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AN OVERVIEW OF DELAWARE-SPECIFIC ISSUES FOR STOCKHOLDERS' MEETINGS

The Dodd-Frank Act's adoption of say-on-pay and the SEC's new proxy access rule implicate state law issues with regard to stockholders' meetings. The authors discuss these issues in the context of an overview of Delaware law requirements for such meetings.

By John Mark Zeberkiewicz and Megan W. Shaner *

With the recent enactment of the Dodd-Frank Wall Street Reform and Consumer Protection Act[1] and the Securities and Exchange Commission's adoption of "proxy access,"[2] there has been an increased focus on stockholders' meetings.[3] Although many of these initiatives are occurring at the federal level, they invariably implicate state law corporate issues. In light of these developments, it is useful to review the various issues of Delaware law and practice that corporations and their advisors should keep in mind when preparing for an annual meeting of stockholders.

[1] Dodd-Frank Wall Street Reform and Consumer Protection Act, Pub. L. 111-203 (2010) (hereinafter the "Dodd-Frank Act").

[2] Securities Exchange Act of 1934, Rule 14a-11 (2010). Following the SEC's adoption of Rule 14a-11, the Business Roundtable and the U.S. Chamber of Commerce filed a petition with the U.S. Court of Appeals for the D.C. Circuit seeking to invalidate the new rules and to stay the effectiveness of the rules pending the resolution of the petition. *See Business Roundtable, et al. v. SEC*, No. 10-1305 (D.C. Cir., filed Sept. 29, 2010). Subsequently, the SEC voluntarily stayed Rule 14a-11 pending the resolution of the petition. *See* Securities Act Rel. No. 9149, Securities Exchange Act Rel. No. 63031, Investment Company Act Rel. No. 29456 (Oct. 4, 2010). While Rule 14a-11 was scheduled to become effective on November 15, 2010, and would have applied to corporations that had mailed their 2010

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proxy statements on or after March 15, 2010, the effect of the stay on most corporations should be to delay the effectiveness of the proxy access rules for at least another year.

[3] Mary L. Schapiro, Chairman, U.S. Securities and Exchange Commission, *Moving Forward: The Next Phase in Financial Regulatory Reform*, Remarks at the Center for Capital Markets Competitiveness, U.S. Chamber of Commerce (July 27, 2010), *available at* http://sec.gov/news/speech/2010/spch072710mls.htm.

* *JOHN MARK ZEBERKIEWICZ is a director, and MEGAN W. SHANER is an associate, at Richards, Layton & Finger, P.A., Wilmington, Delaware. Their e-mail addresses are zeber@rlf.com and mshaner@rlf.com, respectively. Richards, Layton & Finger may have been involved in some of the cases discussed herein, but the opinions expressed in this article are those of the authors and not necessarily those of Richards, Layton & Finger or its clients.*

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Meeting Date

Delaware corporations are required to hold an annual meeting for the election of directors.[4] Typically, the date of the meeting occurs on a regular cycle and is fixed by resolution of the board in the manner provided in the bylaws, but the date may be fixed in the certificate of incorporation or bylaws.[5] While there are few Delaware statutory provisions regarding the date of a meeting of the stockholders, there are certain technical and equitable factors that a board must consider when fixing a meeting date or considering a postponement of that date. First, the meeting date should be selected in light of the relevant provisions, if any, governing advance notice of stockholder nominations and business proposals. Under most advance notice bylaws, scheduling the meeting outside of a specified window (*e.g.*, more than 30 days before or 70 days after the anniversary date of the previous year's annual meeting) will result in a change of the ordinary period for the submission of such stockholder notices. Second, once a meeting date has been publicly announced, the board should approach any change to that date with great caution, particularly where a proxy contest (or other stockholder-driven initiative) is underway.[6]

Special Meetings of Stockholders

Under the Delaware General Corporation Law ("DGCL"), special meetings of stockholders may be called at any time by the board of directors or such other persons as specified by the certificate of incorporation or bylaws.[7] The organizational documents of many public corporations either do not authorize any other parties to call special meetings (thus leaving that power within the discretion of the board) or expressly vest that authority in the board and/or a select class of officers, such as the chairman of the board, the chief executive officer, or the secretary. In recent years, many corporations have received pressure from activist stockholders to amend their bylaws to authorize stockholders holding a specified percentage of the stock (*e.g.*, 10%) to call special meetings.[8] While simple in concept, these proposals raise a number of issues, including the date on which the determination that the stockholder or stockholder group calling the meeting holds sufficient shares, as well as the establishment of the meeting date and the record date. Many corporations that have adopted such bylaws have provided that the secretary shall call the special meeting upon the request of holders of the requisite percentage of shares as of a specified date and have set forth the mechanics for the establishment of the record date, the provision of notice, and other technical aspects of the meeting. These bylaws also contain various conditions on when meetings may be called (*e.g.*, no meeting may be held within 120 days of the next annual meeting) and what matters may be presented (*e.g.*, no proposals may be made that duplicate matters brought (or scheduled to be brought) within a specified time period).

Record Date

Once the board has established the meeting date, it must set the record date and provide notice of the meeting. For most annual meetings, the record date applies to stockholders entitled to receive notice of and to vote at the meeting, and it must not be more than 60 nor less than 10 days before the date of the meeting.[9] In

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[4] 8 *Del. C.* § 211; *Saxon Indus., Inc. v. NKFW Partners*, 488 A.2d 1298 (Del. 1984). The failure to hold an annual meeting at the designated time will not affect otherwise valid corporate acts or work a forfeiture of the corporation, but if the corporation fails to hold the annual meeting for a period of 30 days after the date designated for it, or if no date has been designated for a period of 13 months after the last annual meeting, a stockholder may petition the Delaware Court of Chancery to compel the corporation to hold an annual meeting. 8 *Del. C.* § 211(c).

[5] 8 *Del. C.* § 211(b).

[6] *See*, *e.g.*, *Aprahamian v. HBO & Co.*, 531 A.2d 1204 (Del. Ch. 1987).

[7] 8 *Del. C.* § 211(d).

[8] *See* Ted Allen, RiskMetrics Group, *Showdown over Special Meetings* (Jan. 20, 2010), *available at* http://blog.riskmetrics.com/gov/2010/01/showdown-over-special-meetingssubmitted-by-ted-allen-publications.html.

[9] 8 *Del. C.* § 213(a) ("[T]he board of directors may fix a record date, and such record date shall not precede the date upon which the resolution fixing the record date is adopted by the board of

2009, however, the DGCL was amended to give corporations the power to split the record date used to determine stockholders entitled to receive notice of the meeting, on the one hand, and stockholders entitled to vote at the meeting, on the other.[10] This amendment was designed primarily to reduce the potential for "empty voting" – that is, voting by persons who do not have an economic interest in the stock of the corporation but who are nonetheless holders of record and, therefore, entitled to vote the stock[11] – and is most relevant in the context of a special meeting to vote on a major corporate event, such as a merger or significant asset sale. A split record date likely would not be used for a routine annual meeting. Where the board fixes separate record dates for notice and for voting, those dates must be fixed at the same time.[12] In other words, the board may not fix a record date for notice and then wait several days to determine the most advantageous record date for voting.

Notice

Section 222 of the DGCL requires that the notice for an annual meeting stating the place, date, and hour of the meeting (and, with respect to a special meeting, the purpose of the meeting) be provided to all stockholders entitled to vote.[13] If the board of directors has fixed separate notice and voting record dates, the notice of the meeting must also state the record date for voting.[14] Generally, the notice of a meeting of stockholders must be provided not less than 10 nor more than 60 days before the date of the meeting.[15] To reduce the expense of delivering duplicate materials, Section 233 of the DGCL allows corporations to take advantage of "householding" rules that permit them to deliver a single copy of the notice to any household in which two or more stockholders reside.[16] In addition, although notice is frequently provided by mail, Section 232 provides that any notice shall be effective if given by a form of "electronic transmission" consented to by the stockholder to whom notice is given.[17] An "electronic

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directors, and such record date shall not be more than 60 nor less than 10 days before the date of such meeting.").

[10] 77 Del. Laws ch. 14 (2009). Corporations seeking to take advantage of the ability to split the record dates should consider whether to update their bylaws to reflect these statutory developments. Bylaw provisions regarding the establishment of record dates necessarily will need to be amended, but other provisions regarding notice, adjournment, and the list of stockholders may also require conforming changes.

One example of the use of split record dates appears in On2 Technologies' original proxy statement in connection with its acquisition by Google, Inc. *See* Google, Inc., Form 424B3 (Nov. 4, 2009). After the merger agreement was amended, a new date was set for the meeting and the same record date was used for voting and notice. *See* Google, Inc., Form 424B3 (Jan. 19, 2010).

[11] One example of the type of empty voting that the 2009 amendments attempt to address occurs where shares have been transferred after the record date for voting on a proposed transaction (*e.g.*, September 1) but before the date of the meeting (*e.g.*, October 15), and the transferee of the shares has not obtained the power to direct the manner in which the shares are voted. The transferor has no economic incentive in the outcome of the proposed transaction and is therefore not motivated to vote the shares in a particular manner, while the transferee, who has an economic interest in the outcome of the vote, is not entitled to vote the shares. If the record date for voting were fixed on the meeting date, the transferee in this example would be entitled to vote the shares. The amendments also attempt to address various other forms of empty voting, such as when an investor acquires a substantial block of stock as of the record date in order to vote against a transaction and then shorts the stock to benefit from the anticipated price decline following the rejection of the transaction. As the voting record date is moved closer to the meeting date, this type of transaction becomes more difficult to accomplish.

[12] 8 *Del. C.* § 213(a).

[13] *Id.* § 222(a). In accordance with amendments to the DGCL that allow for stockholders' meetings to take place by means of remote communication, the notice must provide the means of remote communications, if any, by which stockholders and proxy holders may be deemed to be present in person and vote at the meeting.

[14] *Id*.

[15] *Id.* § 222(b). In the case of mergers and sales of all or substantially all of the corporation's assets, notice must be provided not less than 20 days before the meeting and (in the case of a merger) must be sent to all stockholders, whether voting or non-voting. *See id.* §§ 251(c), 271(a).

[16] *Id.* § 233. A stockholder may, however, by written consent, opt out of receiving a single copy of notices from the corporation where two or more stockholders reside at the same household. As a matter of practice, each stockholder of record at any such address continues to receive a separate notice of the meeting and proxy card or voting instruction card. Corporations that take advantage of the "householding" rules should disclose this fact in their proxy statement, as well as how a stockholder may opt out of those rules.

[17] *Id.* § 232. A stockholder's consent to receiving notice by electronic transmission is revocable by the stockholder by written notice to the corporation. Such consent will also be deemed to be revoked if (1) "the corporation is unable to deliver by electronic transmission two consecutive notices

transmission" includes any form of communication that does not directly involve the physical transmission of paper, but that creates a record that may be retained, retrieved and reviewed by a recipient thereof, and that may be directly reproduced in paper form by a recipient through an automated process (*e.g.*, e-mail).[18] Section 232 also provides four statutorily prescribed means through which notice by electronic transmission shall be "deemed" given.[19] The failure to provide notice by electronic transmission through one of these prescribed means, however, will not automatically invalidate any notice actually received by a stockholder.[20]

List of Stockholders

Section 219 of the DGCL requires a corporation to prepare a list of stockholders that must be made available for inspection prior to and at every meeting of stockholders.[21] In 2000, Section 219 was amended to delete the requirement that the stockholder list be made available at the city where the meeting is taking place. The amended statute requires instead that the list be made available during that 10-day period prior to the meeting at the corporation's principal place of business or on an electronic network.[22] Consistent with the amendments to the DGCL allowing for a split in the record date for notice and for voting, Section 219 was amended in 2009 to provide that if the record date for determining stockholders entitled to vote at a meeting is less than 10 days before the meeting, then the list required thereby should reflect the stockholders entitled to vote as of the tenth day before the meeting. The corporation's proxy statement should disclose where the corporation's list of stockholders will be made available for the period prior to the meeting (and, if it is to be made electronically available, the instructions for accessing the list) and should state that the list will be available for inspection for the duration of the meeting.

Meetings by Remote Communication

In 2000, Section 211 of the DGCL was amended to provide that stockholders' meetings may take place by means of remote communication.[23] This provides Delaware corporations with the flexibility of holding a meeting of stockholders essentially over the Internet. To hold an electronic meeting, a corporation must implement "reasonable measures" to verify stockholders

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given by the corporation in accordance with such consent, and (2) such inability becomes known to the secretary or an assistant secretary of the corporation, or to the transfer agent, or other person responsible for the giving of notice." *Id.* § 232(a).

[18] *Id.* § 232(c).

[19] *Id.* § 232(b). An electronic notice shall be deemed given if (1) by facsimile telecommunications, when directed to a number at which the stockholder has consented to receive such notice; (2) by electronic mail, when directed to an e-mail address at which the stockholder has consented to receive such notice; (3) by posting on an electronic network together with separate notice to the stockholder of such posting, upon the later of (a) such posting and (b) the giving of such separate notice; and (4) by any other form of electronic transmission, when directed to the stockholder. *Id*.

[20] S.B. 363, 140th Gen. Assem., Synopsis, § 19 (Del. 2000) ("Subsection (a) [of Section 232] is not intended to suggest that a notice given by a form of electronic transmission and actually received is ineffective solely because the recipient has not consented to the giving of notice by such form of electronic transmission. . . . Subsection (b) of Section 232 specifies when notice by a form of electronic transmission is deemed to have been given.").

[21] 8 *Del. C.* § 219(a). Under Section 219(c), a corporation's stock ledger shall be the only evidence as to who are the stockholders entitled to examine the list of stockholders or to vote in person or by proxy at any meeting. *See id.* § 219(c). In *Kurz v. Holbrook*, 989 A.2d 140, 162 (Del. Ch. 2010), *aff'd in part, rev'd in part sub nom. Crown EMAK Partners, LLC v. Kurz*, 992 A.2d 377 (Del. 2010), the Court of Chancery held that under Delaware law "stockholders of record" included the DTC participant banks and brokers listed on the Cede breakdown

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and, therefore, that the Cede breakdown is part of a corporation's stock ledger for purposes of Section 219(c) of the DGCL. The Delaware Supreme Court essentially reversed this holding, stating that it constituted *obiter dictum*. *See Crown EMAK Partners, LLC v. Kurz*, 992 A.2d 377, 379 (Del. 2010) ("For reasons more fully discussed in this opinion, the Court of Chancery's interpretation of 'stock ledger' under section 219 should be regarded as *obiter dictum* and without precedential effect.").

[22] 72 Del. Laws ch. 343 (2000). We note that some corporations' bylaws still reflect the pre-2000 requirements. Corporations should review their bylaws to determine whether any changes are needed to reflect this development.

[23] 8 *Del. C.* § 211(a) ("[T]he board of directors may, in its sole discretion, determine that the meeting shall not be held at any place, but may instead be held solely by means of remote communication."); *Id.* § 211(b). Examples of Delaware corporations that have conducted stockholders' meetings solely through the Internet include Adaptec, Inc. (Schedule 14A (July 28, 2006)), Ciber, Inc. (Schedule 14A (Apr. 2, 2007)), Inforte Corp. (Schedule 14A (Mar. 30, 2007)), ICU Medical, Inc. (Schedule 14A (Apr. 19, 2007)), and UAP Holding Corp. (Schedule 14A (June 26, 2007)).

and proxy holders and to provide them a reasonable opportunity to participate in meetings.[24] The proxy statement for a stockholders' meeting that is being held via the Internet must set forth the means of remote communication by which stockholders or proxy holders may be deemed present, and the list of stockholders must be made available to stockholders electronically (and, therefore, instructions for accessing it must be provided in the proxy statement).[25]

Quorum and Vote Requirements

Under Delaware law, a majority of the shares entitled to vote constitutes a quorum, unless otherwise provided in the corporation's certificate of incorporation or bylaws (provided that a quorum cannot be set at less than one-third of the shares entitled to vote at the meeting).[26] In the case of any vote of one or more class or classes or series of stock, the quorum requirements for the vote on that matter are keyed off the particular class or classes or series.[27]

The stockholder vote required to authorize corporate action generally depends on the nature of the action proposed. In the case of an election of directors, the default voting provision is a plurality of the votes cast, though that provision may be altered in the corporation's certificate of incorporation or bylaws.[28] In the case of certain significant matters – *e.g.*, amendments to the certificate of incorporation, mergers, substantial asset sales, and dissolutions – the DGCL requires the vote of the holders of at least a majority of the outstanding voting power.[29] On virtually all other matters, the default voting provision is the affirmative vote of a majority of the shares present in person or by proxy and entitled to vote on the matter.[30]

Every proxy statement must disclose the way in which the vote regarding each proposal will be tabulated, including disclosure with respect to the treatment and effect of abstentions and broker non-votes. Such disclosure will apply both to the effect of such votes (or lack thereof) for purposes of the quorum standard as well as their effect on the applicable voting requirements to approve each item to be brought before the stockholders at the meeting. The treatment of abstentions and broker non-votes with respect to approving a proposal or the quorum requirement is dependent upon the applicable voting standard.

Broker "non-votes" are shares of voting stock held in record name by a broker or nominee as to which (i) such broker or nominee does not have discretionary voting power under the applicable stock exchange rules,[31] (ii) instructions have not been received from the beneficial owners, and (iii) such broker or nominee has indicated on the proxy card, or otherwise notified the corporation, that it does not have authority to vote such shares on that matter.[32] Brokers who do not receive voting instructions from their clients have the discretion to vote uninstructed shares on certain matters, but not others. Rule 452 of the NYSE Rules governs discretionary broker voting.[33] Whether "broker non-votes" will count for purposes of a quorum depends on whether the uninstructed shares are entitled to vote on at least one item at the meeting. For meetings held prior to January 1, 2010, brokers had the discretion, even if uninstructed, to vote on the election of directors. Therefore, broker non-votes were necessarily counted for quorum purposes at annual meetings. On July 1, 2009, Section 452 was amended, effective January 1, 2010, to prohibit uninstructed broker votes from being cast in an election of directors. Thus, if the only matter considered at the meeting is the election of directors, broker non-votes would not count for quorum purposes. At most annual meetings, however, broker non-votes still count for quorum purposes, since most corporations, at each annual meeting, submit a proposal to ratify the auditors, which is a matter on which brokers have discretionary authority.

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[24] *Id.*

[25] *Id.* § 222(a).

[26] *Id.* § 216(1).

[27] *Id.* § 216(4).

[28] If the stockholders adopt a bylaw fixing the voting standard for the election of directors, the board may not further amend that bylaw. *Id.* § 216.

[29] *See, e.g., id.* §§ 242(a)(2), 251(c), 252(c), 264(c), 271(a) and 275(b). In limited instances, such as a conversion of the corporation to a different entity or the transfer or continuance of the corporation, the DGCL requires a unanimous vote of all outstanding stock. *See id.* §§ 266(b), 390(b).

[30] *See id.* § 216(2); *see also* Janet L. Fisher & Mary E. Alcock, *Voting at Annual Meetings*, Insights Vol.21, No.11 (Nov. 2007).

[31] *See*, *e.g.*, 2 N.Y.S.E. Guide (CCH) ¶ 2452, Rule 452.11 (1968).

[32] *See Berlin v. Emerald Partners.*, 552 A.2d 482, 494 (Del. 1988).

[33] New York Stock Exchange, Inc., Operation of Member Organizations, Rule 452, *reprinted in* 2 New York Stock Exchange Guide, ¶ 2452 (CCH) (2010 supp.); N.Y.S.E. Listed Company Manual, §§ 402.06, 402.08, *available at* http://nysemanual.nyse.com/lcm/.

With regard to non-discretionary matters, the treatment of broker non-votes depends upon the applicable voting standard. Where the applicable voting standard is a majority of the outstanding shares entitled to vote, a broker non-vote will count as a vote against the proposal. Under a majority of the votes cast standard, a broker non-vote cannot be cast on the non-discretionary matter and, accordingly, is neither a vote for nor against the proposal. Where the voting standard is a majority of the shares present or represented at the meeting and entitled to vote on the proposal, broker non-votes do not count as votes for or against the proposal, because brokers are not entitled to vote on the specific proposal (*i.e.*, it is a non-discretionary item). Finally, where the applicable standard is a majority of the shares present or represented at the meeting and entitled to vote thereat, if the brokers have discretionary authority to vote on *any* matter submitted to the stockholders at the meeting, they are present and entitled to vote "thereat." As a result, with respect to any non-discretionary item, broker non-votes count as votes against the proposal.

An "abstention" is generally viewed as the voluntary act of not voting by a stockholder who is present at a meeting and otherwise entitled to vote.[34] By definition, an abstaining stockholder is present at the meeting and entitled to vote and, therefore, will be counted for purposes of determining whether a quorum is present.[35] As with broker non-votes, the treatment of abstentions depends upon the applicable voting standard. Where the matter requires a majority of the shares outstanding and entitled to vote, an abstention will be counted as a vote against the proposal. Where, however, the applicable standard is a majority of the votes cast, an abstention should not be counted, since it is not a vote cast for or against the proposal.[36] Where a majority of the votes present or represented at the meeting and entitled to vote thereon is required to approve a specific proposal, an abstention will be counted as a vote against the proposal. Finally, where the vote required is a majority of the votes present or represented at the meeting and entitled to vote thereat, an abstention will be counted as a vote against the proposal.

Required Votes – Say-on-Pay

The recently enacted Dodd-Frank Act requires public corporations to provide stockholders with a non-binding advisory vote with respect to executive compensation (a so-called "say-on-pay" vote), and it also provides that the stockholders must determine the frequency with which that vote shall occur.[37] Under the Dodd-Frank Act, a corporation, at least once every six years, must provide its stockholders with the opportunity to determine whether the "say-on-pay" vote will occur every one, two, or three years.[38] The Dodd-Frank Act provides no specific guidance regarding the manner in which the vote must be conducted. One way to submit this proposal to stockholders would be to present a single proposal with three alternatives (*i.e.*, whether stockholders elected to conduct the vote every one, two, or three years) and to provide that the alternative receiving a plurality of the votes shall prevail. Another approach would be for the board to select which of the alternatives it deems advisable and submit that proposal to the stockholders. The appropriate means of submitting the proposal and establishing the voting standard remains subject to further rulemaking or guidance from the SEC. If the SEC's final rules provide for a single vote on the three alternatives, a plurality voting standard would seem to be appropriate. Corporations should consider what, if any, amendments to their bylaws should be made to accommodate this vote.

Stockholder Proposals and Nominations

For most public corporations, there are two sets of rules that govern stockholder proposals and nominations. At the federal level, Rule 14a-8 of the Exchange Act addresses the submission by stockholders of business proposed to be included in the corporation's proxy statement, and new Rule 14a-11 of the Exchange Act addresses the submission by stockholders of nominees for election as director to be included in the corporation's proxy statement, although Rule 14a-11 is

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[34] 1 R. Franklin Balotti & Jesse A. Finkelstein, *The Delaware Law of Corporations & Business Organizations* § 7.25 (3d ed. 2010 supp.); *see Hammersmith v. Elmhurst-Chi. Stone Co.*, 1989 WL 99129, at *3 (Del. Ch. Aug. 17, 1989).

[35] *See Emerald Partners*, 552 A.2d at 491 (confirming inspectors' calculations that included abstentions when calculating the number of shares present in person or by proxy and voting power present).

[36] *But see Licht v. Storage Tech. Corp.*, 2005 WL 1252355, at *5, n.28 (Del. Ch. May 6, 2005) (noting that "[t]here may be some debate as to whether an abstention is a vote" and comparing authority on both sides of the debate).

[37] Dodd-Frank Act, § 951. We note that Section 957 of the Dodd-Frank Act generally prohibits brokers from voting uninstructed shares on executive compensation matters. On September 9, 2010, effective immediately, the NYSE Listed Company Manual was amended to provide that brokers may not vote uninstructed shares on any matter relating to executive compensation. N.Y.S.E. Listed Company Manual, § 402.08, Item 21, *available at* http://nysemanual.nyse.com/lcm/.

[38] *Id.*

currently subject to a stay. If a stockholder's business proposal complies with Rule 14a-8, that proposal will be included in the corporation's proxy statement.[39] Additionally, if a stockholder is eligible under Rule 14a-11 to have his, her, or its nominee(s) for election to the board included in the corporation's proxy statement and the nomination otherwise complies with the requirements of Rule 14a-11, the nominee(s) will be included in the corporation's proxy statement.[40]

At the state level, a corporation's bylaws may contain provisions that regulate the submission of stockholder proposals or nominations for consideration at the meeting, regardless of whether the stockholder intends to use the corporation's proxy statement. Where a stockholder properly submits his, her, or its proposal or nomination in accordance with the corporation's advance notice bylaw, that proposal or nomination may be presented at the meeting for consideration by the stockholders. Under most advance notice bylaws, non-compliant proposals or nominations are automatically disregarded and will not be brought before the meeting. Many advance notice bylaws currently provide that if a business proposal complies with Rule 14a-8, it is deemed to comply with the advance notice bylaw. But a corollary bylaw provision in the Rule 14a-11 context may not be necessary or appropriate. It is our understanding that the SEC has taken the position that, since nominations are based on state law, Rule 14a-11 will not preempt valid state law nomination processes and procedures relating to those nominations. Accordingly, while we understand that no advance notice bylaw may effectively operate as an "opt-out" of Rule 14a-11 (*e.g.*, by providing a higher ownership threshold than Rule 14a-11 requires), it appears that otherwise valid informational and process requirements set forth in the bylaw may be enforced. Moreover, we understand that the proxy access rules are not intended to invalidate otherwise valid state law qualifications on a director's election. Thus, even if a nominee is included in the corporation's proxy statement pursuant to Rule 14a-11, such nominee must satisfy all valid state law qualifications to his or her election to be seated.

Inspectors of Election; Opening and Closing of the Polls; Vote Tabulation

Section 231 of the DGCL provides for the voting procedures and other meeting requirements that are generally applicable to public corporations. First, Section 231(a) of the DGCL requires that "the corporation shall, in advance of any meeting of stockholders, appoint one or more inspectors to act at the meeting and make a written report thereof."[41] Prior to discharging his or her duties, an inspector must take and sign an oath faithfully to execute the duties of inspector with strict impartiality and according to the best of his or

[39] Rule 14a-8(e)(2) generally requires that stockholder business proposals intended to be included in the corporation's proxy materials for a regularly scheduled annual meeting must be received at the corporation's principal executive offices not less than 120 calendar days before the date the corporation's proxy statement was released to stockholders in connection with the previous year's annual meeting.

[40] Rule 14a-11 generally gives stockholders (and stockholder groups) who collectively hold voting power of at least 3% of the voting power of a corporation's securities continuously for at least three years the right to have nominees included in the corporation's proxy statement. The nomination must be communicated by the filing of a new Schedule 14N not earlier than 150 days nor later than 120 days prior to the mailing date of the corporation's proxy statement in connection with the previous year's annual meeting.

Prior to the SEC's recent adoption of a mandatory proxy access regime, the DGCL was amended to expressly authorize corporations to adopt provisions in their certificate of incorporation or bylaws that would allow stockholders to make nominations through the corporation's proxy statement. 77 Del. Laws ch. 14 (2009). Under Delaware's voluntary regime, corporations are entitled to craft the procedures for making nominations and to impose various conditions and limitations on nominations. *See generally* John Mark Zeberkiewicz & Joseph L. Christensen, *The Delaware & SEC Proxy Access Regimes*, The Rev. of Sec. & Commodities Reg., Vol. 42, No. 17 (Oct. 7, 2009). The DGCL was also amended at that time to authorize corporations to reimburse a stockholder's expenses in soliciting proxies in connection with the election of directors. 77 Del. Laws ch. 14 (2009). In light of the uncertainty that existed prior to the SEC's adoption of Rule 14a-11 over the precise contours of any SEC initiative on proxy access, few public corporations had adopted proxy access or proxy reimbursement bylaws. Following the adoption of Rule 14a-11, we believe it is unlikely that public Delaware corporations will adopt proxy access bylaws under the DGCL that grant stockholders additional rights to use the corporation's proxy statement to submit nominations.

[41] 8 *Del. C.* § 231(a). The inspector's duties include ascertaining the number of outstanding shares and the voting power of the shares, determining the shares represented at the meeting, and the validity of proxies and ballots, counting the votes and ballots, determining (and retaining a record of the disposition of) any challenges to any of its determinations and certifying its determination of the shares represented at the meeting and its count of all votes and ballots. *Id.* § 231(b).

her ability.[42] Generally, corporations will announce the presence of the inspector of election at the meeting.

Second, the date and time of the opening and the closing of the polls for each matter upon which the stockholders are being asked to vote must be announced at the meeting.[43] Upon the closing of the polls, no ballot, proxy, or vote (including any revocation or change thereto) may be accepted by the inspectors of election.[44] The only exception to this rule is if, upon application by a stockholder, the Court of Chancery determines otherwise.[45]

Third, Section 231(d) specifies the information that inspectors of election may consider in determining the validity of and in counting proxies and ballots. Inspectors are authorized to examine "reliable information" other than the proxies, ballots. and books and records of the corporation, but only for the limited purpose of reconciling bank and broker "over votes."[46] In 2000, Section 231 was amended to expand the types of materials that inspectors of election may rely on to include any verification information required of stockholders voting electronically.[47] If the inspector considers such other information, the inspector must, at the time of certification, specify the precise information so considered.[48]

Adjournment

The proxy statement should include disclosure regarding the ability of stockholders or other parties to adjourn the meeting, adjournments for lack of a quorum, and adjournments for other reasons.[49] If a quorum is present, the chairman of the meeting may have the power to adjourn the meeting if such authority is conferred upon him in the corporation's organizational documents, but as a matter of practice, that power may be subject to equitable limitations and, generally speaking, may not be exercised over the objection of stockholders.[50] In most cases, the question of whether to adjourn a meeting at which a quorum is present should be submitted to the stockholders present in person or represented by proxy at the meeting. In many cases where stockholders are asked to vote on a significant transaction (*e.g.*, the adoption of a merger agreement) requiring a minimum statutory vote, such as a majority of the outstanding shares, corporations add a separate proposal – one that is subject to a lesser vote, such as a majority of the quorum – to grant the chairman the power to adjourn the meeting for the express purpose of soliciting additional proxies in favor of the proposal with respect to such significant transaction.

CONCLUSION

The recent enactment of the Dodd-Frank Act and the SEC's adoption of proxy access rules has resulted in an increased focus on matters of corporate governance, including the processes and procedures of annual meetings. In light of these developments, we have attempted to summarize some of the most significant state law issues relating to annual meetings and to highlight a few areas in which recent federal initiatives intersect with state law. ■

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[42] *Id.* § 231(a).

[43] *Id.* § 231(c).

[44] *Id.*

[45] *See*, *e.g.*, *In re Waddell & Reed Fin., Inc.*, C.A. No. 4602-CC (Del. Ch. June 12, 2009) (ordering the inspector of elections of the annual meeting of stockholders to reopen the polls in order to count the votes of approximately 3.2 million shares of common stock that had been excluded from the vote tabulation due to a technical error in their transmission from a proxy advisor firm that provided voting services to institutional investors of the corporation to a vote-processing firm that received stockholder votes for the corporation).

[46] 67 Del. Laws, ch. 376, § 9 (1990); *see also Seidman & Assocs., L.L.C. v. G.A. Fin., Inc.*, 837 A.2d 21, 26 (Del. Ch. 2003).

[47] 72 Del. Laws, ch. 343 § 18 (2000).

[48] For example, from whom the information was obtained, when the information was obtained, the means by which the information was obtained, and the basis for the inspector's belief that such information is accurate and reliable. 8 *Del. C.* § 231(d).

[49] For example, the proxy statement may provide: "Adjournments may be made for the purpose of, among other things, soliciting additional proxies in favor of any or all of the Company's proposals. An adjournment may be made from time to time by the holders of shares of Common Stock representing a majority of the votes present in person or by proxy at the meeting without further notice other than by an announcement made at the meeting. No proxies voted against approval of any of the proposals will be voted in favor of adjournment of the meeting for the purpose of soliciting additional proxies."

[50] *See generally, State of Wis. Inv. Bd. v. Peerless Sys. Corp.*, 2000 WL 1805376 (Del. Ch. Dec. 4, 2000); *see also Williams v. Geier*, 671 A.2d 1368, 1376 (Del. 1996); *Blasius Indus., Inc. v. Atlas Corp.*, 564 A.2d 651 (Del. Ch. 1988).