March 25, 2020

Amendment to the New Jersey Business Corporation Act Permits Virtual-Only Annual Meetings During COVID-19 State of Emergency

On March 20, New Jersey Governor Murphy signed into law a bill amending Section 14A:5-1 of the New Jersey Business Corporation Act to permit New Jersey corporations to hold meetings of shareholders solely by means of remote communication (a virtual-only meeting) during a State of Emergency declared by the Governor. At times when New Jersey is not in a State of Emergency, New Jersey remains a "hybrid" state with respect to virtual shareholder meetings, meaning that New Jersey corporations can hold a virtual meeting only so long as there is also an actual physical location for the meeting where shareholders can attend in-person.

Section 14A:5-1 requires that any New Jersey corporation holding a virtual-only or hybrid shareholder meeting:

- obtain board authorization of remote participation and adoption of guidelines and procedures applicable to such a meeting; and
- implement reasonable measures to:
    - verify that each person participating remotely is a shareholder or a proxy of a shareholder,
    - assure that each shareholder has a reasonable opportunity to participate in the meeting (*i.e.*, an opportunity to vote and to read or hear the proceedings), and
    - record, and maintain a record of, any shareholder votes or other action taken at the meeting.

A New Jersey corporation must also confirm that its certificate of incorporation and by-laws do not limit or prevent it from providing for remote participation by shareholders. If any such limitations exist, the corporation may need to amend those documents before proceeding.

Although the legislation provides welcome relief to New Jersey corporations that are grappling with the evolving COVID-19 pandemic and its implications for their 2020 annual shareholder meetings, the condition that a State of Emergency be in place for a corporation to avail itself of this relief may be problematic for many New Jersey corporations, and public companies in particular. Governor Murphy declared a State of Emergency with respect to the COVID-19 pandemic on March 9, pursuant to Executive Order 103, which took effect immediately and "shall remain in effect until such time as it is determined by [the Governor] that an emergency no longer exists."

Because the ability to conduct a virtual-only shareholder meeting is in effect only so long as a State of Emergency has been declared and remains in effect in the State of New Jersey, New Jersey corporations must plan for the possibility that the State of Emergency may be lifted shortly before, or even on the day of, the shareholder meeting, in which case a physical location for the meeting would still be required. This is of particular concern to public companies, which typically file their proxy statements with the Securities and Exchange Commission and mail the notice of meeting to shareholders 30 or more days prior to the meeting date. For a New Jersey corporation that is a public company and has not yet filed its proxy statement, it would be advisable to plan for, and notice, a hybrid meeting (with both in-person and remote components) and to provide in the proxy statement for the possibility of converting to a virtual-only meeting format.[1]

Additionally, we note that the virtual-only shareholder meeting provisions of Section 14A:5-1 are triggered when there is a State of Emergency declared in New Jersey, regardless of whether a meeting is to be held in New Jersey or at an out-of-state location. Thus, there is the possibility that a New Jersey corporation holding a meeting in a state that has declared a State of Emergency cannot hold a virtual-only meeting if there is no ongoing State of Emergency in New Jersey at that time.

Before proceeding with a virtual annual meeting, all public companies (regardless of their state of incorporation) should consult with counsel to ensure that proper procedures are followed and appropriate disclosures are made. Due to the recent influx of requests for virtual shareholder meetings in light of the COVID-19 pandemic, corporations that are considering hybrid or virtual-only shareholder meetings should reach out to their transfer agent or shareholder service company as soon as practicable to account for the additional lead-time that may be required to set up remote participation. Corporations will also need lead-time to coordinate the logistics of the virtual component of their meetings (for example, ensuring that all participants, especially those with speaking roles, are prepared to participate remotely) and to think through other necessary or appropriate changes to the meeting or its structure, such as updating annual meeting scripts, to reflect the virtual component of the meeting.

Day Pitney attorneys are available to assist should you be considering holding, or converting to, a hybrid or virtual-only shareholder meeting.

---

[1] For those corporations which have already filed/mailed their proxy materials, the SEC has issued guidance on how a company should notify its shareholders of the determination to convert its in-person meeting to a virtual meeting.

For more Day Pitney alerts and articles related to the impact of COVID-19, as well as information from other reliable sources, please visit our COVID-19 Resource Center.

COVID-19 DISCLAIMER: As you are aware, as a result of the COVID-19 pandemic, things are changing quickly and the effect, enforceability and interpretation of laws may be affected by future events. The material set forth in this document is not an unequivocal statement of law, but instead represents our best interpretation of where things stand as of the date of first publication. We have not attempted to address the potential impacts of all local, state and federal orders that may have been issued in response to the COVID-19 pandemic.

Authors



Ellen S. Knarr

Partner

Parsippany, NJ | (973) 966-8303

New York, NY | (212) 297-2423

eknarr@daypitney.com



Scott Warren Goodman

Partner

Parsippany, NJ | (973) 966-8226

New York, NY | (212) 297-2436

sgoodman@daypitney.com