Potter Anderson & Corroon LLP

Corporate Law's Challenge to Keep Pace With Technology

Introduction

Corporate boards seeking to improve investor relations have found an ally in the Internet. Corporations are taking advantage of widespread access to and use of the Internet, its improved security, and the tremendous cost-savings of Internet publishing by offering their investors opportunities to receive documents electronically, designate proxy voting instructions online, and even view annual stockholder meetings online. Each year, more and more corporations are offering their stockholders the convenience of voting telephonically or electronically. In 1998, just under 200 companies offered telephone voting. In 1999, that number more than doubled to over 500. ADP-ICS offered beneficial stockholders of 312 companies the ability to vote their proxies via the Internet in 1998; that number sky-rocketed to 14,000 companies in 1999. The number of beneficial holders taking advantage of Internet voting soared from 637,959 in 1998 to over 2.3 million in 1999.[1]

As the number of people using the Internet continues to grow (current usage is estimated by the Computer Industry Almanac to be 327 million people),[2] many jurisdictions, including Delaware, are reviewing their corporation statutes and are considering appropriate changes that would accommodate the world's new business practices. For example, the drafters of the Model Business Corporation Act (the "Model Act") already have amended the Model Act's provisions to make it more "electronically friendly" and Delaware is considering similar changes to its corporation law. These changes represent the opening salvo in what will likely be a continuing effort to update the corporate law in response to changing technology.

This article discusses the issues and potential pitfalls presented by the use of emerging technology by corporations and their stockholders under both the Model act and the DGCL.[3] While the law with respect to the use of the Internet in the corporate governance arena is still emerging, both the DGCL and the Model Act provide certain tools to corporate counsel for the use of computer based technology. The use of such tools has the potential of saving companies substantial expenses and to expedite corporate action. As we move forward, the challenge to the drafters of the DGCL and the Model Act will be to ensure that their respective statutes fully utilize newly emerging technology. This article intends to provide a checklist to corporate counsel seeking to utilize the Internet by walking the reader through the provisions of the Model Act and the DGCL as they currently exist relating to (i) providing notice to stockholders of an annual meeting, (ii) voting agreements, (iii) proxies, (iv) consents, (v) annual meetings, (vi) board meetings, and (vii) the maintenance of corporate records.

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Specific Corporate Actions and the Use of the Internet

Notice Requirements

Section 222 of the DGCL

A necessary starting point in the use of the Internet for corporate governance is the requirement of notice. Section 222(b) of the DGCL provides that "written notice" of a stockholder's meeting must be given to the stockholders.[4] While the DGCL does not explicitly define the term "writing," Title 1 of the Delaware Code sets forth a general definition of the term. That definition is generally applicable to other titles of the Delaware Code. Specifically, Section 302(23) of Title 1 provides that the term "writing" includes:

> printing and typewriting and reproductions of visual symbols by photographing, lithographing, multigraphing, mimeographing, manifolding or otherwise;[5]

The definition of writing in Section 302(23) of Title 1 would appear to be sufficiently flexible to include electronic reproduction of visual symbols including, for example, via electronic mail ("e-mail"). Nothing in Section 302(23) suggests that electronically produced text should not qualify as a writing unless it is first printed on paper. In fact, any such construction would seem to ignore the breadth of the definition itself as well as modern commercial and technological realities. Thus, while it is unresolved under Delaware law whether notice via the Internet and/or e-mail would satisfy the written notice requirement for purposes of Section 222(b), it is reasonable to conclude that electronic notice would be sufficient.

This conclusion is buttressed by the language of Section 222(b) which provides, "[i]f mailed, notice is given when deposited in the United States mail, postage prepaid, directed to the stockholder at such stockholder's address as it appears on the records of the corporation."[6] The use of the qualifier "if mailed" suggests that other methods of delivery are contemplated. Although decided before electronic transmissions were even possible, several Court of Chancery cases lend support to the idea that notice can be given by means other than the mail.[7] Moreover, in another context, the United States District Court for the District of South Carolina held that a computer disk mailed or delivered to an insurance agent could constitute "written notice" to an agent required in order to cancel a policy for nonpayment of premiums.[8] Thus, while the legal sufficiency of electronic notice has not been definitively adjudicated, it is reasonable to conclude that such notice would suffice.[9]

In all events, even if e-mail notice did not satisfy Section 222(b) of the DGCL, stockholders wishing to receive notice electronically can request to do so and in effect "waive" the "written notice" requirement.[10]

Section 1.41 of the Model Act

The Model Act does not specify a method of transmitting notice to shareholders, and states that "[a] corporation shall notify shareholders of the date, time, and place of each annual and special shareholders' meeting...."[11] Section 1.41(b) of the Act further provides that "[n]otice may be communicated in person; by mail or other method of delivery; or by telephone, voice mail or other *electronic means*."[12] Moreover, notice by electronic means is expressly recognized as written notice under the Model Act.[13] Written notice is deemed effective when electronically transmitted to the shareholder in a manner authorized by the shareholder.[14] Thus, under the Model Act, it is permissible to provide notice of a meeting of stockholders via the internet, or any other mode of electronic communication.

It should be noted, however, that if notice is electronically transmitted issues will arise with respect to the setting of a record date. The Model Act provides that if a record date is not fixed by the board of directors, it is the day before the first notice is *delivered* to the corporation's shareholders.[15] As stated, electronically transmitted notice is *effective* "when electronically transmitted to the shareholder in a manner authorized by the shareholder."[16] Despite the potentially conflicting interpretations between "effective" and "delivery," a record date under the Model Act would likely be established the day before electronic notice is transmitted by the Company.

Voting Agreements

Section 218 of the DGCL

Stockholder voting agreements are expressly authorized by Section 218(c) of the DGCL, which provides:

> An agreement between 2 or more stockholders, if in writing and signed by the parties thereto, may provide that in exercising any voting rights, the shares held by them shall be voted as provided by the agreement, or as the parties may agree, or as determined in accordance with a procedure agreed upon by them.

8 Del. C. § 218(c) (emphasis added). Although the language of Section 218(c), standing alone, might appear to suggest that a voting agreement must be "in writing" and "signed" to be enforceable, that language must be read in context with Subsection (d) of Section 218 — the nonexclusivity provision. Subsection (d) provides:

> This section [Section 218] shall not be deemed to invalidate any voting or other agreement among stockholders or any irrevocable proxy which is not otherwise illegal.

8 Del. C. § 218(d) (emphasis added). These two subsections must be reconciled to assess the viability of stockholder agreements entered into by electronic means.

There are no Delaware cases construing the impact of Subsection (d) of Section 218 of the DGCL on voting agreements that are not "in writing" or "signed," as those terms are used in Subsection (c). In a number of instances, however, Delaware courts have invoked Subsection (d) as a basis for concluding that voting arrangements are not invalid merely because the parties unsuccessfully attempted to create a statutory voting trust under Section 218(a)[17] but failed to comply with all the statutory requirements.[18] In those cases, the voting arrangements, while not qualifying as statutory voting trusts, were not rendered unenforceable merely because they failed to satisfy each of the technical requirements of Subsection (a) of Section 218.

These cases support the proposition that Subsection (d) grants broad statutory authority for any type of stockholder voting arrangement that is not otherwise illegal.[19] Under such a reading, Subsection (c) would more properly be viewed as specifying merely one type of voting agreement that is permitted by the statute - i.e., one that is in writing and signed by the parties and that requires shares to be voted in one of the three specified manners. That view is buttressed by the language of Subsection (c) itself, which by its use of the term "may" (as opposed to "shall") appears to be voluntary and permissive in nature rather than mandatory.[20]

Based on the foregoing, one reading of Section 218 is that a writing and signature are not mandatory requirements of a Section 218 voting agreement. Rather, based on Subsection (d), it would appear that any form of voting agreement (or amendment thereto) that is not otherwise illegal should be enforceable under Section 218. There is, however, one Delaware case holding an oral voting agreement to be invalid because it was not "in writing" as contemplated by Subsection (c).[21] In Venture First L.P. v. DeKovacsy, the Court held that an alleged oral agreement concerning voting rights would not be valid, even if it could be proved, because that type of agreement would need to be in writing.[22] It does not appear, however, that the parties raised or that the Court of Chancery considered either the impact of Subsection (d) or the permissive nature of the language of Subsection (c). In view of the express terms of Subsection (d) and the Delaware Supreme Court's recent decision in Elf Atochem concerning the meaning of the permissive term "may," one could argue that the Venture First decision is of questionable precedential value.[23] Nonetheless, the Venture First decision injects a degree of uncertainty into the appropriate construction of Section 218 and leaves open the possibility that an electronically signed and transmitted stockholder voting agreement may not be authorized by the existing statute.

Section 7.31 of the Model Act

Similarly, the Model Act permits shareholder voting agreements. Specifically, Section 7.31 of the Act provides that "two or more shareholders may provide for the manner in which they will vote their shares by signing an agreement for that purposes."[24] The Official Comment to Section 7.31 further provides that the only "formal requirement[ ]" to the creation of a voting agreement is that it be "in writing and signed by all the participating shareholders..."[25]

Although the Model Act does not define a "writing," the Act includes electronic signatures within the definition of "sign" or "signature."[26] Moreover, the Official Comment to the definition of "sign" or "signature" explains that electronic signatures "could include ... electronic entry in the form of a computer data compilation of any characters or series of characters...."[27] When considered in connection with the definition of "Electronic Transmission," which is to be broadly construed to include all evolving methods of electronic delivery, the Model Act likely permits shareholder voting agreements to be in a form other than a "standard writing."

Electronic Proxies

Section 212 of the DGCL

In the field of proxy voting, courts have always been sensitive to the practicalities of corporate life.[28] Therefore, it should come as little surprise that Section 212 is the only section of the DGCL that has been amended to embrace a broad range of electronic transmissions. Specifically, Section 212 of the DGCL was amended in 1990 to add subsections (c) and (d).[29] Those amendments specifically validate certain types of electronic proxies, including those sent via facsimile and those registered via "proxygrams" or "datagrams."[30] Prior to the amendment, the use of datagrams had been severely restricted by the Court of Chancery in Parshalle v. Roy,[31] which involved a challenge to the datagrams in question because there was no procedure to verify that the person who called the toll-free number was either the record holder or someone authorized to act on the record holder's behalf. The datagrams therefore lacked the one "fundamental" attribute required in all proxies, i.e., "to be accepted

as valid evidence of an agency relationship, the proxy must evidence that relationship in some authentic, genuine way."[32] The 1990 amendments to Section 212 represented an effort to keep the law current with evolving technology. Accordingly, under new Section 212 a stockholder can grant a proxy using the Internet, provided that the Internet transmission pursuant to which the proxy was granted is accompanied by information sufficient to demonstrate that the transmission was authorized by the stockholder. Such verification information may include a Social Security number, birthdate, or other fact known only to the stockholder. The use of a personal identification number or control number also may be appropriate. If a company sought greater security than it could achieve through use of unique control numbers, it could encrypt its transmissions.[33]

Section 7.22 of The Model Act

Similar to Section 212 of the DGCL, the provisions of the Model Act recognize the benefits to permitting electronic proxies. Section 7.22(b) of the Model Act expressly permits a vote by proxy to be in the form of an "electronic transmission."[34] "Electronic Transmission" is defined by the Model Act as "any process of communication not directly involving the physical transfer of paper that is suitable for the retention, retrieval, and reproduction of information by the recipient."[35] More specifically, the Official Comment to Section 1.40 of the Model Act describes an electronic transmission as follows:

> "Electronic transmission" or "electronically transmitted" includes both communication systems which in the normal course produce paper, such as telegrams and facsimiles, as well as communication systems which transmit and permit the retention of data which is then subject to subsequent retrieval and reproduction in written form. Electronic transmission is intended to be broadly construed and include the evolving methods of electronic delivery, including electronic transmissions between computers via modem, as well as data stored and delivered on magnetic tapes or computer diskettes. The phrase is not intended to include voice mail and other similar systems which do not automatically provide for the retrieval of data in printed or typewritten form.[36]

Accordingly, the Model Act expressly contemplates a vote by proxy via e-mail. The only requirement of an electronic vote by proxy under the Act is that the electronic transmission "contain or be accompanied by information from which one can determine that the shareholder, shareholder's agent, or the shareholder's attorney-in-fact authorized the transmission."[37] Assuming such requirement is met, the Model Act permits a shareholder to designate an agent to vote by proxy via e-mail or other similar form of electronic transmission.

Securities and Exchange Commission Rules

The Securities and Exchange Commission ("SEC") rules on delivery of materials also allow corporations to take advantage of the Internet. For example, the SEC's guidance on when electronic delivery is permitted includes the following: (1) the company must have a way to ensure that the investor is notified that the data has been sent in electronic form or can be accessed on a Web site; (2) the company must be sure that the investor has access to the Web site or e-mail; (3) the investor must be entitled to request and receive a paper copy; and (4) there must be evidence of delivery, either in the form of (a) informed consent as to

the manner of delivery, (b) electronic verification of receipt, (c) use of data by the investor, or (d) issuer-provided access with the expectation of regular use.[38] These changes have revolutionized the proxy process.

The Logistics of Electronic Voting by Proxy

As a practical matter, electronic proxies can save companies big money by eliminating postage costs and reducing printing costs. Two primary methods are used. Under the "electronic distribution" method, companies notify stockholders, who have previously consented to such notification, by e-mail that complete proxy sets - the annual report, proxy statement, proxy card or voting instruction forms, and any other instructional material is available at a designated URL address. The stockholders use their personal identification numbers to vote and to review materials. No paper flows between the company and the stockholders, and no postage is required. The company is forced, however, to maintain a database with e-mail addresses and to have a back-up plan in the event e-mail addresses fail. Under the second, "electronic availability" method, the stockholder receives a hard copy of the proxy card and a letter giving the URL address where the annual report and proxy statement can be found. While postage is still required for the proxy card and letter, overall postage is significantly lower for stockholders who elect not to receive hard copies of the annual report and proxy statement, opting instead to read them on-line. More savings are achieved by the elimination of the expense of collecting and maintaining a database. In 1999, 101 companies had their annual reports and proxy statements available for either of the above methods, electronic distribution or electronic availability. ADP-ICS reported that those companies saved $2.8 million in postage in 1999, and it has been estimated that they have the potential of saving nearly $11 million in printing costs in the future.[39] Even if not taking full advantage of electronic distribution or electronic availability, other companies are providing electronic posting for the convenience of their stockholders. The Public Register's Online Annual Report Services, for example, found at www.annualreportservice.com, quickly links investors to over 2,292 annual reports (as of March 21, 2000).

Written Consents

Stockholder Consents

Section 228 of the DGCL

Stockholders of a Delaware corporation are permitted to take actions without a meeting if they obtain the requisite written consents pursuant to Section 228 of the DGCL. The use of written consents has become increasingly popular both as a means to simplify corporate governance and as a powerful tool in contests for corporate control. Unless limited by the certificate of incorporation, any action that could be taken by stockholders at a meeting may be taken without a meeting, without prior notice, and without a vote, if the requisite number of stockholders consent to the action "in writing."[40] The written consents must be "signed" by a sufficient number of stockholders.[41] The written consents must be delivered to the corporation at the office of its registered office in Delaware, at its principal place of business, or to the officer or agent of the corporation having custody of the books that record the proceedings of stockholder meetings.[42]

Unlike the amendments to Section 212 which allow electronic proxies, there has been no corresponding change to the law governing written consents. While the definition of

"writing" should be sufficiently broad to encompass electronic transmissions, the signature requirement of Section 228 presents a separate problem. The statute requires written consents to be signed and to contain the date for each stockholder's signature. Section 302(23) of Title 1 also provides a definition of written signature, which is also generally applicable to other titles of the Delaware Code. It states in pertinent part:

> in all cases where the written signature of a person is by law required, it shall be the proper handwriting of such person, or if he cannot write his name, his mark.[43]

This is a very restrictive definition on its face. By contrast, Section 103(h) of the DGCL evidences a fairly flexible approach in specifying permissible forms of "signatures." Specifically, Section 103(h) provides that "[a]ny signature on any instrument authorized to be filed with the Secretary of State under any provision of [the DGCL] may be a facsimile, a conformed signature, or an electronically transmitted signature."[44] This Section suggests that the concept of signing under the DGCL might be broader than the definition of "written signature" in Section 302(23) of Title 1. On its face, however, Section 103(h) is limited to instruments authorized to be filed with the Secretary of State.

Section 3-401(b) of the Delaware Uniform Commercial Code ("DUCC") seems to go a step further. It defines "signature" as follows:

> A signature may be made (i) manually or by means of a device or machine, and (ii) by the use of any name, including a trade or assumed name, or by a word, mark, or symbol executed or adopted by a person with present intention to authenticate a writing.[45]

Under this more expansive definition of Section 3-401(b) of the DUCC, a person's mark or symbol scanned and converted to electronic form might, if the electronic transmission thereof were authorized by that person, qualify as a "signature." It remains unclear, however, whether other types of so-called "electronic" or "digital" signatures (i.e., those involving encryption of authenticating or identifying information within an electronic communication) would be deemed equivalent to a signature under even this more expansive definition.

It is worth noting that Section 228, unlike Section 218, does not include a nonexclusivity provision that would allow other forms of consents that did not meet the requirements of another provision of the statute. Further complicating matters, Section 228 has rigorous delivery requirements since a written consent only is effective upon delivery (assuming the requisite number of consents have been garnered). If electronic consents were used, it would be difficult for the corporation to track all such deliveries, unless hard copies were provided. Under these circumstances, it is unlikely that electronic consents for stockholders meet the prerequisites of Section 228.

Moreover, the Delaware Court of Chancery has taken a strict approach to the interpretation of issues arising from the use of written consents, due to the greater potential for mischief where action is taken outside of the context of a duly noticed meeting.[46] For example, Empire of Carolina, Inc. v. Deltona Corp. involved the summary removal of directors by the execution of written consents. The Court ruled that such actions "can interfere with the orderly corporate governance and cause great injury to an operating corporation and its stockholders."[47] Therefore, it held that the provisions of DGCL § 213(b), determining which stockholders may consent to corporation action, must be strictly complied with "if any semblance of corporate order is to be maintained."[48] Thus, great care must be taken to

ensure measures that will allow corporations to authenticate or verify that the sender was authorized to send the consent and to manage the flow of consents during the heat of a consent contest.

Section 7.04 of the Model Act

The Model Act also permits stockholders to act by consent. Specifically, Section 7.04 of the Model Act provides that action taken in lieu of a shareholders' meeting:

> must be evidenced by one or more *written* consents bearing the date of signature and describing the action taken, *signed* by all the shareholders entitled to vote on the action, and delivered to the corporation for inclusion in the minutes or filing with the corporate records.[49]

As discussed above, the Model Act does not define the term "writing." The Model Act does provide, however, that notice by electronic transmission shall be deemed written notice.[50] Thus, although the Model Act does not provide a definition of writing, Section 1.41(a) gives credence to the assertion that where a writing is required, such requirement will be satisfied if transmitted by electronic means.

Moreover, under Section 1.40(22A) of the Model Act, "sign" or "signature" includes electronic signatures.[51] Electronic signatures encompasses any methodology accepted by the secretary of state, and are intended to include any manifestation of an intention to execute or authenticate a document.[52] Significantly, the Model Act does not place a limitation on the type or form of documents that may utilize an electronic signature like the DGCL. Furthermore, the Model Act defines signature simply as an "electronic signature," not an "electronically *transmitted* signature."[53] The drafters of the Model Act thus recognized the increasing use of computer-based technology by corporations and their stockholders and have permitted corporations and their stockholders to perform corporate business via electronic transmission by using electronic or digital signatures, without limitation. Arguably, when taken together, Sections 1.40(22A) and 1.41(a) of the Model Act support the writing and signature requirements of a consent in lieu of a shareholders' meeting in Section 7.04 of the Model Act.

Although an electronic consent arguably would satisfy the writing and signature requirements of Section 7.04, it is unclear whether the requirement that a consent be delivered for inclusion in the minutes or filing with the corporate records would be satisfied by an electronic consent. Section 1.20 of the Model Act which governs the filing of documents under the Act, provides that "if electronically transmitted, [a document being filed] must be in a format that can be retrieved or reproduced in typewritten or printed form."[54] Moreover, Section 16.01 governing the maintenance of corporate records provides that "[a] corporation shall maintain its records in written form or in another form capable of conversion into written form within a reasonable time."[55] Thus, on balance the Model Act appears to contemplate the filing of corporate documents electronically and, therefore, should permit the delivery of consents electronically. This conclusion is not free from doubt, however, and, at the very least, a corporation using electronic consents should take extreme care to ensure that such consents were authorized and can be authenticated.[56]

Director Consent

Section 141 of the DGCL

Section 141(f) allows, unless otherwise restricted by the certificate or bylaws, directors to take any action that could be taken at a meeting to be taken by written consent so long as the consent is unanimous and the writing or writings are filed with the minutes of proceedings of the board.[57]

Unlike stockholder consents, no signature is expressly required. Therefore, one potential bar to electronic consents is eliminated. The filing requirement, however, suggests that some hard copy must physically be attached to and filed with meeting minutes.[58] Therefore, a director's electronic consent should satisfy both the "writing" and the "filing" requirement of Section 141(f) if it is electronically stored pursuant to Section 224 of the DGCL.

Section 8.21 of the Model Act

Similarly, Section 8.21 of the Model Act permits directors to act without a meeting. To so act, the action must be evidenced by a written consent following the same formalities as required for a written consent of shareholders in Section 7.04.[59] Again, although the writing and signature requirements are likely satisfied if an electronic consent is used, it is unclear whether an electronic consent would satisfy the filing requirement. As discussed above, however, the express authorization of electronic filing with the secretary of state,[60] and the provisions permitting electronic storage of corporate records such as minutes and accounting records,[61] arguably sanction the use of electronic consents by directors to act in lieu of a meeting under the Model Act.

Corporate Records

The DGCL

Section 224 of the DGCL provides that "any records maintained by a corporation in the regular course of its business, including its stock ledger, books of accounts, and minute books may be kept on, or be in the form of, punch cards, magnetic tape, photographs, microphotographs, or any other information storage device."[62] The provisions of Section 224 further provide that "[a]ny corporation shall so convert any records so kept upon the request of any person entitled to inspect the same."[63]

While there has been no clear guidance from the Delaware courts, the statutory language strongly suggests that computer storage of records is entirely appropriate under the statute's broad authorization to use "any other information storage device." Indeed, it is common practice. Nonetheless, it may be helpful if Section 224 were updated to eliminate the reference to archaic forms of information storage such as punch cards and magnetic tape, and to embrace expressly electronic and computer storage. Such storage should satisfy the requirement that records be convertible to clearly legible written form within a reasonable time, but consideration should be given to what constitutes "within a reasonable time." Obviously, that answer will vary greatly depending on the category of corporate record.

The Model Act

The Model Act contains similar provisions to the DGCL requiring a corporation to keep corporate records. By contrast, however, the Model Act provides that a corporation may maintain its records in a form capable of conversion into written form within a reasonable time.[64] Accordingly, it is likely that the Model Act was intended to permit a corporation to keep its records electronically.

"Attendance" at Meetings

Stockholder Meetings

Section 211 of the DGCL

While an increasing number of companies allow stockholders to *view* annual meetings via the Internet, the current statutory framework does not contemplate a shareholder meeting held strictly over the Internet nor does it envision a stockholder "attending" a meeting over the Internet.

Section 111 of the DGCL sets forth two requirements for the holding of an annual meeting that are implicated by Internet usage. First, Section 211 provides that meetings of stockholders may be held "at such place, either within or without this State, as may be designated by or in the manner provided in the bylaws or, if not so designated, at the registered office of the corporation in this State."[65] Other provisions of the DGCL make clear that an annual meeting must be conducted at a specified time and place.[66] Indeed, Section 219 would appear to indicate that "place" refers to a geographic location.[67] With the increasing advances in technology, it is not unforeseeable that a court would determine that a meeting transmitted via Internet screening, for instance, constitutes a place for purposes of Section 211. Even if cyberspace were a "place," however, the absence of a physical location would deprive the meeting of a quorum and prevent those "attending" via cyberspace from voting. Under Section 216 of the DGCL, both quorum and the attainment of the vote of sufficient shares depend upon stockholders being present "in person" or represented by proxy.[68] Accordingly, pursuant to the current state of Delaware law, it is unlikely that a court would conclude that a stockholder who is "attending" the meeting electronically is "present in person." Therefore, that stockholder would not be counted for quorum purposes and would not be entitled to vote.

Section 7.01 of the Model Act

A better argument exists under the Model Act for holding annual meetings over the Internet. Section 7.01 of the Model Act provides that "[a]nnual shareholders' meetings may be held in or out of this state at the place stated or fixed in accordance with the bylaws."[69] Moreover, with respect to the availability of a shareholders' list for inspection prior to a meeting, the Model Act provides, in relevant part:

> The shareholders' list 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.[70]

The reference in the Model Act to posting notice "in the city where the meeting will be held" would appear to contemplate that an annual shareholders' meeting must be held in a geographic location as under the DGCL. Unlike the provisions of the DGCL, however, the Model Act holds that a share is deemed present for quorum purposes once it is "represented for any purpose at a meeting," and does not contain the limitation found in the DGCL that shares "represented in person or by proxy" are counted for quorum purposes.[71] Moreover, as discussed above, the Model Act permits electronically transmitted proxies. Accordingly, although the provisions of the Model Act appear to contemplate the holding of an annual meeting at a physical location, the quorum and voting requirements of the Act do not necessarily mandate as such, thus opening the door for an annual meeting to be held over the Internet in which shareholder votes are cast electronically.

A number of companies have allowed stockholders to *view* their annual meetings on the Internet and to ask questions during the meeting. The first such company to allow investors to the view the annual stockholder meeting while it was in progress was Bell & Howell, a Delaware corporation. After going public (for the second time) in 1995, it was seeking a way to improve its image as a high-tech company. It also wanted to get its message out to stockholders around the world. Therefore, it allowed stockholders to view its first meeting online in May 1996. While only 40 stockholders physically attended the meeting, more than 950 watched online. Investors could hear what was going on through the Web site audio function and could simultaneously view the charts and graphs presented on PowerPoint slides. In addition, the online viewers were permitted to e-mail questions to directors as early as two days before the meeting and while the meeting was in progress, all of which were read and answered during the meeting. Those persons monitoring via the Internet were not, however, considered "present" for quorum or voting purposes.

Board Meetings

Section 141 of the DGCL

Unlike its treatment of stockholder meetings, the DGCL, at Section 141(i), permits members of the board to participate in a meeting "by means of conference telephone or similar communications equipment by means of which all persons participating in the meeting can hear each other." Such participation constitutes "presence in person at the meeting."[72] The overriding requirement thus is participation, which is consistent with the fact that a director may not vote by proxy, but must be present to hear and participate in discussions in order to carry out his or her fiduciary duty.

As telephonic capabilities over the Internet increase, it is increasingly foreseeable that board meetings will be held online. Already, small groups can be joined together on a conference call over the Internet using Microsoft NetMeeting. This software allows participants to hear one another virtually simultaneously, thus satisfying the requirement of Section 141(i). In addition, it offers the added benefit of allowing participants simultaneously to view and edit documents, spreadsheets and PowerPoint slides. Thus, the directors could potentially have access to all of the information and material upon which the decision is based in order properly to carry out their duty of due care.[73]

Section 8.20 of the Model Act

The Model Act contains a similar requirement that a meeting of the board of directors of a corporation be conducted through use of "any means of communication by which all directors participating may simultaneously hear each other during the meeting."[74] "A director participating in a meeting by this means is deemed to be present in person at the meeting."[75] Accordingly, the same analysis attendant to the DGCL with respect to board meetings would be applicable to the provisions of the Model Act.

Logistical Issues Associated With Electronic Corporate Governance Under the Provisions of the DGCL and the Model Act

While the provisions of the Model Act and the DGCL address the use of the Internet for certain functions of corporate governance, as corporations and stockholders use new technology with increasing frequency, a host of new issues likely will emerge. The following discussion attempts to address some of these issues.

Proxies

Unique logistical issues may arise in the context of electronic proxies. One such issue will be resolving conflicting proxies. A proxy may be revoked in the following ways: (1) express revocation;[76] (2) subsequent execution and delivery at an annual or special meeting of stockholders of another proxy;[77] or (3) an actual vote at the annual or special meeting,[78] although mere attendance at the meeting does not constitute revocation.

Where identical, conflicting proxies exist, but none bear any facial indication that the person executing that proxy was unauthorized, then all are entitled to a presumption of validity.[79] The proxy that governs is the one that was executed latest: "[W]hen two proxies are offered bearing the same name, then the proxy that appears from the evidence to have been last executed will be accepted and counted under the theory that the latter - that is, the more recent - proxy constitutes a revocation of the former."[80] Where two proxies are undated or dated the same day, a later post mark is sufficient to show later execution.[81] When the conflict cannot be resolved from the face of the proxies themselves or from the books and records of the corporation, however, then all identical but conflicting proxies must be rejected. [82]

Where one or more of the conflicting proxies are electronic, the analysis may be more complicated. Issues will arise as to which electronic voting instruction controls or whether a particular electronic voting instruction was prior or subsequent to another form of communication. For example, what happens if a stockholder mails a proxy card on Friday afternoon but then changes his or her mind over the weekend and sends electronic voting instructions on Monday. The company would receive the electronic instructions nearly instantaneously on Monday but might not receive the proxy card in the mail until Tuesday or Wednesday. Under the revocation rules discussed above, the later *executed* proxy governs. While unresolved under Delaware law, the critical time of "execution" of an electronic proxy is likely to be the time it was sent, assuming the relevant authentication procedures were followed. Under the hypothetical, then, the proxy that should count would be the earlier-received electronic proxy of Monday. Assuring that the proper proxy is counted under such circumstances will require the corporation and inspectors of election to set up even more

rigorous procedures for resolving proxy conflicts than are now utilized for resolving conflicts among paper proxies.

This analysis also raises interesting questions regarding what evidence, if any comparable to a postmark could be considered in connection with resolving a timing conflict regarding that electronic proxy.[83] The electronic statement declaring when the electronic voting instructions were "sent" that accompanies most, if not all e-mails, would likely be considered part of the "face" of the proxy for such purposes.[84] Therefore, courts will likely look to the electronic statement in the "header" portion of the electronic voting instructions transmissions showing the date and time of transmission to determine the timing of a proxy.

A related problem arises regarding how late stockholders should be able to cast electronic proxies. Given the instantaneous nature of Internet communications, absent a cut-off, stockholders could conceivably be changing and/or revoking proxies even during the meeting. One way to address this problem is by cutting off the right to submit proxies by phone or electronically at a specified time the day before the meeting. An earlier cut-off would make good business sense where, for example, additional logistical steps (such as filing the proxies with the secretary) are required before the vote of the proxy may be cast at the meeting

Notice

Another area raising logistical concerns is electronic notice. Specifically, Section 222 of the DGCL raises the issue of proof or presumption of receipt when providing notice electronically. Section 222(b) of the DGCL presumes receipt of notice in the event the U.S. mail is used, an obvious advantage for the corporation. It is unclear under Delaware law when notice would be deemed given if it is not given by mail,[85] it is likely that the corporation will bear the burden to prove that the stockholders received notice of the meeting. In the event a corporation utilizes procedures for noticing meetings of stockholders other than the mail, it may be advisable to include a provision in the corporation's bylaws concerning the time at which notice via such other means is deemed to have been given and received.[86]

Conclusion

As described above, corporate governance is attempting to keep pace with emerging technological developments. Despite existing provisions of both the DGCL and the Model Act that pertain to modern technology, new amendments undoubtedly will be necessary to resolve ambiguities created by the impact of technological developments. Ideally, the drafters of such amendments will focus on enacting legislation that enables corporations to take advantage of emerging technology. By attempting to keep pace with such technology, the drafters of each statute will ensure that their respective statutes remain on the cutting edge and are viewed as sophisticated enactment's of corporate law.

Notes:

1. See Rhoda Anderson, *All Parties Benefit by Using Technology in the Proxy Process*, 222 N.Y.L.J. 11 (Oct. 14, 1999). Growth rates for the number of record stockholders utilizing the Internet to vote their proxies is lower. In 1998, approximately 100 companies offered Internet voting to their record stockholders; in 1999, about 250 companies offered such a service. Id.; see also *Internet Spurs Shareholder Activism: Web-based Proxy Voting and Communication Between Investors Increase*, Inv. Bus. Rel. (Nov. 1, 1999).

2. Rhoda Anderson, *All Parties Benefit by Using Technology in the Proxy Process*, 222 N.Y.L.J. 11 (Oct. 14, 1999).

3. When counseling the ways in which a corporation may optimize its use of the internet, counsel to the corporation first should review the corporation's bylaws and certificate of incorporation to ensure they are consistent with the practices being contemplated.

4. 8 Del. C. § 222(b).

5. 1 Del. C. § 302(23) (emphasis added).

6. Id.

7. See Bryan v. Western Pac. R. Corp., Del. Ch., 35 A.2d 909, 913 (1944) ("Ordinarily, the requirement of notice is met if the shareholders registered on the corporate books are given *some appropriate form* of notification.") (emphasis added); Hall v. Trans-Lux Daylight Picture Screen Corp., Del. Ch., 171 A. 226 (1934) (costs incurred in notifying stockholders of special meeting by publication instead of by mail, which was required under the bylaws, could properly be paid out of corporate funds). Cf. Petrick v. B-K Dynamics, Inc., Del. Ch., 283 A.2d 696 (1971) (issues of material fact precluded summary judgment on whether corporate bylaws requiring mailing of written notice had been amended by implication through the practice of delivering written notice to stockholders' desks at their place of business). Petrick involved a bylaw that expressly required written notice by mail. As mentioned previously in footnote 3, supra, a corporation's bylaws and certificate are the necessary starting point in any consideration of using the Internet to facilitate corporate governance. This is particularly true in the context of notice because many bylaws still require notice by mail.

8. See Clyburn v. Allstate Ins. Co., 826 F. Supp. 955, 956-57 (D.S.C. 1993). ("In today's ?paperless' society of computer generated information, the court is not prepared, in the absence of some legislative provision or otherwise, to find that a computer floppy diskette would not constitute a ?writing' within the meaning of § 38-75-730.") (footnote omitted).

9. By comparison, the SEC requires that the method of delivery of the data be at least as reliable as the U.S. mail. Therefore, a company must have reason to believe that the delivery method selected will result in the satisfaction of the delivery requirement. Examples provided by the SEC include (1) obtaining an informed consent from an investor to receive the information through a particular electronic medium coupled with assuring appropriate notice and access; (2) obtaining evidence that an investor actually received the information, for example, by electronic mail return-receipt; and (3) disseminating information through certain facsimile methods. Delivery and notice can be assumed, however, when materials are provided by an employer through an e-mail to employees who regularly receive electronic communications during work.

10. See 8 Del. C. § 229 (written waiver of notice signed by person entitled to notice shall be deemed equivalent to notice). By analogy, the SEC typically requires that a stockholder consent to electronic delivery of corporate documents. It may be possible to couple this securities law election to receive proxy materials electronically with a consent/waiver regarding electronic notice of annual or special meetings.

11. Model Act § 7.05(a).

12. Model Act § 1.41(b) (emphasis added).

13. Model Act § 1.41(a). The Model Act, unlike the DGCL, does not expressly define the term "writing."

14. Id.

15. Model Act § 7.05(d).

16. Model Act § 1.41(c).

17. To qualify as a voting trust under Section 218(a), the statute requires (1) a written agreement (2) by one or more stockholders (3) to deposit stock with or transfer it to a trustee (or trustees) (4) for the purpose of vesting in such trustee the right to vote such stock for a period of time. Section 218(a) further requires (5) that such agreement be filed with the registered office of the corporation in Delaware, (6) that certificates of stock (or uncertificated shares) be issued to the trustee, (7) that such certificates, in the case of certificated shares, state thereon that they are issued pursuant to the voting trust agreement, and (8) that the stock ledger of the corporation reflect that the stock deposited with or issued to the trustee has been so deposited or transferred pursuant to such agreement. 8 Del. C. § 218(c). With respect to amendments, Section 218(b) provides that "[a]ny amendment to a voting trust agreement shall be made by a written agreement, a copy of which shall be filed in the registered office of the corporation in this State." 8 Del. C. § 218(b).

18. See, e.g., Oceanic Exploration Co. v. Grynberg, Del. Supr., 428 A.2d 1, 7-8 (1981) (reversing Court of Chancery's holding that voting arrangement was per se invalid for failure to satisfy the requisites of a voting trust under Section 218(a) and (b), and remanding on the basis that Subsections (a) and (b) "should [not] be a legal bar to a factual inquiry and a discretionary consideration ... of full enforcement of the contract....") (citing 8 Del. C.

§§ 218(c) and 218(e) (now 218(d))); Fixman v. Diversified Indus., Inc., Del. Ch., C.A. No. 4721, 1975 WL 1947, at *6 - *7, Quillen, C. (May 5, 1975) (discussing Section 218(e) (now 218(d)) and holding that voting arrangement of the kind presented was not invalid even though that arrangement did not satisfy the requirements necessary to constitute a voting trust agreement under Section 218(a)).

19. See David A. Drexler, et al., Delaware Corporation Law & Practice § 26.07 (1999) (noting that Section 218(d) "provides that the entire Section 218 is not to be construed so as to invalidate agreements among stockholders which are not otherwise illegal") (emphasis added).

20. See Elf Atochem N. Am., Inc. v. Jaffari, Del. Supr., 727 A.2d 286, 289, 296 (1999) (legislature's use of word "may" in provision of Delaware Limited Liability Company Act relating to contractual forum selection clauses "connot[ed] the voluntary, not mandatory or exclusive, set of options"). Compare Section 218(b), which uses the mandatory language "shall" with respect to the requirements for amending a voting trust agreement ("shall be made by written agreement, a copy of which shall be filed in the registered office...."). See 8 Del. C. § 218(b).

21. See Venture First L.P. v. DeKovacsy, Del. Ch., C.A. No. 11715, 1990 WL 186458, Hartnett, V.C. (Oct. 19, 1990), aff'd, Del. Supr., No. 394, 1990, Holland, J. (Dec. 20, 1990) (ORDER).

22. See id. at *2 (citing 8 Del. C. § 218(c) and Abercrombie v. Davies, Del. Supr., 130 A.2d 338 (1957)).

23. More recently, the "in writing" provision of Subsection (c) was raised, but ultimately not construed, in Independent Cellular Tel., Inc. v. Barker, Del. Ch., C.A. No. 15171, 1997 WL 153816, at *5, Jacobs, V.C. (Mar. 21, 1997). The defendants in that case argued that a disputed oral agreement actually was a voting agreement subject to the "in writing" requirement of Subsection (c). On the record presented, however, the Court could not determine as a threshold matter whether the oral agreement at issue indeed was a voting agreement. See id. The Court therefore did not address either Subsection (d) or the meaning of the term "may" in Subsection (c).

24. Model Act § 7.31.

25. Model Act Official Comment to § 7.31.

26. Model Act § 1.40(22A).

27. Model Act Official Comment 9 to § 1.40.

28. Schott v. Climax Molybdenum Co., Del. Ch., 154 A.2d 221, 222-23 (1959) (proxies that were rubber-stamped with the owners' names were "signed" and therefore properly counted).

29. Section 212(c)(2) now permits a stockholder to authorize another person "to act for such stockholder as proxy by transmitting or authorizing the transmission of a telegram, cablegram, *or other means of electronic transmission* to the person who will be the holder of the proxy or to a proxy solicitation firm provided that any such means of electronic transmission must either set forth or be submitted with information from which it can be determined that the electronic transmission was authorized by the stockholder." 8 Del. C. § 212(c)(2) (emphasis added). Section 212(d) now allows for the use of copies or reproductions of proxies for any purpose for which the original could be used provided that the entire proxy is reproduced. 8 Del. C. § 212(d).

30. These terms refer to a procedure in which a record shareholder, by using a toll-free telephone number, communicates his or her vote in telegraphic or datagram form. See Parshalle v. Roy, Del. Ch., 567 A.2d 19, 25 (1989). See also Concord Fin. Group, Inc. v. Tri-State Motor Transit Co. of Del., Del. Ch., 567 A.2d 1, 18 (1989). This practice has become widespread among professional proxy solicitors. Parshalle, 567 A.2d at 25; Concord, 567 A.2d at 18.

31. Del. Ch., 567 A.2d 19 (1989).

32. Parshalle, 567 A.2d at 27.

33. One method of encryption is the "digital signature," an encoded message that assures the recipient of the identity of the sender. Creation of the digital signature involves encryption of the message using a "private key" known only to the signer, and a "public key," available to anyone who may read the sender's message. Anyone who has the public key can send messages that only the private-key owner can read, and the private key can be used to send messages that could only have been sent by that private-key owner. In 1996, the American Bar Association published "Digital Signature Guidelines: Legal Infrastructure for Certification Authorities and Secure Electronic Commerce." Since then, forty-six states (all states except Massachusetts, Michigan, New Jersey, and South Dakota) and the District of Columbia have enacted some form of legislation allowing the use of digital or electronic signatures under certain circumstances. See McBride Baker & Coles, Table 1, Scope of Authorization to Use Electronic Signatures in Enacted Legislation (last updated January 13, 2000). Delaware permits the use of electronic signatures for certain state documents relating to budget, accounting, and payroll. See 29 Del. C. §§ 2706, 5942.

34. Model Act § 7.22(b).

35. Model Act § 1.40(7A).

36. Model Act Official Comment 4 to § 1.40.

37. Model Act § 7.22(b).

38. See, generally, SEC Release No. 33-7233 (Oct. 6, 1995); SEC Release No. 33-7288 (May 9, 1996).

39. Rhoda Anderson, *All Parties Benefit by Using Technology in the Proxy Process*, 222 N.Y.L.J. 11 (Oct. 14, 1999).

40. 8 Del. C. § 228(a).

41. Id.

42. 8 Del. C. § 228(b).

43. 1 Del. C. § 302(23) (emphasis added).

44. 8 Del. C. § 103(h).

45. 6 Del. C. § 3-401(b) (emphasis added). See also 17A Am. Jur. 2d Contracts § 188 (1991) (defining "signature" as "whatever mark, symbol, or device one may choose to employ as representative of himself ... ") (footnote omitted).

46. See Empire of Carolina, Inc. v. Deltona Corp. Del. Ch., 501 A.2d 1252, aff'd, Del. Supr., 514 A.2d 1091 (1985).

47. Id. at 1256.

48. Id.

49. Model Act § 7.04(a) (emphasis added).

50. Model Act § 1.41(a).

51. Model Act §1.40(22A).

52. Model Act §1.40 Official Comment No. 9.

53. Compare 8 Del. C. § 103(h) with Model Act § 1.40(7A).

54. Model Act § 1.20(d).

55. Model Act § 16.01(d).

56. A stockholder soliciting electronic consents faces a riskier proposition. Presumably, a stockholder soliciting electronic consents would be unaware whether the form used was capable of conversion into written form within a reasonable time by the corporation. Thus, a stockholder intending to solicit consents in electronic form should take caution to ensure the technology he or she is using can be retrieved by the corporation.

57. 8 Del. C. §141(f).

58. Section 224 of the DGCL, as discussed below, provides that corporate records are to be kept by a Delaware corporation. If corporate records may be kept electronically, as this article concludes is the case, the filing requirement arguably is satisfied if done electronically.

59. Model Act § 8.21(a).

60. See Model Act § 1.20(d).

61. See Model Act § 16.01(d).

62. 8 Del. C. § 224.

63. Id.

64. Model Act § 16.01(d).

65. 8 Del. C. §211(a).

66. See 8 Del. C. § 222(a) (requiring notice of the time and *place* of the annual meeting).

67. See 8 Del. C. § 219(a) (requiring that list of stockholders be made available prior to meeting either at the place of the meeting or "at a place within the city where the meeting is to be held").

68. 8 Del. C. § 216. See also Berlin v. Emerald Partners, Del. Supr., 552 A.2d 482, 491-94 (1988) (discussing distinction between quorum and voting power and stating "If a stockholder is not present in person, and if he is not given a proxy to vote on the proposed Business Combination, his stock cannot be regarded as ?voting power present,' for purposes of the vote required under the supermajority provision"). Compare Section 211 of the DGCL which contains provisions relating to the conduct of an annual meeting that has been ordered

by the Court under that section. Subsection (c) expressly provides: "The shares of stock represented at such meeting, either in person or by proxy, and entitled to vote thereat, shall constitute a quorum ..." 8 Del. C. § 211(c).

69. Model Act § 7.01.

70. Model Act § 7.20(b).

71. Compare Model Act § 7.25(b) with 8 Del. C. §§ 211 and 216.

72. Id.

73. See Smith v. Van Gorkom, Del. Supr., 488 A.2d 858 (1985).

74. Model Act § 8.20(b).

75. Id.

76. See Schott, 154 A.2d at 223 ("[c]learly a later proxy revokes an earlier one when such instructions appear on the face of the later proxy").

77. See, e.g., Standard Power & Light Corp. v. Investment Assoc., Inc., Del. Supr., 51 A.2d 572, 580 (1947); Parshalle, 567 A.2d at 23; Blasius Indus., Inc. v. Atlas Corp., Del. Ch., 564 A.2d 651, 666 n.12 (1988); Schott, 154 A.2d at 223. Revocation by subsequent proxy does not apply, however, where a series is submitted by a broker, but the total number of shares covered by the proxies does not exceed the total number of shares registered in the proxy-giver's name. See Schott, 154 A.2d at 223 (inspectors could conclude brokers were expressing views of varying beneficial owners).

78. See Elgin Nat'l Indus., Inc. v. Chemetron Corp., 299 F. Supp. 367, 371-72 (1969).

79. Parshalle, 567 A.2d at 23.

80. Standard Power & Light, 51 A.2d at 580. Accord Parshalle, 567 A.2d at 23 (inspectors correctly gave effect to later-dated proxy even where party argued that later-dated proxy was result of internal mistake or misunderstanding); see also Blasius, 564 A.2d at 666 n.12 ("later proxy not only revokes an earlier one, but acts as an affirmative vote").

81. See Standard Power & Light, 51 A.2d at 580. Accord Concord, 567 A.2d at 7-8 (1989).

82. Williams v. Sterling Oil of Okla., Inc., Del. Supr., 273 A.2d 264, 265 (1971) (inspectors acted improperly by rejecting one proxy on basis of an affidavit submitted by counsel for the management group). Accord Concord, 567 A.2d at 6. However, where stockholders are forced by statute to hold their shares beneficially, and a clerical mistake results in irreconcilably conflicting proxies that ordinarily would be disregarded under the rule of Williams, a court can intervene to effectuate the beneficial stockholders' voting instructions. See Preston v. Allison, Del. Supr., 650 A.2d 646 (1994).

83. See Williams, 273 A.2d at 265 (generally, no extrinsic evidence can be considered to resolve conflict between proxies).

84. Cf. Concord, 567 A.2d at 8 (envelope and postmark considered "face of the proxies themselves").

85. Compare SEC Release 33-7233 (Oct. 6, 1995) (electronic verification of receipt is sufficient proof of delivery).

86. See 8 Del. C. § 109(b).