The Virtual Board Meeting in the New COVID-19 World Order

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The advent and acceleration of the coronavirus has wrought seismic changes in our world order. Live meetings of ten or more folks locked in a conference room are being discouraged by health care organizations. Business organizations have suspended usual operations and employees are encouraged to work remotely. Industry conferences or smaller events are being cancelled on widespread scale. With the general angst and anxiety of convening live meetings, the virtual meeting has become the new regime and regimen for the Board of Directors. In this age of COVID-19 anxiety, more than ever Boards of Directors should be convening periodically, exercising their fiduciary duties of due care and loyalty to the enterprise to discuss corporate strategy in the face of the specter. During these tumultuous times, vigilant Boards should be intimately engaged in discussing and revisiting business strategy, and considering business exigencies, disease-protection measures, and the welfare of the business and its constituencies, whether employees, creditors, customers, partners and vendors.

But convening meetings in person, however, is no longer a safe and sensible exercise in light of current COVID-19 concerns. Boards must adopt new policies and procedures which have always been available: the *virtual, electronic meeting*. Virtual Board meetings are nothing novel, imaginative nor unusual. However, given the current exigencies, Boards should be meeting frequently – and virtually – to consider careful planning as businesses are becoming severely impacted by the pandemic. Fortunately, the Delaware Corporation Law (DGCL) certainly permits electronic meetings of the Board of Directors — as long as certain statutory requirements are satisfied. As always, to host a special meeting of the Board, proper advance notice is required under the DGCL, and also under the company's bylaws – often overlooked in the process. The bylaws should be checked for proper notice requirements: typically, many bylaws stipulate at least two business days' notice.

If a special Board meeting is called, typical bylaws also require the delivery of an agenda for the special meeting – in advance of the meeting, and accompanying the advance notice requirement. Furthermore, under the DGCL (see Section 241(i)), Board members should "acknowledge" – orally, while on the call — that all participants can hear one another by means of the conference telephone or inside the electronic room (e.g., Zoom or WebX). To evidence compliance with the statute, that acknowledgment should be recorded in the minutes, but most companies forget this important requirement of the Delaware Corporation statute. Many minutes I have encountered over the years simply do not record this acknowledgment in the minutes of the meeting. Arguably, the actions to be taken at any meeting might be deemed "defective" to establish proper Board approval of actions or resolutions. A simple phrase, however, will suffice to satisfy this requirement: "*The Board and those present acknowledged that each person could hear each other by means of the conference telephone or the electronic device*". Furthermore, when convening a special meeting of the Board, an agenda of discussion items should be dispatched in advance of the meeting.

Typically, many company bylaws require that the notice be given to each director in person or by telephone (including a voice messaging system or other system or technology designed to record and communicate messages), facsimile transmission or PDF, or by electronic mail or other electronic means, during normal business hours, and at least two (2) business days in advance of the meeting. Notice need not be given to a director if a written waiver of notice is executed by

the director before or after the meeting. The waiver is not valid, however, if the director attends the meeting for the express purpose of objecting to the meeting (and it should be at the beginning of the meeting), and objects to the transaction of any business because the meeting is not lawfully called or convened. Hence, it is prudent for the company to ensure that the special Board meeting is lawfully called, in accordance with the Delaware Corporation statute — and the company's bylaws. Don't forget the bylaws!

As is to be expected, at any virtual meeting of the Board, a majority of the directors then in office usually constitutes a quorum, unless the charter or bylaws provides otherwise (i.e., for a higher number). Therefore, if a quorum is present, then *less than* a majority of the directors in office can, conceivably, review, adopt and approve most corporate actions. This peculiar aspect of the statute and the quorum is often ignored or forgotten. Less than a majority of the directors present at a properly called Board meeting can execute and approve corporate actions. At any meeting of the Board of Directors at which a quorum is present, a majority of the Directors present may take any action on behalf of the Board, unless otherwise provided by the DGCL, by the company's certificate of incorporation or bylaws. Be mindful, however, the terms of investor preferred stock frequently contain "protective provisions" for corporate actions which might mandate the vote of a majority of the directors in office, as well as one or more of the directors who serve as the representative of the preferred stock.

Proper corporate governance in the New World Order requires vigilance, due care, exercise of business judgment – all within the confines of the virtual Board meeting. But proper governance also requires proper mechanics. Follow these simple parliamentary procedures for practicing "safe social distancing" in the virtual Board meeting.

For more information on virtual Board meetings, please feel free to contact Dan Blanchard.