

CORPORATE

ALERT

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COVID-19: Governor's Order about Annual Shareholder Meetings in New York

By Sarah Hewitt

Most states have now issued stay at home orders and are mandating social distancing through April 30 and possibly beyond in light of the COVID-19 pandemic facing our country. As April and May are popular times of year for shareholder meetings, New York's Governor Cuomo issued an executive order No. 202.8 on March 20, 2020 that has the effect of permitting corporations incorporated in New York to hold virtual-only shareholder meetings immediately and through April 19, 2020.

The Governor's order temporarily suspends the provisions of Section 602(a) of the New York Business Corporation Law ("BCL") (which requires meetings to occur at a "place") and Sections 605(a) and (b) of the BCL (which require prior notice of annual meetings and certain adjournments thereof) "to the extent they require meetings of shareholders to be noticed and held at a physical location." An October 2019 rule change to Section 602(b) of the BCL permits a virtual component to shareholder meetings, subject to certain conditions, but not virtual-only meetings as states such as Delaware permit¹. It does not appear that Section 603 of the New York Not-For-Profit Corporation Law (which requires meetings of

members to occur at a "place") was similarly suspended. New York business corporations remain subject to all applicable shareholder notice and disclosure requirements including the Federal securities laws and their own charter and bylaw requirements relating to shareholder meetings.

The language of the executive order suggests that it applies to shareholder meetings actually held before April 19, unless the order is extended. New York corporations which switch from announced physical meetings to virtual meetings should give notice of the change but may not need to comply again with the minimum notice periods unless required by their bylaws.

Companies should consider the pros and cons of virtual shareholder meetings which may include, without limitation, the following:

- Conceivably allows more shareholders to attend and participate;
- May reduce meeting costs for both the company and shareholders;
- May present certain logistical challenges relating to shareholder access and eligibility to attend and vote, although there are vendors available to provide technical and other support;
- May create uncertainty in vote counts between proxy voting and voting during the virtual meeting;

¹ Section 211(a)(1) of the Delaware General Corporation Law permits the board of directors of Delaware companies, in its sole discretion, to determine that the meeting not be held at any place, but instead "be held solely by means of remote communications," subject to certain conditions set forth in Section 211(a)(2) of the DGCL.

- May make it more difficult for shareholders to present proposals;
- May make it more challenging for the board and management to respond to shareholder questions, especially difficult questions or questioners; and
- May not present the ideal environment to engage with shareholders.

The U.S. Securities and Exchange Commission does not take a position on the type of shareholder meeting that reporting companies should hold, leaving that decision to management and state law requirements. State corporation laws vary. The New York Stock Exchange and the Nasdaq Stock Market also do not prescribe the form of shareholder meetings, only that their listed companies hold such meetings. Many corporations' bylaws give the board of directors discretion to determine the proper venue and format of the shareholder meeting, but each company should check to be sure what its own bylaws provide and consider an appropriate bylaw amendment, if necessary.

New York corporations should consider seeking guidance from legal counsel if they have shareholder meetings planned during this uncertain time. Businesses may want to consider postponing or adjourning or converting to a virtual meeting, and monitoring whether Governor Cuomo's March 20 executive order will be extended past April 19.

This Alert is based on information available at the time of publishing. It is subject to change. Business leaders should consult with counsel and refer to government websites and publications for the most up-to-date information.

For more detailed analysis on a wide range of legal issues, please see Schnader's COVID-19 Resource Center at www.schnader.com/blog/covid-19-coronavirus-resource-center. ◆

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