
By the Committee on Corporate Laws, ABA Section of Business Law *

The Committee on Corporate Laws of the ABA Section of Business Law (the “Committee”) develops, and from time to time publishes proposed changes in, the Model Business Corporation Act (the “Act”).

The Committee has approved the changes described in this Report on second reading and invites comments from interested persons. Comments should be addressed to Herbert S. Wander, Chair, Committee on Corporate Laws, 525 West Monroe Street, Chicago, Illinois 60661, or sent to him by e-mail at hwander@kattenlaw.com. Comments should be received by January 31, 2010, in order to be considered by the Committee before adoption of the amendments on third reading.

The proposed amendments address shareholder voting in two principal ways. First, the amendments add a new section 7.09 that permits shareholders to participate in annual and special shareholder meetings by means of remote communication, such as over the internet or through telephone conference calls, to the extent the board of directors authorizes such participation and subject to guidelines and procedures the board adopts. Section 7.05 is also proposed to be amended to address notice issues where the board of directors authorizes such shareholder participation by remote communication.

Second, a series of amendments to sections 7.03, 7.05, 7.07, and 7.20 of the Act are proposed that would authorize directors to bifurcate the record date for receipt of notice of a meeting from the record date for determining the shareholders entitled to vote at that meeting. Related changes are also proposed that deal with notice, the list of shareholders entitled to notice of a meeting, the list of shareholders entitled to vote at a meeting, the information rights of a person who becomes a shareholder subsequent to the record date for notice of the meeting, and other matters. The changes are to provide corporations, if the directors so choose, greater flexibility to align shareholder ownership and voting by setting a record date for voting closer to the meeting date. Delaware has enacted similar

* Herbert S. Wander, Chair.
provisions. Although the corporate law would provide this flexibility, public corporations would need to consider the SEC’s proxy rules and the practicalities of proxy voting and vote counting mechanisms in using this flexibility.

The changes are set forth below. Changes to existing provisions are presented marked to show changes from the current Act. New language is indicated by underscoring and deletions by strikeout.

I. REMOTE PARTICIPATION IN SHAREHOLDER MEETINGS

§ 7.05. NOTICE OF MEETING

Change (a) to read as follows (changes marked):

(a) A corporation shall notify shareholders of the date, time, and place of each annual and special shareholders’ meeting no fewer than 10 nor more than 60 days before the meeting date. If the board of directors has authorized participation by means of remote communication pursuant to section 7.09 for any class or series of shareholders, the notice to such class or series of shareholders shall describe the means of remote communication to be used. Unless this Act or the articles of incorporation require otherwise, the corporation is required to give notice only to shareholders entitled to vote at the meeting.

* * * *

OFFICIAL COMMENT

Change paragraph 1 to read:

Shareholders entitled to notice must be given notice of annual and special meetings pursuant to section 7.05 unless the notice is waived pursuant to section 7.06. Notice must be given at least 10 but not more than 60 days before the meeting date. If the board of directors authorizes shareholders to participate in any meeting by means of remote communication pursuant to section 7.09, the notice also must include notification of such authorization and the means of remote communication to be used. The corporation may limit such notice to the class or series of shareholders authorized to participate by means of remote communication. In order to give corporations the flexibility to choose the most efficient means of remote communication, the board may require that shareholders communicate their desire to participate by a certain date and condition the provision of remote communication or the form of communication to be used on the affirmative response of a certain number or proportion of shareholders eligible to participate.

*****

Add a new Section 7.09 and related Official Comment as follows:

§ 7.09. REMOTE PARTICIPATION IN ANNUAL AND SPECIAL MEETINGS

(a) Shareholders of any class or series may participate in any meeting of shareholders by means of remote communication to the extent the board of
directors authorizes such participation for such class or series. Participation by means of remote communication shall be subject to such guidelines and procedures as the board of directors adopts, and shall be in conformity with subsection (b).

(b) Shareholders participating in a shareholders’ meeting by means of remote communication shall be deemed present and may vote at such a meeting if the corporation has implemented reasonable measures:

(1) to verify that each person participating remotely is a shareholder, and
(2) to provide such shareholders 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.

OFFICIAL COMMENT

Section 7.09 permits shareholders to participate in annual and special shareholder meetings by means of remote communication, such as over the internet or through telephone conference calls, subject to the conditions set forth in section 7.09(b) and any other guidelines and procedures that the board of directors adopts. This authorization extends as well to anyone to whom such shareholder has granted a proxy. Section 7.09 does not eliminate the requirement that corporations hold meetings at a physical location. See sections 7.01 and 7.02. Section 7.09 expressly provides that participation by remote means is permitted only if it is authorized by the board of directors. This limitation is meant to ensure that the board of directors has the sole discretion to determine whether to allow shareholders to participate by means of remote communication. Thus, a corporation may not be compelled to allow such participation either through amendments to the bylaws, shareholder resolutions, or otherwise.

Section 7.09 allows the board of directors to limit participation by means of remote communication to all shareholders of a particular classes or series, but does not permit the board of directors to limit such participation to particular shareholders within a class or series.

Section 7.09 requires the board of directors to implement certain procedures when allowing shareholder participation by means of remote communication. First, the board of directors must create reasonable measures for verifying those entitled to vote. Second, the board of directors must institute reasonable measures to ensure that all shareholders and their proxies within the authorized class or series have the opportunity to participate in the meeting, including measures that provide them with an opportunity to communicate with management and other shareholders present at the meeting, and to read or hear the proceedings. While this provision is aimed at approximating as much as possible shareholder participation in person or by proxy, including interacting with management during the meeting, it does not require that all can so participate and interact. In addition, section 7.09 is not intended to expand the rights to participate in meetings or otherwise alter the ability of the board of
directors or the chair to conduct meetings pursuant to section 7.08 in a manner that is fair and orderly. For example, many corporations limit or cut-off shareholder comments and, if such practice is fair to shareholders consistent with section 7.08, such practice is not changed by section 7.09. The two requirements under section 7.09(b) reflect the minimum deemed necessary to safeguard the integrity of the shareholders’ meeting. Section 7.09 specifically gives the board of directors the flexibility and discretion to adopt additional guidelines and procedures for allowing shareholders to participate in a meeting by means of remote communication.

In order to give corporations the flexibility to choose the most efficient means of remote communication, the board may require that shareholders communicate their desire to participate by a certain date and condition the provision of remote communication or the form of communication to be used on the affirmative response of a certain number or proportion of shareholders eligible to participate. If the board of directors authorizes shareholder participation by means of remote communication pursuant to this section, such authorization and the process for participating by remote means of communication, must be included in the meeting notice required by section 7.05.

II. BIFURCATED RECORD DATES

SECTION 7.03. COURT-ORDERED MEETING

Change (b) by inserting “or dates” after “specify a record date.”

OFFICIAL COMMENT

Add to paragraph 4 as new second sentence:

In addition to the authority granted to the board of directors under section 7.07(e), the court may in its discretion set different record dates for notice and voting.

SECTION 7.05. NOTICE OF MEETING

Change (a) to read as follows (changes marked):

A corporation shall notify shareholders of the date, time, and place of each annual and special shareholders’ meeting no fewer than 10 nor more than 60 days before the meeting date. The notice shall include the record date for determining the shareholders entitled to vote at the meeting, if such date is different than the record date for determining shareholders entitled to notice of the meeting. Unless this Act or the articles of incorporation require otherwise, the corporation is required to give notice only to shareholders entitled to vote at the meeting as of the record date for determining the shareholders entitled to notice of the meeting.

Change the last clause of (e) to read:

however, notice of the adjourned meeting must be given under this section to shareholders entitled to vote at such adjourned meeting as of the record date fixed for notice of such adjourned meeting.
OFFICIAL COMMENT
Change the first sentence of paragraph 1 to read:

Generally, only shareholders who are entitled to vote at a meeting determined on the record date for notice are entitled to the notice required by section 7.05.

SECTION 7.07. RECORD DATE
Change (a) by inserting “or dates” after “fixing the record date.”
Change (c) by inserting “or dates” after “fixes a new record date.”
Change (d) to read:

If a court orders a meeting adjourned to a date more than 120 days after the date fixed for the original meeting, it may provide that the original record date or dates continue in effect or it may fix a new record date or dates.

Add (e) as follows:

The record date for a shareholders’ meeting fixed by or in the manner provided in the bylaws or by the board of directors shall be the record date for determining shareholders entitled both to notice of and to vote at the shareholders’ meeting, unless in the case of a record date fixed by the board of directors and to the extent not prohibited by the bylaws, the board, at the time it fixes the record date for shareholders entitled to notice of the meeting, fixes a later record date on or before the date of the meeting to determine the shareholders entitled to vote at the meeting.

OFFICIAL COMMENT
Add at end of Official Comment to Section 7.07:

Section 7.07(e) permits the board of directors, when the board has the authority to fix the record date, to fix different record dates for notice of the meeting and for determining the shareholders entitled to vote at the meeting, unless the bylaws prohibit such separate dates. This provision provides boards of directors with greater flexibility to align shareholders’ voting and economic interests and address in part concerns over the separation of ownership and voting by setting a record date for voting closer to the meeting date. The provision does not restrict how close a record date for voting can be to the meeting date, but a board would need to consider carefully the practical issues in setting the voting record date, including the requirement of section 7.20(c) that a list of shareholders entitled to vote be available at the meeting. The board can fix a separate record date for voting only at the time it fixes the record date for notice and, as provided in section 7.05, notice of the separate record date must be included in the notice of meeting. If the board sets separate record dates, section 16.02(b) provides for shareholders entitled to vote at the meeting who were not shareholders on the record date for notice to have access to the information provided by the corporation to shareholders in connection with the meeting. If the board does not set separate record dates, the normal provisions for setting a single record date for notice and voting will apply.
SECTION 7.20. SHAREHOLDERS’ LIST FOR MEETING

Change Section 7.20 to read as follows (changes marked):

(a) After fixing a record date for a meeting, a corporation shall prepare an alphabetical list of the names of all its shareholders who are entitled to notice of a shareholders’ meeting. If the board of directors fixes a different record date under section 7.07(e) to determine the shareholders entitled to vote at the meeting, a corporation also shall prepare an alphabetical list of the names of all its shareholders who are entitled to vote at the meeting. The list must be arranged by voting group (and within each voting group by class or series of shares) and show the address of and number of shares held by each shareholder.

(b) The shareholders’ list for notice must be available for inspection by any shareholder, beginning two business days after notice of the meeting is given for which the list was prepared and continuing through the meeting, at the corporation's principal office or at a place identified in the meeting notice in the city where the meeting will be held. A shareholders' list for voting must be similarly available for inspection promptly after the record date for voting. A shareholder, or the shareholder’s agent or attorney, is entitled on written demand to inspect and, subject to the requirements of section 16.02(c), to copy the list, during regular business hours and at the shareholder's expense, during the period it is available for inspection.

(c) The corporation shall make the shareholders’ list of shareholders entitled to vote available at the meeting, and any shareholder, or the shareholder's agent or attorney, is entitled to inspect the list at any time during the meeting or any adjournment.

(d) If the corporation refuses to allow a shareholder, or the shareholder's agent or attorney to inspect the shareholders’ list before or at the meeting (or copy the list as permitted by subsection (b)), the [name or describe] court of the county where a corporation's principal office (or, if none in this state, its registered office) is located, on application of the shareholder, may summarily order the inspection or copying at the corporation's expense and may postpone the meeting for which the list was prepared until the inspection or copying is complete.

(e) Refusal or failure to prepare or make available the shareholders’ list does not affect the validity of action taken at the meeting.

OFFICIAL COMMENT

Add as a new third paragraph:

If the board of directors fixes a different record date under section 7.07(e) to determine the shareholders entitled to vote, section 7.20 requires the corporation to prepare and make available a list of shareholders entitled to vote.

Change paragraph 1 and 2 to read as follows (changes marked):
1. When the List Must Be Available
   The list of shareholders entitled to notice must generally be available for in-
   spection two business days after notice of the meeting is given and continuously
   thereafter until the meeting occurs. The list of shareholders entitled to vote, if dif-
   ferent, must be available promptly after the voting record date, and must be avail-
   able at the meeting. This permits the corporation and others soliciting votes to be
   on a relatively equal footing. If, however, notice of the meeting is waived by all
   the shareholders, the list need be available only at the meeting itself under section
   7.20(c) unless one or more waivers are conditioned upon receipt of the list.

2. Where the List Must be Maintained
   Section 7.20(b) permits the list or lists to be maintained either at the corpora-
   tion's principal office or at another location in the city in which the meeting is
   to be held, the precise location to be designated in the notice of meeting. If the
corporation changes the location of its annual meeting, it thus may correspond-
ingly change the location of the list or lists of shareholders pursuant to this sub-
section.

   Section 7.20(c) also requires a copy of the shareholders' list of shareholders
   entitled to vote to be available at the meeting itself for inspection. This list will be
   the list of shareholders entitled to notice of the meeting unless the board of direc-
   tors has fixed a different date to determine shareholders entitled to vote. This list
   may be used to determine attendance, the presence or absence of a quorum, and
   the right to vote.

**SECTION 8.63. SHAREHOLDERS’ ACTION**

Add at the end of subsection (a):

In the case of shareholders' action at a meeting, the shareholders entitled to vote shall
be determined as of the record date for notice of the meeting.

**SECTION 13.02. RIGHT TO APPRAISAL**

Change (b)(2)(i) by deleting “, and to vote at,”

**SECTION 16.02. INSPECTION OF RECORDS BY SHAREHOLDERS**

Add (b) as follows:

(b) For any meeting of shareholders for which the record date for determin-
ing shareholders entitled to vote at the meeting is different than the record date
for notice of the meeting, any person who becomes a shareholder subsequent
to the record date for notice of the meeting and is entitled to vote at the meet-
ing is entitled to obtain from the corporation upon request the notice and any
other information provided by the corporation to shareholders in connection
with the meeting, unless the corporation has made such information gener-
ally available to shareholders by posting it on its web site or by other generally
recognized means. Failure of a corporation to provide such information does not affect the validity of action taken at the meeting.

Redesignate subsections sequentially and change references to subsections (b) and (c) to subsections (c) and (d), respectively.

**Official Comment**

Insert new paragraph 2 as follows and change numbers of succeeding paragraphs and references to subsections (b) and (c) to subsections (c) and (d), respectively:

2. Section 16.02(b)

Section 16.02(b) gives shareholders of a corporation the right to receive from the corporation the notice and other information provided by the corporation to shareholders in connection with a meeting if the record date for voting is subsequent to the record date for notice and the shareholder became entitled to vote after the record date for notice. The information is to be provided on request, except that the corporation may satisfy this requirement by making the information generally available on its web site or by other generally recognized means. The failure of the corporation to provide the information does not affect the validity of the action taken at the meeting. This provision does not apply to information provided to shareholders by persons other than the corporation.