

Recent COVID-19 Guidance Facilitates Virtual Stockholder Meetings for Delaware Corporations—Know What’s Required Under Delaware Law

The COVID-19 pandemic state stay-at-home orders have compelled corporations, for example Starbucks and the Ford Motor Company, to forgo an in-person annual meeting of stockholders and hold their annual stockholder meetings as virtual or hybrid meetings.¹ It has also spurred government authorities to make it easier for corporations to hold virtual meetings. On March 13, 2020, the Staff of the U.S. Securities and Exchange Commission (the “SEC”) issued guidance to “facilitate the ability of public companies to hold these important” annual stockholder meetings virtually “through the use of technology, and engage with shareholders while complying with the federal securities laws” (the “SEC Meetings Guidance”).² On April 6, 2020, the Governor of Delaware issued a Modified Declaration concerning the State’s response to the COVID-19 emergency that eased

¹ Remote or virtual meetings are meetings held without a physical location either via video or audio means or a combination of the two. Hybrid meetings are a combination of a physical and remote meeting in that the annual meeting is held at a physical location, but attendees may participate remotely in the same manner.

² *SEC Staff Provides Guidance to Promote Continued Shareholder Engagement, Including at Virtual Annual Meetings, for Companies and Funds Affected by the Coronavirus Disease 2019 (COVID-19)*, U.S. Securities & Exchange Commission, <https://www.sec.gov/news/press-release/2020-62> (last visited Apr. 7, 2020).



some of the requirements under Delaware law concerning holding remote stockholder meetings (the “Modified Emergency Declaration”).³ The Modified Emergency Declaration permits any Delaware corporation subject to the reporting requirements of Section 13(a) or Section 15(d) of the Securities Exchange Act of 1934 to notify its stockholders of a change in a meeting’s location from a physical location to a remote meeting by publicly filing a document with the SEC and issuing a press release that is promptly posted on the corporation’s website. These requirements also apply to adjournments of in-person meetings.

Although the SEC Meetings Guidance and the Modified Emergency Declaration ease the process for holding virtual annual meetings, the state law that governs authorizing, noticing, and conducting an annual stockholder meeting remains in place, and corporate planners must keep these requirements in mind in planning a virtual meeting. This Memo discusses the state law requirements that govern Delaware corporations under the Delaware General Corporation Law

³Tenth Modification of the Declaration of a State of Emergency for the State of Delaware Due to a Public Health Threat § 4(a) (Apr. 6, 2020), <https://governor.delaware.gov/wp-content/uploads/sites/24/2020/04/Tenth-Modification-to-State-of-Emergency-04062020.pdf>.



(“DGCL”) that undertake to hold a virtual meeting, including the overlay of the SEC Meetings Guidance and the Modified Emergency Declaration.⁴

I. Delaware Law Allows a Corporation to Hold a Virtual Meeting If Permitted by the Corporation’s Certificate of Incorporation or Bylaws

Section 211 of the DGCL expressly permits a corporation to hold a virtual stockholder meeting. That statute provides:

If, pursuant to this paragraph or the certificate of incorporation or the bylaws of the corporation, the board of directors is authorized to determine the place of a meeting of stockholders, the board of directors may, in its sole discretion, determine that the meeting shall not be held at any place, but may instead be held solely by means of remote communication as authorized by paragraph (a)(2) of this section.⁵

So, the first inquiry must be: what do the corporation’s certificate of incorporation or bylaws provide? If the governing documents give the board discretion to determine the place of an annual meeting, the board may determine that the meeting may be

⁴ The law governing annual stockholder and virtual meetings varies widely from state to state and this Memo does not address issues arising under other states’ laws.

⁵ 8 *Del. C.* § 211(a)(1).



held by means of “remote communication” as an alternative to a physical meeting.⁶

But, if the certificate or bylaws require that annual meetings be held in person at a physical location and do not give the board discretion to determine the location, then the board is not authorized to hold a virtual meeting.⁷ To permit a virtual meeting, the governing documents would have to be amended. The board will usually have the power to amend bylaws, but an amendment to a certificate of incorporation requires a stockholder vote. And, unless the stockholders are empowered to act by written consent, the certificate cannot be amended without a stockholder meeting.

⁶ A typical provision empowering a board to call a virtual annual stockholder meeting reads as follows:

The chairman of the board or the board of directors may designate any place, either within or without the State of Delaware, as the location for any annual meeting of stockholders, and may, in his/her/its sole discretion, determine that a virtual meeting of stockholders by means of remote communication shall be held in addition to or instead of a physical meeting as permitted by Delaware law.

⁷ Section 211 of the DGCL suggests that the board’s general discretionary authority to determine the “place of a meeting” includes the authority to determine that it shall not be convened at any “place” and instead be convened “solely by means of remote communication.” To ensure that the board’s discretion extends to calling a virtual or hybrid meeting, however, the corporation may nonetheless authorize the board to determine that the place may be solely or partly by remote means to avoid any argument later that a virtual or hybrid meeting was beyond the board’s authority.

II. Guidelines for Noticing and Conducting a Virtual Meeting

By statute, only the board has the discretion to determine that a stockholder meeting will be held virtually. Section 211(a)(2) of the DGCL also provides that the board’s discretion will be subject to “guidelines and procedures” as the directors may adopt for virtual meetings.

A. Giving Notice of the Virtual Meeting

After the board authorizes a virtual meeting, the corporation must then provide notice of the meeting to its stockholders. If the corporation has not yet noticed a meeting or published proxy materials, the process for noticing a virtual meeting is similar to the process for an in-person meeting. Delaware law requires a corporation to send to its stockholders a notice of an annual meeting giving the meeting date, time, and location. Notice must be sent no less than 10 days and no more than 60 days in advance of an annual meeting.⁸

The notice of a virtual meeting may be written and either mailed to the stockholder or delivered by courier.⁹ Notice may also be sent by e-mail, except where the stockholder has notified the corporation that the stockholder objects to

⁸ 8 *Del. C.* § 222(b).

⁹ *Id.* § 232(a).



receiving notice by e-mail.¹⁰ If the notice is sent by email, it must contain “a prominent legend that the communication is an important notice regarding the corporation.”¹¹

The notice of a virtual meeting must also provide information about how the virtual meeting will be conducted. *First*, the notice must provide “the means of remote communications.”¹² Typically, a corporation will engage a third-party hosting service to provide the virtual platform for the meeting, which can include audio or video access or both. The virtual meeting notice should provide explicit instructions to stockholders on how to access the virtual platform. *Second*, the “guidelines and procedures” the board has adopted under Section 211(a)(2) should be included in the notice to ensure an efficient meeting and minimize disruption.

B. Conducting a Virtual Annual Meeting

Section 211(a)(2)(b) sets forth three requirements for conducting a virtual meeting. Each of these requirements should be considered by the board when

¹⁰ *Id.* § 232(a)(3).

¹¹ *Id.* § 232(a).

¹² *Id.* § 222(a).



adopting guidelines and procedures for the virtual meeting and when conducting the meeting.

1. Verifying Stockholder or Proxyholder Status

Section 211(a)(2)(b)(i) requires that “the corporation shall implement reasonable measures to verify that each person deemed present and permitted to vote at the meeting by means of remote communication is a stockholder or proxyholder” For an in-person meeting, this verification is usually done by having an inspector of elections check credentials of anyone seeking to attend the meeting to ensure the attendee is a bona fide stockholder or holds a valid proxy. Virtual meetings need a similar gatekeeper. For example, if the meeting is hosted by a third-party hosting service, the service may limit access to the meeting by giving credentialed stockholders and proxyholders unique access codes or control numbers.

2. Reasonable Opportunity to Participate in the Meeting and Vote

Section 211(a)(2)(b)(ii) requires that “the corporation shall implement reasonable measures to provide such stockholders and proxyholders a reasonable opportunity to participate in the meeting and to vote on matters submitted to the stockholders, including an opportunity to read or hear the proceedings of the meeting substantially concurrently with such proceedings” What is “reasonable” in a virtual meeting



is not a bright line determination and depends on facts and circumstances of the meeting. Although the board has broad power to control the business to be conducted at the meeting, this legitimate need for efficiency and order is limited by the stockholders' statutory right to a reasonable opportunity to participate. For example, a reasonable process to permit stockholder participation in a virtual meeting may require that questions or requests to speak be submitted by stockholders in advance of the meeting or during the meeting by email, and addressed sequentially at the meeting, so that the meeting may proceed in an orderly fashion. The board will need to ensure that the virtual meeting has sufficient technical support necessary to enable these processes, and the meeting notice should instruct stockholders how to access technical support should they experience technical issues.

Crafting a process that permits stockholders and proxyholders the ability to vote on all matters presented at the virtual meeting should not present serious technological or practical challenges. Again, by providing stockholders and proxyholders with unique access codes or control numbers before the meeting, the hosting service and inspectors of election should have an accurate and auditable record of stockholder votes.¹³

¹³ Although Section 211(e) provides that elections of directors must be by written ballot unless otherwise provided in the certificate of incorporation, that statute also

3. Maintaining a Record of Stockholder Action

Section 211(a)(2)(b)(iii) requires that “if any stockholder or proxyholder votes or takes other action at the meeting by means of remote communication, a record of such vote or other action shall be maintained by the corporation.” As discussed above, most third-party hosting services will generate a record of voting that the corporation can preserve. What this requirement highlights is that a virtual stockholder meeting is more complicated than simply circulating a dial-in number or Zoom invite and having the corporate secretary take good notes. To maintain control over the meeting and satisfy the procedural requirements of Section 211(a)(2)(b), the corporation will need a sophisticated system to control who participates in the meeting and to maintain a record of how the participants voted. That will require engaging and coordinating other players—the corporation’s executive team, board and investor relations staff, as well as its transfer agent, proxy manager, proxy solicitor, and outside legal counsel.

provides that this requirement shall be satisfied, if authorized by the board, “by a ballot submitted by electronic transmission, provided that any such electronic transmission must either set forth or be submitted with information from which it can be determined that electronic transmission was authorized by the stockholder or proxyholder.”

Relatedly, Section 219 of the DGCL requires a corporation to make available “on a reasonably accessible electronic network” a list of stockholders entitled to vote at the meeting. The information needed to access the list must be provided with the notice of the virtual meeting, and stockholders must have access to the list “during the whole time of the meeting.”¹⁴ In a virtual meeting, the platform may allow stockholders and proxyholders access to download or view documents during the meeting. The stocklist is one of the documents that must be available to those present at the virtual meeting.

In adopting “guidelines and procedures” for a virtual meeting, a board should keep in mind the meeting chair’s broad power when conducting any meeting of stockholders—whether in person or virtual. Under Delaware law, a meeting chair has discretion to establish and enforce meeting procedures. Those meeting procedures must, however, be applied fairly and equitably so as not to disenfranchise the stockholders. The meeting chair and the board retain the power to reasonably limit discussion during the meeting, including the power to determine whether

¹⁴ 8 *Del. C.* § 219.

questions will be permitted, and how those questions are to be submitted.¹⁵ At an in-person meeting, the chair has the authority to physically remove a stockholder. At a virtual meeting, a chair should have similar authority to “remove” a disruptive stockholder if necessary to maintain the orderly progression of the meeting. In a virtual meeting, that could be achieved either by muting the stockholder or by electronically cutting off the stockholder’s access to the meeting. Although it is not yet settled whether cutting off electronic access to a disruptive stockholder would run afoul of the “opportunity to participate” requirement of Section 211(a)(2)(b)(ii), it seems doubtful that a meeting chair would have less power to control a virtual meeting than would a chair presiding over an in-person meeting.

III. How a Corporation Can Convert an Already Noticed In-person Meeting to a Virtual Meeting

The COVID-19 pandemic has struck the United States with the 2020 proxy season already in full swing. The timing of the pandemic has added an unwanted wrinkle for those corporations that have already sent out notices and proxies for an in-person meeting and that now would like, or need, to switch to a virtual meeting. The Modified Emergency Declaration and SEC Meetings Guidance simplify some

¹⁵ See *Loudon v. Archer-Daniels-Midland Co.*, 1996 WL 74730, at *8 (Del. Ch. Feb. 20, 1996), *aff’d*, 700 A.2d 135 (Del. 1997).



aspects of making the switch, but meeting planners still need to be mindful of Delaware law’s remaining requirements.

Delaware law permits changing the location or format of a meeting after a corporation has sent its proxy materials to stockholders. Although Delaware law does not require a corporation to explain the reason for the change, sound governance and investor relations principles counsel stating the reason for the change to avoid any claim or suggestion that the corporation made the change to disadvantage particular stockholders or for some other inequitable purpose. As described below, the mechanics of how to convert an in-person annual meeting to a virtual annual meeting will depend on the timing of the meeting.

A corporation must give at least 10 days’ advance notice to stockholders of the change to a virtual meeting under Section 222(b). Where a corporation has already provided notice of an annual meeting, and the date for that meeting is still more than 10 days in the future, the corporation may change the meeting from in-person to virtual by sending a new notice to the stockholders. The Modified Emergency Declaration permits reporting companies to provide notice of the change from a physical meeting to a remote meeting by an SEC filing and by a press release promptly posted on the company’s website. The requirements for authorizing a virtual meeting under Section 211(a)(2)—board authorization and announcement of

the date, time, and place or means of remote communication for the reconvened meeting—still must be followed.

If less than 10 days remain before the meeting date, a corporation will not be able to meet the 10-day notice requirements by providing a new notice announcing the change. A workaround for a corporation facing this problem would be to convene the in-person meeting, and then quickly adjourn the meeting to another location—i.e., a virtual location. In making the change to a virtual meeting through an adjournment, the board must still comply with the requirements of Section 211(a)(2) for the reconvened meeting. But, the announcement of the adjournment and reconvening of the meeting do not have to comply with the 10-day advance notice requirements of Section 222(b) and the delivery requirements of Section 232. Section 222(c), which governs the procedures for adjournment, provides (in part):

When a meeting is adjourned to another time or place, unless the bylaws otherwise require, notice need not be given of the adjourned meeting if the time, place, if any, thereof, and the means of remote communications, if any, by which stockholders and proxy holders may be deemed to be present in person and vote at such adjourned meeting are announced at the meeting at which the adjournment is taken.

Announcing the adjournment at the in-person meeting allows the corporation to disclose the details of the virtual meeting under the more flexible notice requirements set forth in the recent SEC Meetings Guidance concerning proxy

materials. The SEC Meetings Guidance does not require reporting companies to mail additional materials to its stockholders before changing the date, time, or location or format of the meeting. Instead, reporting companies must (1) announce changes by press release, (2) file the announcement on EDGAR as definitive additional soliciting material, and (3) take reasonable steps to inform other intermediaries in the proxy process (such as any proxy service provider) and other relevant market participants (such as the securities exchanges) of the conversion.¹⁶ Likewise, the Modified Emergency Declaration permits reporting companies to follow the SEC Meetings Guidance and provide notice of the adjourned meeting by an SEC filing and by a press release promptly posted on the company's website.¹⁷ The corporation must take these actions promptly after deciding to convert the meeting.

¹⁶ *Staff Guidance for Conducting Shareholder Meetings in Light of COVID-19 Concerns*, U.S. Securities & Exchange Commission, <https://www.sec.gov/ocr/staff-guidance-conducting-annual-meetings-light-covid-19-concerns> (last updated Apr. 7, 2020).

¹⁷ Tenth Modification of the Declaration of a State of Emergency for the State of Delaware Due to a Public Health Threat § 4(a) (Apr. 6, 2020), <https://governor.delaware.gov/wp-content/uploads/sites/24/2020/04/Tenth-Modification-to-State-of-Emergency-04062020.pdf>.

Thus, for an adjourned meeting, these procedures allow a corporation to provide the information that Section 211(a)(2) requires for a virtual meeting by issuing a press release filed on EDGAR and by taking reasonable steps to inform other intermediaries and relevant market participants, rather than having to provide a new notice under Section 222(b) that would require a physical mailing or dissemination by e-mail.

We suggest that a corporation that wishes to convene an in-person meeting, and then adjourn it and reconvene as a virtual meeting, consider issuing its press release containing the virtual meeting details as soon as it can. Indeed, the corporation could provide this information before the in-person meeting begins. If, however, the adjournment will be for more than 30 days, then new notice must be given, which might then require setting a new record date.¹⁸

Although Section 211 has provided for virtual meetings since 2000, they have yet to become a popular way for corporations to conduct their annual meetings, perhaps because of a human desire to stay with the tried and true rather than experiment. The COVID-19 pandemic, by forcing corporations to hold virtual meetings, is altering that landscape. Once corporations become fluent in holding

¹⁸ 8 *Del. C.* § 222(c).



virtual meetings, virtual meetings may become the preferred format for annual stockholder meetings. Regardless of what the post-pandemic world will look like, corporations will need to become adept in holding virtual meetings now.

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