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Delaware Emergency Order: Remote Shareholder Communication Meetings

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Editor's note: Andrew Freedman, Ron Berenblat, and Adrienne Ward are partners at Olshan Frome Wolosky LLP. This post is based on an Olshan memorandum by Mr. Freedman, Mr. Berenblat, Ms. Ward, and Steve Wolosky, and is part of the Delaware law series; links to other posts in the series are available here.

In a client alert issued by Olshan's Shareholder Activism Group last week, we reported that certain factions within the Delaware State Bar Association ("DSBA") were attempting to fast track an amendment to Section 110 of the Delaware General Corporation Law ("DGCL") that would allow Delaware corporations to postpone their annual meetings of stockholders in light of the COVID-19 pandemic. We expressed serious concerns that the proposed amendment could be abused by corporations looking to postpone their annual meetings and disenfranchise stockholders under the pretense that such a delay is required due to COVID-19.

Shortly after the release of our client alert, Governor John Carney issued on April 6 the tenth modification to his State of Emergency Declaration relating to COVID-19 intended to reduce the number of in-person stockholder meetings held by Delaware corporations in order to protect the health and safety of the civilian population in light of the pandemic. Rather than giving corporations broad discretion to summarily postpone in-person annual meetings during an emergency and irrespective of whether the emergency prevented a quorum of the board from being convened, as proposed in the DSBA leadership's draft DGCL amendment, the Governor's order takes a more cautious approach by only permitting boards of SEC reporting companies to address the public health threat caused by COVID-19 by switching from a currently noticed in-person meeting to a remote communication meeting and allowing an adjournment of a currently noticed in-person meeting to a later dated remote meeting if necessary. The relevant excerpts from the emergency order are set forth below:

- if, as a result of the public health threat caused by the COVID-19 pandemic or the COVID-19 outbreak in the United States, the board of directors wishes to change a meeting currently noticed for a physical location to a meeting conducted solely by remote communication, it may notify stockholders of the change solely by a document publicly 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; and
- 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.

We commend Governor Carney for giving corporations the ability to protect the safety of meeting participants without endangering the rights of stockholders. Allowing a corporation to pivot from an in-person meeting to a remote communication meeting and to adjourn an in-person meeting to a later dated remote meeting if necessary addresses the health concerns presented by COVID-19 without creating unnecessary fallout that could threaten shareholder democracy. By stopping short of replicating features of the DSBA leadership's proposed legislation that would allow boards to postpone in-person meetings, preserve stale record dates indefinitely and eliminate the requirement for a causal link between the emergency and an inability to convene a quorum for board action, we believe the Governor deliberately crafted the emergency order with an eye towards reducing the likelihood that it will be used as a board entrenchment device. We believe the Governor's order is sufficient to allow corporations to address COVID-19 related logistical challenges they may be facing with respect to their meetings and there is no need for state legislators to rush to adopt a statutory amendment that could threaten stockholder rights.