In this edition of *The MBCA Newsletter*, we have an excellent piece by Steve Haas on remote participation in shareholder meetings. Steve’s article covers the current status of so-called virtual meetings -- that is, hybrid meetings that allow remote participation and virtual-only meetings that are not convened in a particular place, but rather are conducted entirely by means of remote participation. This is a timely note. Not only have many states been addressing virtual meetings in their corporate codes, but also the Corporate Laws Committee is now considering amendments to the MBCA in this area.

Also, in this edition, Professors Larry Hamermesh and Jonathan Lipson discuss our project to publish the Fifth Edition of the *Model Business Corporation Act Annotated*. This edition will align with the 2016 revision of the MBCA and contain updates to the Reporter’s Annotations from 2013.

Turning to the Committee’s other activities, during the first half of 2018, two of our Task Forces have continued updating editions of two popular Committee publications – *The Corporate Director’s Guidebook* and *Handbook for the Conduct of Shareholders’ Meetings* – projected for completion in 2019 and 2020, respectively. Another of our Task Forces continues work on the “hub and spoke” version of the MBCA, hopefully nearing completion in 2019. Working with the Committee on LLCs, Partnerships and Unincorporated Entities and the ABA’s Gatekeeper’s Task Force, our Beneficial Ownership Transparency Task Force has made good progress on drafting fundamental principles for federal legislation which would provide for tailored disclosure of beneficial ownership of corporations and other entities in appropriate circumstances. These principles, when and if agreed to, could inform ABA policy positions going forward. Our Task Force on Appraisal Remedies is close to finishing its review of the MBCA’s appraisal remedy provisions. It is still too early to predict whether this will result in proposed amendments to the MBCA, but we are pleased that this has been a thorough and long-overdue evaluation of how appraisal works under the MBCA.

Finally, at our meeting last April, the Committee voted to sunset our Directors and Officers Duties and Liabilities Task Force, upon that Task Force’s recommendation. After two years of careful consideration of the MBCA’s provisions relating to the duties and liabilities of directors and officers, including the Official Comment to those provisions, the Task Force concluded that no amendments to the MBCA (or the Official Comment) were necessary at this time. The work of the Task Force has been memorialized for future reference, and the Committee is happy to discuss its thinking in this area with any interested parties.

In closing, we would appreciate feedback and input for future editions of *The MBCA Newsletter*. Please let us know if there are items you would like addressed. The newsletter is to highlight recent developments regarding the MBCA and the activities of the Committee, along with noteworthy developments in U.S. corporate law. Your input will help us do that better.

Best regards,

David Martin
Committee Chair
A Brief Overview of Virtual Shareholder Meetings

By Steven M. Haas & Charles L. Brewer

Steven M. Haas is a partner at Hunton Andrews Kurth LLP, where he focuses his practice on mergers and acquisitions, corporate law and corporate governance, and Charles L. Brewer is an associate at Hunton Andrews Kurth LLP, representing clients in connection with mergers and acquisitions, other strategic transactions and general corporate matters. The views expressed herein are those of the authors and are not necessarily the views of Hunton Andrews Kurth LLP or its clients.

Introduction

The number of public companies holding “virtual” shareholder meetings has increased in each of the past several years, with 93 companies holding virtual meetings in 2014, 134 in 2015, 187 in 2016, and 236 in 2017. Despite some shareholder opposition, initial reports indicate this trend is continuing in 2018. This article describes the basic legal requirements under state law as well as various practical considerations for holding a virtual meeting.

Legal Requirements under the MBCA

Virtual shareholder meetings fall into two categories—“hybrid” and “virtual-only.” Hybrid shareholder meetings are in-person meetings that are broadcast simultaneously to shareholders and include the ability for shareholders to participate in—and vote at—the meeting remotely. Virtual-only shareholder meetings are held entirely remotely, without any opportunity for shareholders to attend the meeting in-person. As of March 2018, nine states required in-person meetings and did not permit remote participation by shareholders; approximately 42 states permitted hybrid meetings; and approximately 30 states, including Delaware, permitted virtual-only shareholder meetings.

The Model Business Corporation Act (the “MBCA”) currently permits corporations to hold hybrid meetings but not virtual-only meetings. In other words, there must be a physical place for the meeting. See MBCA §§ 7.01(b) and 7.02(c). Under Section 7.09 of the MBCA, however, shareholders may participate remotely if such participation is authorized by the board of directors. Moreover, the MBCA provides that shareholders can vote and be counted for quorum purposes through remote participation if the corporation has implemented reasonable measures to (1) verify that each person participating remotely as a shareholder is a shareholder and (2) provide shareholders with a reasonable opportunity to participate in the meeting and to vote on matters submitted to the shareholders, including an opportunity to communicate, and to read or hear the proceedings of the meeting, substantially concurrently with such proceedings.

The Corporate Laws Committee is considering proposed changes to the MBCA which would allow virtual-only meetings. The proposed changes will give the board of directors the authority to determine whether an annual or special shareholder meeting will be virtual-only, unless the corporation’s articles of incorporation or bylaws require that the meeting be held at a physical place.

Practical Considerations

Generally

A corporation must first confirm that virtual meetings are permitted under state law and its articles of incorporation and bylaws. In many cases, the corporation may need to amend its bylaws (e.g., because they require a “place” for the meeting). The corporation must then consider how to comply with the applicable statutory requirements (i.e., verifying the identities of its shareholders and providing them with a reasonable opportunity to participate in the meeting). For public corporations, this will usually mean engaging an outside service provider like Broadridge or Computershare to host an online meeting platform. For privately-held companies, engaging a third-party service provider may not be necessary. At some privately held companies, for example, a conference call in which the access code is circulated to the shareholders in
advance and each shareholder identifies himself or herself on the call may be sufficient. The remainder of this article focuses on public companies because of the increased complexities associated with their shareholder meetings, but much of the discussion is also relevant to private companies.

Meeting Format: Audio-Only or Video

One of the fundamental decisions a corporation must make regarding a virtual shareholder meeting is whether it will be audio-only or include video. An audio-only meeting resembles an earnings call, with the key addition of shareholder authentication and voting through a secure website. Speakers are heard but not seen, although the corporation may choose to supplement the audio feed with a contemporaneous slide presentation. A meeting that includes a video feed will generally resemble an in-person shareholder meeting, with the obvious exception that no shareholders would be in physical attendance if it is a virtual-only meeting. To date, corporations holding virtual meetings have overwhelmingly chosen audio-only meetings.

Shareholder Questions and Proposals

For many shareholders, annual meeting question and answer sessions represent their only opportunity to engage directly with a corporation’s directors and officers. Corporations have a number of options regarding how remote shareholder questions can be accepted at virtual meetings, including: (1) live questions via telephone, similar to an earnings call; (2) live questions via text, submitted through the virtual meeting platform; and (3) pre-submitted questions, either through pre-recorded audio or video files or in writing. Corporations can take steps to alleviate potential shareholder concerns over “cherry picking” favorable questions and downplaying, rephrasing, or ignoring questions that are seen as overly negative or hostile by providing transparency into how they select shareholder questions, including by committing to respond to all reasonable questions at the meeting or, if too many questions are received, to post all questions on a website available to shareholders and respond to them after the meeting. To date, taking questions via text has been the most common approach. Just as corporations cannot always accommodate every shareholder who wishes to speak at a traditional meeting, however, reviewing text questions in real-time may be impractical if too many shareholders wish to participate.

Corporations holding a virtual shareholder meeting must also determine how shareholder proposals will be presented. Options include: (1) providing a dedicated dial-in number for the shareholder or the shareholder’s designated representative to present the proposal, similar to an analyst line for an earnings call; (2) permitting proponents to provide an audio or video recording of their presentation, which the corporation would play during the meeting; and (3) designating a representative of the corporation to read the proposal or an introduction to the proposal submitted in advance by the proponent.

Transparency of Meeting Procedures

Corporations will reach different decisions on how to accept shareholder questions and permit the presentation of shareholder proposals in light of their particular circumstances, including their shareholder base and historic practices for holding shareholder meetings. Regardless of the result of any particular decision, however, corporations should strongly consider publishing their chosen procedures for shareholder participation in virtual meetings. Corporations should then adhere to those procedures to ensure that all shareholders receive—and feel that they have received—a meaningful opportunity to participate in the shareholder meeting even if they attend virtually rather than in-person.

Technological Issues

Before holding a virtual shareholder meeting, companies should develop contingency plans to deal with a technological failure, such as a power or network outage. These contingency plans should include scenarios in which there is a brief outage where the meeting can be promptly reconvened, and a prolonged outage that requires the meeting to be reconvened on a later date. To minimize the risk of a technological failure disrupting the official business at the meeting, corporations should structure the agenda of any virtual meeting to bring matters to a vote, close the polls, and adjourn the formal part of the meeting as quickly as possible. Similarly, corporations should consider having the chairman of the meeting announce at the start of the meeting that in the event of any disruption, the meeting will adjourn and reconvene automatically at a specified time and date, to be accessed via the same website. Whether the meeting will need to be reconvened will depend on whether the formal business was concluded or, as a matter of shareholder relations, the corporation should continue with the rest of the agenda (e.g., answering shareholder questions).

Criticism and Support of Virtual-Only Meetings

Unlike hybrid shareholder meetings, which offer the opportunity for remote participation without eliminating shareholders’ ability to attend a meeting in-person, virtual-only meetings have faced significant criticism from some shareholders. These critics argue that shareholders should be
afforded an annual opportunity to sit in the same room as the corporation's directors and officers, “look them in the eye,” and ask hard questions. Critics also believe that corporations may use virtual-only meetings to answer only favorable questions while ignoring pointed or negative questions, or even avoiding shareholder engagement altogether. These criticisms have led to unfavorable press for some companies holding virtual-only meetings and may lead to more shareholder proposals calling for in-person meetings. The critics also note that hybrid meetings can reach a broader audience of shareholders by allowing remote participation without cutting off shareholders’ in-person access to the directors and officers.

Proponents of virtual-only shareholder meetings argue that they are more efficient and convenient for both corporations and shareholders, may result in higher levels of attendance by shareholders, and permit an equivalent level of engagement between shareholders and corporations’ directors and officers as in-person meetings. Virtual-only meeting advocates also note that most uncontested shareholder meetings are poorly attended and are almost always perfunctory rather than substantive. They view quarterly earnings calls, not annual shareholder meetings, as the true forum for substantive performance updates to shareholders. In short, most advocates believe that the time and costs of conducting an in-person meeting outweigh the benefits.

Conclusion

A corporation considering a virtual meeting will need to take into account numerous factors, including a cost-benefit analysis of virtual-only, hybrid, and traditional meeting scenarios and the potential reaction of its shareholders if it chooses a virtual-only meeting. The corporation will also need to ensure that it will satisfy the statutory requirements for remote participation by verifying that each person participating remotely as a shareholder is a shareholder and providing shareholders a reasonable opportunity to read or hear the proceedings of the meeting substantially concurrently with such proceedings, communicate, and vote at the meeting. In addition, as virtual meetings become more popular, particular practices may coalesce regarding how to address many of the issues described in this article. Corporations and their advisors will need to continue monitoring the best practices in corporate governance and adjust their meeting procedures accordingly.
Task Force will recommend its final work to the Committee for its approval.

The Task Force is actively seeking the participation of the Committee’s State Liaisons as well as others who may be involved in the enactment of the MBCA in their respective states. If you are among this group and interested in participating in our process, please let us know at lahamermesh@widener.edu and jlipson@temple.edu.

Why Annotate?

The Committee is revising the MBCAA for two reasons:

- First, and most obviously, it is important that the MBCAA reflect the many changes embodied in the 2016 revision of the MBCA, which was the first comprehensive revision since 1984.

- Second, the MBCAA provides a high level of peer-generated and -reviewed guidance about the MBCA. This peer review aspect may be the MBCAA’s principal value. In the same way that electronic research can easily generate lists of statutory citations, a search in Westlaw or Lexis can easily produce a list of cases citing or interpreting a given provision of the MBCA or of the corporate law of a MBCA state. What no electronic database can do, however, is provide the collective insights of practitioners, jurists, and academics into which interpretations are better or worse, and why. The MBCAA, in other words, is not only a living guide to the history of the MBCA, but also a feedback mechanism by which the Committee is able to keep the MBCA current and in tune with its use in the real world.

What Will MBCAA5 Look Like?

We expect the new edition of the MBCAA to retain the basic structure of the current edition, with one major change: rather than comparing each state’s version of the MBCA to that of other states, we will provide a comparison of the MBCA to other major variations of corporate law in the MBCA and other states, such as Delaware. The current version of the comparison section provides more detail, but it appears that much of this detail can now easily be accessed by electronic searches.

In addition, we are considering two new features. First, we hope to make available both a paper and electronic version. An electronic version would have internal hyperlinks and (possibly) links to certain external authorities. Whether MBCAA5 is released in electronic form and, if so, how, will be the subject of further discussions. However, an important benefit of an electronic edition would be that it would be easier to update on a regular (e.g., annual) basis.

Second, in addition to a textual comparison of key differences between the MBCA and state corporation laws, MBCAA5 will include a cross-reference table correlating, by statutory section number, the Delaware General Corporation Law and the MBCA. Because the Delaware General Corporation Law is arguably the single most influential and best-developed body of corporation law, a handy correlation between Delaware and the MBCA would be especially useful.

Conclusion

The MBCA has been highly successful as a model statute, and constitutes the basis for statutory corporate law in well over half the nation’s jurisdictions. One of its several virtues is that, unlike other model or uniform acts, it is supported by an annotation which reflects and enhances the depth and understanding of practitioners, judges and academics.

The MBCAA is, however, only as effective as its contributors wish to make it. If you are reading this, there is a good chance that you could make a positive difference in the revision of the MBCAA, so we encourage you to let us know whether you or others with similar interests wish to participate in this important process at lahamermesh@widener.edu and jlipson@temple.edu.
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ARTICLES & AUTHORS NEEDED

The Committee is seeking articles and notes for future issues of the newsletter which are circulated to our Committee members and all State Liaisons. Please send your submission to John Lawrence at jlawrence@goodwin.com.

Articles should be 1500 words or less and on any corporate law topic of interest to practitioners from MBCA decisions or developments to interesting state corporate law developments. We appreciate your help in making this newsletter a success.