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Business Governance Issues of Remote/Virtual Meetings: How Can your Corporation or LLC Conduct Remote Meetings?

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With most businesses moving to remote work due to the COVID-19 (coronavirus) pandemic, one issue that may arise is how, as a matter of corporate governance, boards, shareholders, or members (in the context of an LLC) may conduct meetings remotely. This is generally possible, though the process may depend on the state of incorporation, type of entity involved, and whether the meeting is of the board, shareholders, or members.

Corporate Board Meetings

Virtual Board Meetings: Allowed Under Michigan and Delaware Law

For Michigan corporations, profit and nonprofit, state law has long permitted remote meetings of directors. Section 521(3) of the Michigan Business Corporation Act (“BCA”) and the same section of the Michigan Nonprofit Corporation Act (“NCA”) both allow meetings by conference telephone or other means of remote communication (e.g., a webcast) as long as all meeting participants can communicate with the other participants. Both statutes provide that remote attendance constitutes attendance in person at the meeting, and thus board members can be counted for quorum purposes.

Delaware for-profit corporations are governed by the Delaware General Corporation Law (“DGCL”). Under DGCL Sec. 141(i), remote board meetings are allowed by telephone or other communications equipment, as long as all persons participating in the meeting can hear each other. The wording in Delaware differs slightly from Michigan, but the practical effect is the same.

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No particular type of remote platform or software is required, so boards can use different methods to share information and facilitate communication among meeting participants. Boards that may be discussing confidential or proprietary matters, or that handle sensitive and highly-regulated information (such as educational or healthcare organizations), should consider appropriate security and encryption processes.

Internal Documents Govern

Corporations have considerable leeway in structuring their internal operations, and thus should also check their articles/certificate of incorporation^[1] and bylaws to see if there are other, more restrictive, requirements applicable to remote meetings. Under each of the BCA, NCA and DGCL a corporation may, through a provision in its charter or bylaws, prohibit remote meetings otherwise permitted by statute. It's rare for corporations to include meeting provisions in their charters, but bylaws frequently include provisions regarding how meetings are called and conducted.

Entities looking to convene meetings remotely must account for several factors. First, they must ensure compliance with timing and notice requirements, which will typically be found in corporate bylaws. In light of the current pandemic, corporations may want to consider revising governing documents to ensure there's a well-planned process through which an emergency meeting may take place and that the notice provisions permit prompt action in response to urgent developments. Another concern is the robustness of the systems and programs that will be used to host the remote meeting, and whether directors may run into connection issues. A director trying to connect to an online meeting via smartphone with a weak internet connection may find meaningful participation difficult, and it may be advisable to also include a backup telephone dial-in number even if a video meeting is planned.

Written Board Consent

Unless prohibited by the governing documents, both Michigan and Delaware allow for board action by unanimous consent of all board members, and such consents can be by a written and signed document or by electronic submission. Records of these consents must be maintained by the corporation.

A Word of Caution for the Board

The fiduciary duties of directors are personal and non-delegable, and the language on remote meeting reinforces this when it requires all meeting participants be able to *communicate with the other participants*. Corporations may not "poll" directors by phone or email to get to a majority vote. Note also that as a general rule, directors cannot give proxies to other directors to vote on board matters, and may not designate a "delegate" or "alternate" to act (either in person or remotely). The exception for consent requires *unanimous* action in writing or by email; there is no such thing as a "majority vote" of a board via email, call, or written document.

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There are some exceptions for closely held corporations. Section 488 of the BCA allows such corporations to incorporate a number of special provisions that otherwise would not be valid, including, among others, eliminating the board, allowing director proxies, and requiring dissolution upon a specified event. This is allowed with the aim to provide flexibility for Michigan corporations and to allow shareholders the ability to influence the governance structure of a corporation. Section 488 provisions must be set forth in a provision of the articles of incorporation or bylaws approved by all persons who are shareholders at the time of adoption, or in a written agreement signed by all persons who are shareholders at the time of the agreement and made known to the corporation. Similar restrictions apply to amendments. Section 488 provisions must be conspicuously noted on certificates and persons who become shareholders without knowledge of such restrictions are entitled to rescind their purchase.

A separate subchapter XIV of the DCGL is available for corporations with less than 30 shareholders who elect to be designated as subject to the subchapter and contain specific charter provisions. Such corporations may incorporate provisions similar to those provided in BCA Sec. 488, though director proxies are not mentioned.

Corporate Shareholder Meetings

Virtual Shareholder Meetings: Allowed under Michigan and Delaware Law

The BCA (Section 405), NCA (Section 405) and DGCL (Section 211) all allow remote participation by shareholders at shareholder meetings (in the case of the NCA, this is also allowed for members in a membership corporation). One significant difference in the BCA between remote board meetings and remote shareholder or member meetings is that unlike directors, shareholders or members are not required to be able to communicate with each other in remote meetings. Recall that remote board meetings are permitted so long as participants can “communicate with the other participants,” under the Michigan statute, and “can hear each other,” under the Delaware statute. The rationale behind this difference between board and shareholder meetings is partly due to the view of a board as a deliberative body and also due to the impracticality of a communication rule for large shareholder meetings. Note, however, that the NCA still requires that for remote shareholder or member meetings, all participants be able to communicate with all other participants.

However, both Michigan and Delaware require reasonable measures be implemented to verify that each person considered present and permitted to vote is a shareholder or proxy holder. Thus, for remote meetings the corporation may have to put into place procedures to verify shareholders or proxies, as the case may be. The statutes have other provisions that should be followed if a remote shareholder meeting is planned, such as implementing measures to provide each shareholder and proxy holder a reasonable opportunity to participate and vote on the matters submitted for vote, including an opportunity to read or hear the proceedings of the meeting substantially concurrent with the proceedings, and maintaining records of actions taken by shareholders and proxy holders at the meeting.

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Again, Internal Documents Govern

As with board meetings, corporations can have detailed requirements for shareholder meetings. As such, it will be important to review the corporation's articles and bylaws before planning a remote shareholder meeting, and to consider revising governing documents, as needed, to ensure there are efficient and well-planned processes in place.

Limited Liability Companies ("LLCs")

Unlike Delaware, the Michigan Limited Liability Company Act does not expressly address remote meetings. The Delaware Limited Liability Company Act permits remote member (or manager) meetings by conference telephone or *other communications equipment* so long as all persons participating can hear each other. This requirement is consistent with the DGCL rule for remote board meetings, discussed above. Due to the flexibility of LLCs, it is important to look to the Limited Liability Company Agreement for language on remote member (or manager) meetings.

The requirements of the corporate acts can be kept in mind as good practices when adding language to the applicable governing agreement to permit remote meetings. The language should seek to: (i) ensure all members or managers are advised of the method of remote meeting (e.g., conference call, video conference), (ii) confirm all members or managers have sufficient technological means and familiarity to meaningfully engage in the meeting, (iii) implement measures to verify the identity and authority of a member, manager, or proxy holder virtually present, and (iv) require that all actions discussed and agreed to are adequately recorded and maintained in the company's records.

Takeaway

Overall, there is considerable flexibility for business entities to conduct remote meetings, and doing so is an especially good idea in the current environment of social distancing. Directors and officers must follow the requirements of statutes and constituent company documents to ensure meetings are properly called, noticed and conducted, so that any action taken will be duly authorized.

Other assistance.

For other advice on business entity meeting requirements, or for reviews of entity governing documents, or for training on board governance duties and responsibilities, please contact the authors of this alert or any member of Butzel Long's Business Law or Corporate Governance teams.

For other information for businesses and individuals on the legal, regulatory, and commercial implications of the COVID-19 virus, see the Butzel Long Coronavirus (COVID-19) Resource Center at [coronavirus-covid-19-resource-page.html](https://www.butzel.com/coronavirus-covid-19-resource-page.html).

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[1] Michigan and Delaware use different nomenclature for a corporation's fundamental charter document. Michigan corporations file articles of incorporation, while Delaware corporations file a certificate of incorporation. We use the term "charter" in this alert to refer to either document.

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