NYSBA

Staff Memorandum

EXECUTIVE COMMITTEE
Agenda Item #14

REQUESTED ACTION: Approval of an affirmative legislative proposal from the Business Law Section to amend Business Corporation Law sections 602 and 605 to permit remote attendance at shareholder meetings and to participate in proceedings and/or votes via electronic communications.

Attached is a proposed bill and memorandum in support prepared by the Business Law Section. The memorandum notes that in the past, the Section has opposed legislation that would mandate New York corporations to take reasonable measures to provide remote access to shareholder meetings and to provide reasonable means for shareholders to vote or cast proxies by electronic communications. However, the Section is supportive of the concept of remote access and participation. The Section's proposal would empower corporations to hold electronic shareholder meetings, but it would not be mandatory to do so. Instead, a corporation's board of directors would be given discretion to determine whether electronic meetings are appropriate for the corporation. Factors the board likely would consider include the time and expense of electronic participation; the types of shareholders (i.e., local or spread over a large area); and the overall goals of the corporation and of shareholder meetings.

This report was posted to the Reports Page on November 29, 2011. No comments have been received to date.

The report will be presented at the January 26, 2012 meeting by Section chair Paul H. Silverman and Jeffrey Bagner, chair of the Section's Corporations Law Committee.

BUSINESS LAW SECTION --
Proposal in relation to attendance of a meeting of shareholders by remote communication

AN ACT to amend the business corporation law, in relation to attendance of a meeting of shareholders by remote communication

The People of the State of New York, represented in Senate and Assembly, do enact as follows:

Section 1. Paragraphs (b), (c) and (d) of section 602 of the business corporation law are relettered paragraphs (c), (d) and (e) and a new paragraph (b) is added to read as follows:

(b)(i) A corporation may, if authorized by the board of directors: (1) implement reasonable measures to provide shareholders not physically present at a shareholders' meeting a reasonable opportunity to participate in the proceedings of the meeting substantially concurrently with such proceedings; and/or (2) provide reasonable measures to enable shareholders to vote or grant proxies with respect to matters submitted to the shareholders at a shareholders' meeting by means of electronic communication; provided that the corporation shall, if applicable, (A) implement reasonable measures to verify that each person deemed present and permitted to vote at the meeting by means of electronic communication is a shareholder of record and (B) keep a record of any vote or other action taken by a shareholder participating and voting by means of electronic communications at a shareholders' meeting. A shareholder participating in a shareholders' meeting by this means is deemed to be present in person at the meeting.

(ii) Nothing required in subparagraph (i) of this paragraph shall limit, restrict or supersede other forms of voting and participation.

(iii) For purposes of this paragraph, "reasonable measures" with respect to participating in proceedings shall include, but not be limited to, audio webcast or other broadcast of the meeting and for voting shall include but not be limited to telephonic and internet voting.

§2. Section 605 of the business corporation law, as amended by chapter 746 of the laws of 1963, paragraph (a) as amended by chapter 498 of the laws of 1998, is amended to read as follows:

§ 605. Notice of meetings of shareholders.

(a) Whenever under the provisions of this chapter shareholders are required or permitted to take any action at a meeting, notice shall be given stating the place, date and hour of the meeting, **the means of electronic communications, if any, by which**

shareholders and proxyholders may participate in the proceedings of the meeting and vote or grant proxies at such meeting and, unless it is the annual meeting, indicating that it is being issued by or at the direction of the person or persons calling the meeting. Notice of a special meeting shall also state the purpose or purposes for which the meeting is called. Notice of any meeting of shareholders may be written or electronic. If, at any meeting, action is proposed to be taken which would, if taken, entitle shareholders fulfilling the requirements of section 623 (Procedure to enforce shareholder's right to receive payment for shares) to receive payment for their shares, the notice of such meeting shall include a statement of that purpose and to that effect and shall be accompanied by a copy of section 623 or an outline of its material terms. Notice of any meeting shall be given not fewer than ten nor more than sixty days before the date of the meeting, provided, however, that such notice may be given by third class mail not fewer than twenty-four nor more than sixty days before the date of the meeting, to each shareholder entitled to vote at such meeting. If mailed, such notice is given when deposited in the United States mail, with postage thereon prepaid, directed to the shareholder at the shareholder's address as it appears on the record of shareholders, or, if the shareholder shall have filed with the secretary of the corporation a request that notices to the shareholder be mailed to some other address, then directed to him at such other address. If transmitted electronically, such notice is given when directed to the shareholder's electronic mail address as supplied by the shareholder to the secretary of the corporation or as otherwise directed pursuant to the shareholder's authorization or instructions. An affidavit of the secretary or other person giving the notice or of a transfer agent of the corporation that the notice required by this section has been given shall, in the absence of fraud, be prima facie evidence of the facts therein stated.

(b) When a meeting is adjourned to another time or place, it shall not be necessary, unless the by-laws require otherwise, to give any notice of the adjourned meeting if the time and place to which the meeting is adjourned **and the means of electronic communications, if any, by which shareholders and proxyholders may participate in the proceedings of the meeting and/or vote or grant proxies at the meeting** are announced at the meeting at which the adjournment is taken, and at the adjourned meeting any business may be transacted that might have been transacted on the original date of the meeting. However, if after the adjournment the board fixes a new record date for the adjourned meeting, a notice of the adjourned meeting shall be given to each shareholder of record on the new record date entitled to notice under paragraph (a) of this section.

(c) Nothing required in paragraphs (a) and (b) of this section shall limit, restrict or supersede other forms of voting and participation.

Section 3. This act shall take effect immediately.

BUSINESS LAW SECTION --
Proposal in relation to attendance of a meeting of shareholders by remote communication

AN ACT to amend the business corporation law, in relation to attendance of a meeting of shareholders by remote communication

Introduction

The Business Law Section, through its Committee on Corporations Law, has for several years opposed legislation that would mandate that all New York corporations whose shares are traded on a stock exchange or in the over-the-counter market (i) use reasonable measures to enable shareholders not physically present to witness shareholder meetings and (ii) provide reasonable means to permit shareholders to vote or cast proxies at meetings by electronic communications.

While the Section has opposed such legislation, it is supportive of this remote attendance concept, which addresses an important and timely issue and recognizes the swiftly evolving technological advances in electronic communications.

Discussion

The Section has most strongly objected to making it mandatory that New York corporations offer electronic shareholder participation. The objective of the instant proposal would be to facilitate, but not mandate such participation. Namely this proposal would: (1) give the board of directors of each New York corporation the discretion to decide whether to hold electronic shareholder meetings and/or electronic voting, (2) require that shareholders participating electronically can interact with those shareholders actually present at the meeting, and (3) require certain security measures to verify shareholders' identities.

Empowering corporations to hold electronic shareholder meetings is a timely issue that has previously been addressed by at least thirty-two other states. Electronic shareholder meetings can have many benefits, including increasing shareholder participation, transparency and voting. Therefore, the Section has developed a legislative proposal that appropriately addresses the issue.

This proposal would provide that the board of directors of each New York corporation has the discretion to consider the relevant facts and circumstances and determine whether electronic shareholder meetings are appropriate for the corporation. Adding an electronic component to shareholder meetings comes at a significant cost of

both time and money. Each board of directors should have the ability to weigh the costs against the types of shareholders that own the corporation's stock (which can impact attendance rates for both physical and electronic shareholder meetings) and the overall goals of the corporation and of its shareholder meetings. In addition, each corporation should have the ability to decide whether to allow shareholders to participate in the shareholder meetings electronically but not vote, or whether to allow shareholders to vote electronically in addition to participating in the meetings. Therefore, we propose in this bill that the boards be given the discretion to decide whether to allow electronic shareholder meetings, and electronic voting by shareholders, for their individual corporation.

Second, shareholders availing themselves of an electronic meeting must be able to not only witness (i.e., hear or read the proceedings of the meeting), but also participate in the meeting (i.e., be heard by the other participants), in each case, substantially contemporaneously with the live proceedings. Similar to the requirements telephonic meetings of directors, an important component of counting a shareholder as having been present at a meeting is that shareholder's ability to be heard and participate in such meeting. Therefore, we recommend that if remote participation is employed, then shareholders must have the ability to participate in electronic shareholder meetings.

Third, if shareholders are allowed to vote electronically, the corporation must be able to ensure that each person voting is in fact a stockholder and that no stockholder is able to vote more than once. Therefore, we recommend with this proposal that corporations implement certain procedures to verify shareholders' identities prior to voting.

Conclusion

The Business Law Section respectfully requests that the NYSBA Executive Committee approve this affirmative legislative proposal.

Section Chair: Paul H. Silverman, Esq

Committee Chair: Jeffrey Bagner, Esq.

Memorandum Prepared By: Jeffrey Bagner, Esq.