

LIGHTS! CAMERA! ACTION!

Shareholder Meetings Enter the Modern Age



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The COVID-19 pandemic has had a profound impact on American society and the global economy. The crisis brought on new developments and accelerated technological innovations. Organizations have been at the forefront of these changes, especially as entities evaluate corporate governance requirements and the manner in which business is conducted with the public.

Most state corporate statutes require corporations to conduct an “annual” meeting and meetings that may otherwise be required to approve corporate actions. One of the primary agenda items is often the election of directors by the shareholders. Annual meetings also often address shareholder approval for amending corporate governance documents, including the cer-

tificate of incorporation or bylaws; approving material changes or transactions such as a merger, acquisition, dissolution or sale of substantial assets; or approving a guarantee of debts not otherwise in furtherance of the corporation’s purpose.

As individuals and businesses increasingly turned out of necessity to electronic meeting platforms to conduct business and participate in “virtual” face-to-face remote meetings, many state legislatures took note. As a result, in the context of corporate governance, multiple jurisdictions amended applicable corporate laws to more specifically and broadly permit remote shareholder meetings, including allowing the use of electronic meeting platforms. Corporate attorneys, general counsel and commercial

litigators should take note of these developments.

While initially these statutory amendments permitted remote shareholder meetings during a declared “state of emergency,” such as the COVID-19 pandemic, given the rapid and widespread implementation of remote platforms, many jurisdictions have dropped the state of emergency requirement and now permit remote shareholder meetings to be held solely or in part by means of remote communication if the Board of the organization authorizes, secures and adopts guidelines and procedures that: (a) verify that each person participating remotely is a shareholder or a proxy of a shareholder; (b) provide each shareholder participating remotely with a

reasonable opportunity to participate in the meeting, including the ability to read or hear the proceedings, as well as to vote during same; and (c) make and maintain a record of any shareholder votes or other actions taken by remote communication at the meeting.

It should also be noted that today limited liability companies (“LLC”) constitute a significant percentage of business entities in the United States. While many recent statutory amendments to state corporate laws did not similarly address changes to the statutory provision governing LLCs, the following recommendations are designed to ensure that the protections outlined above are implemented for remote corporate shareholder meetings will also apply to LLCs. Similarly, the guidelines for remote shareholder meetings are arguably equally applicable to directors’ meetings which are also authorized by state statute and bylaws provisions.

VERIFICATION

Verifying that each remote participant is a shareholder or a proxyholder in the Company and tracking each shareholder or proxyholder’s vote can be a challenge. Often, public corporations that hold virtual-only shareholder meetings delegate this process to a third-party service provider to facilitate the meeting through a dedicated virtual annual meeting platform (e.g., Broadridge) (as opposed to a simple livestream). For both public and nonpublic companies, virtual meeting platforms should allow virtual attendees to verify their identities so that they can be counted toward a quorum and actions requiring a vote, as well as to ask questions and participate during the meeting.

Shareholder verification typically occurs by including a unique code in each shareholder’s proxy materials or a meeting link that he or she can use to log in to the meeting website. If a shareholder casts a vote during the meeting, the unique code allows the proxy solicitor to ensure that the shareholder’s proxy, if one was submitted, is replaced by the shareholder’s vote cast during the meeting. As a practical matter, companies should conduct a dry run of the virtual meeting with its virtual meeting platform provider to avoid and minimize issues.

PARTICIPATION GUIDELINES

Companies also have an obligation to provide clear and complete directions to their shareholders on how they can participate in shareholder meetings. It is critically important that companies electing to hold virtual shareholder meetings address the

following issues:

1. Provide shareholders with complete, clear and detailed instructions on how they can attend the meeting and vote both prior to and at the meeting.
2. Prepare all instructions in a clear and unambiguous manner.
3. Display all instructions in a prominent and easily accessible location.
4. Where applicable, distinguish and explain different procedures for shareholders of record and shareholders holding shares as beneficial holders.
5. Where applicable, describe whether and why a shareholder must obtain and/or provide additional information to the corporation, including, without limitation, a legal proxy in advance of the meeting and how to do so.
6. Confirm whether attendance at the meeting is limited solely to shareholders or is open to both the shareholders and guests.
7. Adopt guidelines for online participation in shareholder meetings. These guidelines for online participation should be shared in advance of and during the meeting.
8. Establish procedures to validate online meeting participants as shareholders.
9. Establish procedures for shareholders to vote remotely and to record such votes properly.
10. Establish guidelines for questions from shareholders who intend to participate online. For example, it is advisable to develop procedures for posting all questions in advance of the meeting and for allowing shareholders to communicate before the meeting to indicate they wish to ask a question or make a statement.

Similarly, corporations should provide specific and reasonable time guidelines for posing questions to management. As important, these should delineate specific and reasonable guidelines for the display of questions and answers to avoid the potential for misuse of how questions are filtered, organized, displayed or answered.

To address these concerns, the company should consider displaying all reasonable questions asked during a meeting; provided, however, that malicious or frivolous questions are excluded at the discretion of the company. Companies should also consider organizing and answering questions based on groupings of related questions or organizing and answering questions based on the time that each question is submitted. When a hybrid meeting format is utilized, companies should con-

sider alternating questions that are posed in person, over the telephone and via the internet. Consideration should also be given to establishing procedures for questions received during the meeting but not answered during the meeting as well as to establishing procedures to allow a shareholder to revoke or re-frame a question.

MEETING RECORDATION

It is critically important that corporations utilizing remote platforms for shareholder meetings also implement policies and procedures to archive the meeting on a publicly available website for a specific and reasonable period of time. These procedures should address, among other issues, how long the record will be maintained, whether to record executive sessions and the impact, if any, on any decisions or votes taken if all or a portion of the recordation is subsequently lost. Companies should also consider the need to mute disruptive participants who cause or induce interference at a meeting. It is also important for corporations to establish procedures to allow for the posting of questions and answers after the meeting is concluded. Corporations should also reserve the right, subject to statutory requirements, to make a decision to cease recording a meeting at any point.

The use of remote meeting and election meeting platforms to conduct shareholder (as well as member and director) meetings will likely continue to grow. To protect the rights of shareholders, directors and other stakeholders, practitioners should be mindful of this trend and monitor applicable controlling state law, which continues to evolve with technology and the needs of society. Corporations should proactively adopt bylaw amendments to address the myriad of issues -- substantive and practical -- that are implicated by these changes. Commercial litigators should also take note of these developments and ensure participants comply with all procedural requirements. Traditional in-person meetings may never go away fully but are much more likely to be completed in a hybrid or remote format.



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