From The Chair

This edition of The MBCA Newsletter, my first as Chair of the Corporate Laws Committee, comes at a time of great uncertainty and concern for individuals and businesses. Markets are down, volatility up, and people are concerned about the loss of health, employment and loved ones. Many of us are now working from home, testing home office technology, enterprise business continuity plans, and in some cases the patience of those with whom we live! It is of some comfort to know we are all in the same situation.

Despite these uncertain times, the work of the Corporate Laws Committee continues. Our scheduled in-person meetings in Boston were cancelled. Nevertheless, we went forward with task force calls and a full committee meeting with 40 people on the phone. The professionalism and dedication of the members of the Committee and our other colleagues have never been more apparent. We recognize that the work we are doing will outlast the current turbulence and set the groundwork for the future.

The restrictions on public gatherings and the current financial uncertainty create thorny legal issues for corporations. Many public companies may be struggling with questions of whether to postpone their annual shareholder meetings or move to “virtual” meetings in light of COVID-19. This Newsletter includes an article discussing the practical and legal issues related to those decisions. The article also highlights the emergency measures being adopted in states that had not previously provided for virtual shareholder meetings.

Notably, the Committee is emerging from a period of intense work on significant publications that are used frequently by many of us. This winter we published the seventh edition of our Corporate Directors’ Guidebook. This Newsletter includes an article by the Co-Chairs of the task force that led the drafting of the Guidebook. The article highlights new areas of emphasis in the Guidebook and is an excellent preview of this updated and expanded edition. Our planned Continuing Legal Education program discussing the Guidebook, which was to have been held at the spring meeting of the Business Law Section, was cancelled and will be rescheduled in the fall. Another significant publication, and an important companion to our 2016 Revision of the Model Business Corporation Act, is the 5th edition of the Model Business Corporation Act Annotated (MBCAA). This work, tirelessly led by our Reporter, Professor Larry Hamermesh, is in the final stages, and we hope to have it available for you by summer.

As reported in our fall Newsletter, the Committee is continuing its work on two additional publications. Handbook for the Conduct of Shareholders’ Meetings, which we hope to have completed in time for the cycle of shareholder meetings in 2021, after which our updated edition of Managing Closely Held Corporations, first released in 2003, will be published.

Finally, this winter we initiated several new task forces. One task force is looking at antitakeover statutes. In preparing the 5th edition of the MBCAA, we reminded ourselves that more than 30 states have some form of antitakeover statute, and the approach and application of those statutes are highly varied. We determined to take a disciplined look at these statutes, many enacted more than 30 years ago. Another task force is tracking developments related to the corporate purpose. Finally, we have established a task force on derivative proceedings and litigation to consider whether any revisions to Chapter 7D of the Model Act (or, relatedly, Section 2.08) may be appropriate given the experience with those provisions in jurisdictions that have adopted them. The “task force” is looking for input from our State Liaisons and others. Please send your comments and other input to Bill Johnston at Young Conaway: email wjohnston@ycst.com or telephone (302) 571-6679.

We appreciate your support in our work to keep the Model Act current and effective. We continue to solicit ideas for future editions of The MBCA Newsletter. The Newsletter highlights recent developments regarding the Model Act and the activities of the Corporate Laws Committee, along with noteworthy developments in U.S. corporate law. Your input will help us do that better.

Best regards,

Laurie A. Smiley
Committee Chair
Considerations for Shareholder Meetings During the COVID-19 Crisis

By Steven M. Haas

Steven M. Haas is a Partner at Hunton Andrews Kurth LLP in Richmond, Virginia.

The views expressed in this article are solely those of the author and not his firm or its clients. No legal advice is being given.

Many public companies are considering how the COVID-19 pandemic, caused by the novel coronavirus, and the related public health concerns may affect their shareholder meetings. In particular, many companies are considering whether to change meeting dates or locations or even host “hybrid” in person/virtual shareholder meetings or virtual-only shareholder meetings. This article addresses issues for these companies to consider.

KEY TAKE-AWAYS

• A company may decide to delay its meeting date, change the meeting location (e.g., because of reported cases nearby or applicable government restrictions on group activities), or shift the format of the meeting from an in-person meeting to a hybrid or virtual-only meeting.

• Hosting a hybrid meeting is the best way to facilitate a later transition to a virtual-only meeting.

• For publicly traded companies, a decision after the company distributes its proxy materials to change the meeting date, location, or format should not require the company to redistribute its proxy materials under federal securities laws. Rather, the company should be able to satisfy its obligations under those laws by: (1) issuing a press release announcing the change; (2) filing the announcement as definitive additional soliciting material with the Securities and Exchange Commission (“SEC”) via EDGAR; and (3) taking all reasonable steps necessary to inform other intermediaries in the proxy process and other relevant market participants of such change.

• In many jurisdictions, postponing the meeting date requires a company to give a new notice of the meeting under state law. Changing the location or format of the meeting (i.e., from an in-person meeting to a hybrid or virtual-only meeting) while retaining the original meeting date may also require the giving of a new notice depending on state law. A company that is unable or unwilling to give a new notice should consider various factors, including whether there are important or contested items being considered at the meeting.

In addition, a company may be able to avoid giving a new notice by convening the meeting as originally scheduled but then immediately adjourning it to a later time or different place or format.

• A company that has not previously considered a hybrid or virtual-only shareholder meeting but now wishes to do so should contact a virtual meeting platform provider as soon as possible. In addition, companies currently intending to hold in-person meetings should strongly consider advising shareholders that the meeting format could change and the manner in which the company would announce such change.

OVERVIEW

Although many annual shareholder meetings are sparsely attended, many companies this year have concerns about hosting large gatherings at their annual shareholder meetings or imposing unnecessary travel obligations on their directors, employees, and shareholders that could expose them to health risks. Thus, many companies may wish to hold hybrid shareholder meetings to give attendees (including directors, employees, and shareholders) an option to participate remotely. Other companies may decide to change their meeting date or location or to hold hybrid or virtual-only meetings.

KEY LEGAL ISSUES IF A CHANGE IS MADE AFTER DISTRIBUTION OF PROXY MATERIALS

Companies have flexibility in delaying shareholder meetings. Under Delaware law, a corporation is effectively required to hold an annual meeting every 13 months. Under the Model Business Corporation Act, a shareholder can petition a court to order an annual meeting if it has not been held within 15 months of the prior annual meeting. The failure to hold a meeting within the required time period, however, does not render corporate action invalid.

Under federal securities laws, a company that decides to change its annual meeting date, location, or format should not need to redistribute its proxy materials. Instead, the staff of the SEC has issued guidance confirming that an issuer does not need to re-mail proxy materials or a proxy card if it:

• issues a press release announcing such change;
• files the announcement as definitive additional soliciting material on EDGAR; and
**GOING HYBRID OR VIRTUAL-ONLY**

*Making the Switch*

As I have previously written, there are numerous considerations in deciding whether to host a hybrid or virtual-only meeting. For example, the company must determine whether to permit attendance by non-shareholders, how shareholders will present their successors are duly elected.

Companies could mitigate the risk of legal challenge by proactively including in their meeting notices a statement informing shareholders that they should monitor the company's press releases, SEC filings and/or website for important changes that might be made to the meeting as a result of the COVID-19 pandemic. As set forth in the example below, the notice could indicate that the company will issue a press release and update its website should the company decide to hold the meeting virtually.

In addition, as further described below, companies that give notice of hybrid meetings might similarly reserve the right to shift to a virtual-only meeting and advise shareholders that such shift will be announced via press release and on the company's website.

Finally, companies may be able to avoid having to give a new notice by convening the meeting as originally scheduled and then immediately adjourning it to a different time, place, and/or format. The adjournment could be until later that day or until another date, although state law may require a new notice if the meeting is adjourned beyond a certain number of days after the originally scheduled date (e.g., 30 days under Delaware law) or a new record date is set. There could be some uncertainty as to whether a notice is required if the adjournment of a physical meeting will reconvene solely in a virtual format, but a strong argument can be made in most jurisdictions that no such notice is required. In Delaware, however, the Governor issued an emergency order to avoid any uncertainty for publicly traded corporations. The order provides that the adjournment can be announced through an SEC filing and press release.

Typically, when a publicly traded company decides in advance to adjourn a meeting, it issues a press release announcing its intention to reduce the chance that shareholders will attend. For private companies, other communications may be advisable (including by e-mail). Ultimately, a company that decides not to give a new notice will need to consider applicable state law and the risk that the meeting is later determined to have been improperly convened.

Where it is not clear whether new notice must be mailed, the conservative approach will always be to give a new notice. Some companies, however, may find themselves in situations in which mailing a new notice is impractical (e.g., because the decision to change the meeting location or format is made less than ten days before the meeting). In that situation, companies should consider whether there are important or contested items to be voted upon that might be challenged later because of the change (e.g., due to alleged inadequate notice or claims that the directors were acting inequitably to affect the outcome of the vote). In the absence of contested items, companies may have strong equitable arguments that a public announcement of the change is sufficient, especially when done to protect the public health. In addition, even if a court

If a publicly traded company decides to change the format, time, or location of its meeting, it needs to announce the change promptly. In addition, in connection with a change in format, the staff of the SEC stated in its recent guidance that companies must “disclose clear directions as to the logistical details of the ‘virtual’ or ‘hybrid’ meeting, including how shareholders can remotely access, participate in, and vote at such meeting.”

Under state law, a change in the meeting date, location, or format generally does not require a new record date as long as the meeting is held within 60 days of the original record date (or 70 days under the Model Business Corporation Act).

Companies may, however, need to give a new notice to their shareholders under state law. State law notices typically have to be given at least 10 days prior to the meeting date, although longer periods of time could be required depending on state law and the matters to be voted upon. Traditionally, many practitioners have viewed a postponement of a shareholder meeting as requiring a new notice. It is less clear under state law whether a company must give a new notice if it keeps its meeting date and time but announces via an SEC filing and/or press release a change in location or decides to hold a virtual-only meeting. Importantly, the Governor of Delaware recently issued an emergency order providing that corporations subject to the reporting requirements of Section 13(a) or 15(d) of the Securities Exchange Act of 1934 may notify stockholders of a change from a physical location to a virtual meeting pursuant to a document filed with the SEC and a press release posted on such corporation’s website. The combination of the Governor’s order and the SEC’s guidance means that publicly traded Delaware corporations can satisfy state law and federal proxy rule obligations without incurring the costs of a new mailing to stockholders.

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**GOING HYBRID OR VIRTUAL-ONLY**

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- takes all reasonable steps necessary to inform other intermediaries in the proxy process (such as any proxy service provider) and other relevant market participants (such as the appropriate national securities exchanges) of such change.

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Where it is not clear whether new notice must be mailed, the conservative approach will always be to give a new notice. Some companies, however, may find themselves in situations in which mailing a new notice is impractical (e.g., because the decision to change the meeting location or format is made less than ten days before the meeting). In that situation, companies should consider whether there are important or contested items to be voted upon that might be challenged later because of the change (e.g., due to alleged inadequate notice or claims that the directors were acting inequitably to affect the outcome of the vote). In the absence of contested items, companies may have strong equitable arguments that a public announcement of the change is sufficient, especially when done to protect the public health. In addition, even if a court
questions, and how to decide which shareholder questions will be answered. Note that state law imposes requirements on the ability of shareholders to participate. Companies also need to plan for contingencies, such as a power or network outage during the meeting.

This year, many companies will probably find that managing the risks relating to COVID-19 supports a decision to hold a virtual-only meeting. It is not too late for companies to shift to a hybrid or virtual-only meeting, but companies considering whether to hold a hybrid or virtual-only meeting should contact platform providers as soon as possible. First, the leading platform providers are receiving numerous inquiries on this matter, which may create scheduling difficulties or ultimately lead to more hybrid or virtual-only meeting requests than they can accommodate. Second, there are numerous logistical issues that may be associated with such a switch, including providing shareholders with log-in credentials if different from the previously mailed proxy credentials, deciding how shareholders will participate in the meeting, and disclosing the process for such participation.

Advising Shareholders of the Possibility of a Switch
To provide maximum flexibility, many companies may want to proceed at the outset with a hybrid meeting or refer to the possibility of converting an in-person meeting to a hybrid or virtual-only meeting in the initial meeting notice, along with the method the company will undertake to communicate the change and, if known, the means of remote communications through which the company will conduct the meeting. By including this information in the original meeting notice, the company may mitigate risk later if it switches format and does not mail a new notice. Here is an example of one such disclosure:

We intend to hold our annual meeting in person. However, we are actively monitoring the coronavirus (COVID-19); we are sensitive to the public health and travel concerns our shareholders may have and the protocols that federal, state, and local governments may impose. In the event it is not possible or advisable to hold our annual meeting in person, we will announce alternative arrangements for the meeting as promptly as practicable, which may include holding the meeting solely by means of remote communication. Please monitor our annual meeting website at [website] for updated information. If you are planning to attend our meeting, please check the website one week prior to the meeting date. As always, we encourage you to vote your shares prior to the annual meeting.

Companies wishing to hold virtual-only meetings, however, should confirm it is permitted under applicable state law and review their organizational documents to confirm whether any amendments are necessary.

Shareholder Considerations
In addition, companies should consider the views of their shareholders and proxy advisory firms on virtual-only meetings. Institutional Shareholder Services does not have a formal policy on virtual-only meetings, whereas Glass Lewis & Co. traditionally recommended voting against governance committee members if the company plans to hold a virtual-only shareholder meeting and does not provide robust disclosure assuring shareholders that they will have the same participation rights as at an in-person meeting. Glass Lewis & Co. recently announced a temporary change in its policy for the 2020 proxy season in which it “will generally refrain from recommending to vote against members of the governance committee [for holding a virtual-only meeting], provided that the company discloses, at a minimum, its rationale for doing so, including citing COVID-19.”

Staff Guidance on Shareholder Proposals
The SEC’s recent guidance also encourages companies to provide shareholder proponents with alternative means, such as by telephone, to present their proposals at the annual meetings in light of the difficulties that shareholder proponents face due to COVID-19. In the context of hybrid or virtual-only meetings, issuers usually have several options, including (1) providing a separate dial-in number to a shareholder proponent to allow him or her to present the proposal, (2) pre-recording the shareholder proponent’s message so that it can be played during the meeting, or (3) with the shareholder proponent’s consent, having a representative of the issuer read the proponent’s script.

To prepare for various contingencies (e.g., a network outage), some issuers may want to adopt a combination of the above approaches so that, for example, the issuer has a script that can be read in the event that the shareholder proponent is disconnected and unable to present the proposal.

The staff’s guidance also notes that, if a shareholder proponent does not attend a meeting due to COVID-19, the staff will consider it a “good cause” under Rule 14a-8(h) so that the proponent would not be barred from making additional proposals in future years.

OTHER SEC CONSIDERATIONS IN CONNECTION WITH ANNUAL MEETINGS
On March 4, 2020, the SEC announced that it will allow some companies an extended filing period for certain disclosure reports (such as Form 10-Q or Form 10-K) to meet hardships that may arise from the spread of COVID-19. The SEC’s order provides relief from March 1, 2020, through April 30, 2020, although the SEC could extend the time period if future developments warrant. To rely on the relief, a company must satisfy four conditions:
The company must state that its inability to meet the filing deadline arose because of circumstances related to COVID-19. The company must furnish a Form 8-K or Form 6-K by the original filing deadline. The report must state why the company invoked the filing relief, including a brief statement of the reasons it could not timely meet the filing deadline, a statement of when the company plans to file the report, an appropriate risk factor explaining the impact of COVID-19 on its business, and, if applicable, documentation via an exhibit regarding why a report is delayed because of another’s inability to provide a required opinion, report, or certification. The report must be filed no later than 45 days after the original deadline. The company must state that it is relying on the SEC’s order granting conditional relief and state why it cannot timely file the report.

The SEC’s order also addresses the furnishing of proxy and information statements under circumstances in which a company is unable to deliver proxy materials because of disruptions in mail delivery due to COVID-19 in areas where its securities holders are located. The SEC’s conditional relief is available if:

- the company’s security holder has a mailing address in an area where mail delivery has been suspended due to COVID-19; and
- the company has made a good faith effort to furnish soliciting materials or information materials to an affected security holder in accordance with rules applicable to the delivery of soliciting and information materials.

The SEC’s recent guidance also advises that “in circumstances where delays are unavoidable due to COVID-19 related difficulties, the staff would not object to an issuer using the ‘notice-only’ delivery option in a manner that, while not meeting all aspects of the notice and timing requirements of Rule 14a-16, will nonetheless provide shareholders with proxy materials sufficiently in advance of the meeting to review these materials and exercise their voting rights under state law in an informed manner and so long as the issuer announces the change in the delivery method” through an SEC filing and press release.

**D&O ATTENDANCE AT ANNUAL MEETINGS**

Another issue that may arise this year is whether directors and officers should attend annual meetings in person. Under SEC rules, a company must describe in its proxy statement the company’s policy, if any, regarding director attendance at annual meetings of shareholders. In addition, a company must state in its proxy statement the number of directors who attended the prior year’s annual meeting.

The SEC’s rules do not define what constitutes “attendance” for purposes of its rules. However, by analogy, under most state laws, a director participating remotely (e.g., by telephone) at a board meeting is considered present at that meeting provided the director has the ability to hear and speak to the other directors. Similarly, many states now permit shareholders to be deemed present and vote at shareholder meetings if a company’s board of directors authorizes participation by means of remote communication.

For a company that has a director attendance policy and is holding an in person or hybrid shareholder meeting, the company should review the applicable policy to determine if it expressly requires “in person” or “physical” attendance. If the applicable policy simply requires “attendance,” a company should be comfortable relying on state law to take the position that a director who attends the annual meeting remotely (e.g., by means of remote communication through which the director can hear and speak at the meeting) will be considered to have attended such meeting for purposes of the SEC’s rules. In addition, the extraordinary situation arising from COVID-19 provides further justification for companies to take the position that, for purposes of the SEC’s rules, remote attendance will be treated equivalently to in person attendance at the annual meeting of shareholders.

A company that proceeds with an in person meeting, however, should be aware of potential criticism from shareholders if directors or senior officers participate remotely while shareholders are required to attend in-person to participate. Many factors may influence shareholders’ views on that situation, including:

- the number of directors or senior officers attending in-person versus remotely;
- whether governmental authorities have imposed restrictions on the number of people permitted to gather;
- whether the directors or senior officers who participate remotely reside or recently traveled to high-risk areas, are of an age that makes them at higher risk of contracting the virus, or have health concerns that would put them at greater risk if they were to suffer from COVID-19, thus making their attendance at the meeting an above-average risk;
- whether COVID-19 has continued to spread or there are broader travel restrictions imposed within the United States or at the location of the meeting; and
- whether it is a contested election.

In contrast, a hybrid meeting would seem to avoid most potential criticism since shareholders would not be required to travel and attend in-person. In any event, we hope that, in light of the numerous challenges facing companies as a result of COVID-19, shareholders and proxy advisory firms will be understanding of remote participation by directors and officers.
STATES WHERE VIRTUAL MEETINGS ARE NOT PERMITTED

Many states that have not previously enacted virtual shareholder meetings are doing so through emergency actions. In New York, Connecticut, and Massachusetts, the governors have issued emergency orders that, among other things, suspended in-person meeting requirements and authorized virtual-only meetings. As noted above, Delaware’s governor issued an emergency order providing that companies did not need to mail supplemental notices to transition from a physical to virtual meeting. Whether other states can do this depends on applicable state law and the governor’s emergency powers. Moreover, even where there is an executive order granting relief, corporations may need to consider whether such order is within the governors’ powers, particularly if shareholders are voting on non-routine matters.

In New Jersey, the state legislature recently passed a law allowing virtual-only shareholders meetings as part of its emergency aid legislation. Massachusetts did the same following its governor’s emergency order. In states that have not obtained such relief, corporations should consider imposing attendance limitations consistent with government laws or guidance as well as requiring attends to register in advance.

1 See 8 Del. C. § 211(c).
2 Model Business Corporation Act (2016 Revision) (hereinafter “MBCA”) § 7.03(a)(1).
3 See 8 Del. C. § 211(c). See also MBCA § 7.01(c) and the Official Comment (“Many corporations, such as nonpublic subsidiaries and closely held corporations, do not regularly hold annual meetings and, if no shareholder objects or action has been taken by written consent, that practice creates no problem under section 7.01, because section 7.01(c) provides that failure to hold an annual meeting does not affect the validity of any corporate action.”).
5 See id.
6 Id.
7 See, e.g., 8 Del. C. § 213; MBCA § 7.07(b).
8 See, e.g., 8 Del. C. § 222(b); MBCA § 7.05(a).
10 Under the “holdover rule,” a director continues to serve until his or her successor is elected and qualified. 8 Del. C. § 141(b).
11 Cf. Securities and Exchange Commission, Staff Guidance for Conducting Annual Meetings in Light of COVID-19 Concerns (Mar. 13, 2020) (“To the extent that issuers have not yet mailed and filed their definitive proxy materials, they should consider whether to include disclosures regarding the possibility that the date, time, or location of the meeting will change due to COVID-19. Such determination should be made based on each issuer’s particular facts and circumstances and the reasonable likelihood of such a change.”).
12 See 8 Del. C. §§ 213(a), 222(c) (“When a meeting is adjourned to another time or place, unless the bylaws otherwise require, notice need not be given of the adjourned meeting if the time, place, if any, thereof, and the means of remote communications, if any, by which stockholders and proxy holders may be deemed to be present in person and vote at such adjourned meeting are announced at the meeting at which the adjournment is taken.”); MBCA § 7.05(e).
13 See 8 Del. C. § 222(c).
14 See MBCA § 7.05(e). Note that a new record date may be required under state law if the adjournment exceeds a certain number of days. See MBCA § 7.07(c) (requiring a new record date if the adjournment is beyond 120 days after the originally scheduled meeting date).
16 “[If it is impracticable to convene a currently noticed meeting of stockholders at the physical location for which it has been noticed due to the public health threat caused by the COVID-19 pandemic or the COVID-19 outbreak in the United States, such corporation may adjourn such meeting to another date or time, to be held by remote communication, by providing notice of the date and time and the means of remote communication in a document filed by the corporation with the Securities and Exchange Commission pursuant to § 13, § 14 or § 15(d) of such Act and a press release, which shall be promptly posted on the corporation’s website after release.”).
20 See id.
23 See Item 7(b) of Schedule 14A and Item 407(b)(2) of Regulation S-K.
24 For virtual-only meetings, it should be clear that a director’s remote participation constitutes being “present” for the annual meeting because there is no physical location.
30 Mass. Bill H.598 (enacted Apr. 3, 2020), https://malegislature.gov/Laws/SessionLaws/Acts/2020/Chapter53 (“Notwithstanding section 7.08 of chapter 156D of the General Laws or any other general or special law to the contrary, as a result of the outbreak of the 2019 novel coronavirus, also known as COVID-19 and the declaration of a state of emergency issued on March 10, 2020, for the duration of said state of emergency and 60 days thereafter, a public corporation, as referenced in said section 7.08 of said chapter 156D and otherwise consistent with the other provisions of said section, may conduct an annual or special meeting of the shareholders solely by means of remote communication.”).
The Corporate Laws Committee released in January 2020 the Seventh Edition of the Corporate Director’s Guidebook. Since its initial publication in 1978, directors, business executives, advisors, students of corporate governance, and their counsel have all come to rely on the advice and commentary in the Guidebook. Indeed, the Guidebook is one of the most frequently cited handbooks in its field.

As with prior editions, the new edition of the Guidebook is designed to provide practical guidance to corporate directors in meeting their responsibilities. It focuses on the role of the individual director in the context of the duties and functions of the board and its key committees (audit, nominating and governance, and compensation). Although many director decisions and tasks occur against a legal backdrop, the Guidebook emphasizes the law only in limited and necessary instances, but otherwise attempts to avoid legalisms. The Guidebook provides practical and concise advice.

The Guidebook focuses on the allocation of the respective rights and duties among directors, shareholders, and management. The primary objective of the Guidebook is to explore and analyze how directors should devote their time and experience to the strategy and oversight of the corporation’s business. It provides a guide for the role of the board, as well as the functions, structure, and responsibilities of the board and its committees. The goal is to help directors effectively fulfill their duties to the corporation.

The new edition of the Guidebook emphasizes changes in expectations and responsibilities of directors since the prior version. There is a focus on the shifting landscape of director responsibilities in terms of interfacing with shareholders. The Guidebook highlights the increasing (and complex) pressures on directors to take into account social goals and sustainability in their decision making.

There is a growing recognition that, in their decision-making, boards should consider employees, suppliers, customers, the environment, and the communities in which the corporation operates. Non-shareholder constituency concerns are best understood as factors to be considered in determining what is in the best interests of the corporation. Being responsive to stakeholder interests and concerns can contribute positively to corporate valuation, work place culture, risk aversion or mitigation, and reputation for integrity and ethical behavior. Moreover, some institutional shareholders with significant, long-term investments in a corporation increasingly expect the board to consider the interests of the corporation’s stakeholders, as well as the corporation’s contribution to society as a whole.

In their service on the board, directors make many decisions on a regular basis. In doing so, they must apply their business judgment based on reasonably available relevant information and act in what they reasonably believe to be the best interests of the corporation. In some cases, a board may even make a decision, in good faith, with which they know some shareholders will disagree. In today’s world, most public corporation directors are “independent directors” who are not employees of the corporation and who are not directly involved in its daily operations. A key challenge for directors is to direct and oversee management of the corporation’s activities and strategy in a dynamic and ever-changing environment using effective processes to make informed decisions and provide effective oversight, without becoming day-to-day managers. In doing so, directors must be cognizant of their obligation to act free of conflicts and in what they perceive to be the best interests of the corporation. The Guidebook is designed to help directors meet that responsibility by explaining how they can best exercise their oversight and decision-making responsibilities through boardroom practices and procedures that promote effective director involvement.

Director decisions and oversight responsibilities continue to be subject to a significant level of public and shareholder scrutiny. To help directors (and the counselors who advise them) engage in effective oversight and decision-making processes in the current environment, the Guidebook emphasizes the following:

- The role of directors in communicating or otherwise interacting with shareholders with different investment objectives and time horizons;
- Corporate responsibility (environmental, sustainability, labor practices) and social goals as part of shareholder value creation and risk mitigation;
- Employee safety, welfare, and talent development;
- Board composition, tenure, refreshment, diversity, skills, and compensation;
- Executive compensation, particularly as it relates to performance and risk;
- Risk management, including processes for identification, assessment, and mitigation;
- Crisis preparedness, including natural and technological crises as well as reputational risks from inappropriate, unethical,
or illegal behavior of executives or other constituents of the corporation; and

- Fiduciary duties and best practices in mergers and acquisitions (whether negotiated or unsolicited).

The new edition of the Guidebook discusses in more detail than earlier versions the relationship between the board of directors and the corporation's shareholders. Under state law, responsibility for managing the business and affairs of the corporation is vested in the board. Shareholders do not have direct management rights or responsibilities under state law. Instead, shareholders influence the corporation principally by voting in director elections and on certain other fundamental matters. Shareholders of public companies also have the right under federal securities laws to cast advisory votes on executive compensation and to request votes on other corporate governance and policy matters. Some institutional shareholders seek to exercise influence through direct communication with management and, increasingly, with directors.

Today's shareholders often seek to engage directly with one or more independent members of the board of a wide range of subjects. For example, institutional shareholders may be concerned about the corporation's operating strategy, management's performance, or strategic alternatives. Investors are increasingly focused on how the companies in which they invest address environmental and social issues. These issues include a wide range of topics such as environmental impacts, human rights policies, community and political involvement, and sustainability standards both for the corporation and its suppliers. Some investors view environmental and social issues as consistent and perhaps integral with long-term sustainable value creation and risk mitigation.

The Guidebook offers advice to directors of public companies and their counsel, but it is also relevant to directors and lawyers of all corporations in understanding their duties and obligations. The new edition of the Guidebook succinctly provides an overview of current boardroom best practices.
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Articles should be 1,500 words or less and on any corporate law topic of interest to practitioners from Model Act decisions or developments to interesting state corporate law developments. We appreciate your help in making this Newsletter a success.