

NYS Executive Orders Facilitate Action by Electronic Means for Business Corporations

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Client Advisory

March 31, 2020 by Macculloch M. Irving, Jeremy S. Steckel and Jane Elberg

In connection with the Coronavirus (COVID-19) pandemic, New York Governor Andrew Cuomo has been issuing a series of executive orders which, among other things, aim to help businesses ensure continuity during this challenging time. As described in detail below, so long as certain conditions are met, Executive Order 202.5 makes clear that directors of business corporations may provide consent electronically, and Executive Order 202.8 suspends any requirement that shareholder meetings for business corporations be noticed and held at a physical location. These Executive Orders are effective from now until April 17, 2020 and April 19, 2020, respectively.

Executive Order No. 202.5

On March 18, 2020, the Governor issued Executive Order No. 202.5 ("EO 202.5"), *Continuing Temporary Suspension and Modification of Laws Relating to the Disaster Emergency*. EO 202.5 impacts Section 708(b) of the New York Business Corporation Law (the "BCL"), which governs the manner in which boards of business corporation may act outside of a meeting by unanimous written consent. BCL § 708(b) provides that "[u]nless otherwise restricted by the certificate of incorporation or the by-laws, any action required or permitted to be taken by the board or any committee thereof may be taken without a meeting if all members of the board or the committee consent in writing to the adoption of a resolution authorizing the action." (*emphasis added*)

Until April 17, 2020, EO 202.5 "temporarily suspends or modifies" BCL § 708(b) "[t]o the extent necessary to permit business corporations to take any action otherwise permitted under that section with the electronic consent of the members of the board or committee, when such consent is submitted via electronic mail along with information from which it can reasonably be determined that the transmission was authorized by such member." In other words, electronic consents by directors or committee members submitted by email will be deemed to be "in writing" for purposes of BCL § 708(b), so long as any other applicable requirements are met.

We note that this is already the case for directors of New York not-for-profit corporations, and for directors of Delaware corporations, including Delaware nonstock, nonprofit corporations.

Executive Order No. 202.8

On March 20, 2020, the Governor issued Executive Order No. 202.8 ("EO 202.8"). EO 202.8 temporarily modifies BCL §§ 602(a), 605(a) and 605(b) with respect to the location and notice of shareholder meetings. BCL § 602(a) provides: "Meetings of shareholders may be held at such place...as may be fixed by or under the by-laws, or if not so fixed, at the office of the corporation in this state." (*emphasis added*). BCL § 605(a) requires that notice of such meetings must state the "place" where the meeting will be held, and BCL § 605(b) requires that a notice of adjournment must state the "place" to which the meeting is adjourned. While shareholders are permitted by law to participate by electronic

means so long as certain conditions are met, the plain language of BCL § 602(a) contemplates that they will have the option to attend in person at a physical place. Until April 19, 2020, EO 202.8 “temporarily suspends or modifies” BCL §§ 602(a), 605(a) and 605(b) “to the extent they require meetings of shareholders to be noticed and held at a physical location.”

Like the BCL, the New York Not-for-Profit Corporation Law (the “N-PCL”) requires that membership meetings of not-for-profit corporations with members be noticed and held at a “place.” Thus far, the Governor has not issued a similar executive order modifying or suspending that provision of the N-PCL for nonprofits. Delaware law, on the other hand, permits nonstock, nonprofit corporations to hold membership meetings solely by means of remote communication, so long as certain other conditions are met.

Conclusion

As the legal landscape continues to evolve in the wake of the COVID-19 pandemic, for-profit and nonprofit businesses are encouraged to consult legal counsel to assess applicable laws and regulations and to evaluate compliance obligations. The Carter Ledyard team is monitoring developments in this area and will continue to issue updates as the situation evolves.

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*Carter Ledyard has created a COVID-19 Response Group to monitor the evolving legal landscape, address client questions and ensure client compliance with the laws and regulations issued in response to the COVID-19 pandemic. The Carter Ledyard COVID-19 Response Group consists of **Jeffery S. Boxer** (212-238-8626, boxer@clm.com), **Judith A. Lockhart** (212-238-8603, lockhart@clm.com), **Bryan J. Hall** (212-238-8894, hall@clm.com), **Alexander G. Malyshev** (212-238-8618, malyshev@clm.com), **Melissa J. Erwin** (212-238-8622, erwin@clm.com), and **Leonardo Trivigno** (212-238-8724, trivigno@clm.com). Clients should contact the attorneys listed above or their regular CLM attorney for any questions concerning legal obligations arising from the COVID-19 pandemic.*

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