each year with the Secretary of State during a six-month period ending with the calendar month in which the corporation's original articles of incorporation or qualification to do business in California were filed.

Regulations and Forms

Corporations have traditionally filed their information statement required by Section 1502 of the California Corporations Code on a single, one-page form provided by the California Secretary of State. The Act contemplates that the California Secretary of State will create a new form that corporations will use for the Act's expanded annual filing. The Secretary of State may promulgate regulations interpreting ambiguous provisions of the Act. As of the date of this publication, however, no such forms have been made available and no proposed or final regulations have been adopted.

*** Additional New Laws of Concern ***

California Expands WARN Act

Pursuant to newly enacted provisions of the California Labor Code, an employer classified as "covered establishment" that employs 75 or more people (as opposed to the federal standard of 100 or more people) must give 60 days advance notice of a layoff, termination or relocation involving 50 or more employees. The new law takes effect January 1, 2003.

The new law also provides that a "parent corporation is an 'employer' as to any covered establishment directly owned and operated by its corporate subsidiary." Thus, the law appears to impose notice obligations - and possible liability - upon parent companies when a subsidiary engages in a covered layoff, relocation, or termination.

Covered establishments that fail to provide the required notice are subject to substantial civil penalties and liability to terminated employees for lost compensation otherwise payable during the required notice period.

Accounting Firm Employees

Pursuant to newly enacted provisions of the California Business and Professions Code, an accountant licensed in California cannot become employed in a position of significant authority over accounting or financial reporting by a publicly traded client if such individual provided to that client audit services requiring the exercise of significant judgment within the prior 12 months. The new law takes effect January 1, 2003.

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Attorneys

Lawrence M. Braun

Amy L. Tranckino

Practice Areas

Corporate