

Memorandum

Keeping the Machine Running: Corporate Actions and SEC Filings in the COVID-19 Era

March 26, 2020

With the coronavirus disease 2019 (“COVID-19”) pandemic and the recent widespread transition to remote work arrangements, many public companies are facing novel questions on how to properly conduct common corporate activities remotely, including board actions, SEC filings and contracts. This memorandum provides a brief summary of key considerations as to how companies may be able to continue to function when in-person interaction is not possible.

Board Actions

- Under Section 141 of the Delaware General Corporation Law (“DGCL”), unless otherwise restricted by its certificate of incorporation or bylaws, a company’s board of directors may hold meetings via conference call or other communications equipment (such as Zoom or similar video applications), and such participation will be considered in-person presence at a meeting, so long as all participants can hear each other.
- As with any in-person meeting, for any action taken at a remote meeting to be valid, the meeting must satisfy all applicable notice and quorum requirements set forth in the company’s bylaws and the action must receive the requisite number of director votes in favor.
- Similarly, unless restricted by the company’s charter or bylaws, boards can take action via unanimous written consent without a meeting, so long as all members of the board consent either in writing or by electronic transmission.
- For this purpose, the term “electronic transmission” is defined under Section 232 of the DGCL to include electronic networks or databases that create a record that may be retained, retrieved and reviewed by the recipient and that may be directly reproduced in paper form via an automated process. This means a director’s consent can be provided through a number of ways, including a scanned PDF of a manual signature, a picture of a manual signature taken from a mobile phone, an email indicating approval or use of an e-signature application such as DocuSign.
- Therefore, assuming that a company’s certificate of incorporation and bylaws do not contain restrictions in this regard, there should be several methods for a board of directors to continue to be able to take corporate action while working remotely, even if a printer or scanner is not immediately available.

SEC Filings

- Currently, virtually all SEC filings are made electronically and use typed, conformed signatures rather than actual manual signatures.
- However, pursuant to Rule 302(b) of Regulation S-T, there is a parallel requirement that the filer obtain a manual signature from the person indicated electronically as having filed the document and, moreover, the manual signature must be retained by the filer for five years. Such signature may be on the actual signature page, or another document “authenticating, acknowledging or otherwise adopting” the typed signature in the electronic filing.
- On March 24, 2020, the SEC staff released a statement acknowledging that some persons and entities may be experiencing difficulties satisfying the manual signature requirements of Rule 302(b) due to circumstances arising from COVID-19. As a result, the SEC staff has stated it will not recommend SEC enforcement action with respect to the requirements of Rule 302(b) if:
 - a signatory retains a manually signed signature page or other document authenticating, acknowledging or otherwise adopting his or her signature that appears in typed form within the electronic filing and provides such document, as promptly as reasonably practicable, to the filer for retention in the ordinary course pursuant to Rule 302(b);
 - such document indicates the date and time when the signature was executed; and
 - the filer establishes and maintains policies and procedures governing this process.

The SEC confirmed that a signatory may also provide to the filer an electronic record (such as a photograph or PDF) of such document when it is signed. Accordingly, we believe that taking a photo from a mobile phone of the authorizing document and emailing back to the filer may be the simplest approach if more traditional methods are not available.

- A related difficulty involves the requirements of Form ID—the application that all new filers must complete to gain access to EDGAR and that is currently required to be manually signed and notarized. The SEC recently announced that it is considering options to address the difficulties relating to notarization of the Form ID and that, in the interim, companies should contact SEC filer support for assistance.
- Based on oral communications with SEC filer support, currently the SEC is accepting Form ID submissions containing electronic signatures of both the applicant and the notary so long as both signatures appear on the same document rather than in counterparts.
- In addition, some states, including New York, have adopted emergency procedures relating to notarization of documents providing that videoconferencing may be utilized for such purpose. The relevant order is available online at: <https://www.governor.ny.gov/news/no-2027-continuing-temporary-suspension-and-modification-laws-relating-disaster-emergency>.

Electronic Signatures and Contracts

- In general, electronic signatures are valid—permitted by either the Electronic Signature in Global and National Commerce Act (“E-SIGN”) or a state’s adoption of the substantially similar Uniform Electronic Transactions Act (“UETA”).
- Both E-SIGN and the UETA provide for the legal effect of electronic signatures in business contracts, when all parties to the contract—one of whom must be subject to one of E-SIGN or the UETA—explicitly or implicitly agree to the use of electronic signatures.
- For clarity, it is recommended that the applicable contract contain explicit language consenting to the use of electronic signatures, stating that terms such as “execution,” “signed,” “signature” and “delivery” shall be deemed to include electronic signatures and confirming that electronic signatures shall be of the same legal effect, validity and enforceability as manually executed signatures.
- Note that these laws contain exceptions to their application, the most significant of which for corporate purposes relates to negotiable instruments and other instruments of title, which may have potential implications for the issuance of debt securities and transactional closings. Accordingly, it is recommended that the willingness of all parties to utilize electronic signatures be confirmed early in the transactional process.

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