

April 19, 2010

### **Stockholders' Meetings under Maryland Law – 2010**

The 2010 annual meeting of stockholders is fast approaching for many companies. The volatility in economic performance and share prices in the past year, the increasing adoption of majority voting in the election of directors and newly amended Rule 452 of the New York Stock Exchange (the "NYSE"), prohibiting brokers from voting in uncontested director elections, among other developments, have increased the likelihood of contested or at least contentious stockholders' meetings. Accordingly, we want to call your attention to certain matters of Maryland law relating to meetings of stockholders. (Because the same principles generally apply to both corporations formed under the Maryland General Corporation Law (the "MGCL") and to real estate investment trusts formed under the Maryland REIT Law, we shall refer hereafter only to corporations.)

Generally. Under the MGCL, a corporation must hold an annual meeting of stockholders "to elect directors and transact any other business within its powers." The annual meeting is an opportunity for stockholders to attend and voice their views. Accordingly, courts have held that the meeting should be conducted fairly and reasonably in light of its purposes.

Chair and Secretary. The bylaws of many corporations designate the chair of the meeting, provide for the board of directors to appoint the chair or, in the absence of such an appointment, provide a specific order of persons to chair the meeting. Likewise, there may also be a specific appointment, or provision for appointment, of an individual, often the secretary of the corporation, to serve as secretary of the meeting. Each company should review its bylaws prior to the meeting to ascertain what steps, if any, need to be taken to appoint the chair and the secretary of the meeting. The availability of these individuals and their immediate back-ups should also be confirmed.

Admission to the Meeting. Under Maryland law, as is typical elsewhere, the only people entitled to attend the meeting are stockholders of record as of the record date for the meeting and proxy holders for record date holders. Others, including management and media, may be permitted to attend by the chair but are not entitled to participate. In the case of a contested meeting, admission of representatives of the contestants is often negotiated in advance.

Conduct of the Meeting. The bylaws of many corporations include provisions for the conduct of stockholders' meetings and the powers of the chair. In addition, we have assisted many of our clients in preparing Conduct of Meeting Guidelines, which are usually distributed to attendees upon admission. These Guidelines typically establish procedures for orderly conduct of the meeting, for example, the manner and time for presenting questions or comments and prohibitions on the use of cell phones, cameras or recorders.

Script. Public companies rarely hold a meeting of stockholders without a detailed script providing, word for word, who should speak and what should be said. As many of the matters in the script have state law implications, it should be carefully drafted, reviewed and followed. The script should identify the chair and secretary of the meeting and the inspector of elections, if any. It should also provide for convening the meeting, note the time, confirm the mailing of notice, identify the nominees for election as directors and other business to be conducted and provide for an opportunity for questions, opening and closing of the polls, collecting and tabulating ballots, reporting vote results (or preliminary results) and concluding the meeting. It is good practice for the chair, rather than the secretary or inspector, to announce

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the presence of a quorum after receiving the report of the inspector in this regard. Also, in view of the recent emphasis on the presence of directors and director nominees at the meeting, it is advisable for the script to provide for introducing them near the outset of the meeting.

It is also common to have alternative script language available for unexpected occurrences, such as the absence of a quorum or dealing with a disruptive stockholder.

Question-and-Answer Books. It is a common practice for corporate staff and counsel to prepare for the chair a notebook containing possible questions and suggested answers. Care should be taken to assure that any suggested answers are concise, accurate and consistent with prior company disclosure or statements.

Motions and Seconds. Unless the charter or bylaws provide otherwise, it is not necessary to follow *Robert's Rules of Order* or any other parliamentary procedure. While motions and seconds are often made, they are not required, especially if there is a desire to conduct the business of the meeting expeditiously. If motions and seconds are used, it is important to confirm in advance that each mover and seconder is a stockholder of record or holds a proxy for a stockholder of record and will be present at the meeting.

Quorum. The MGCL provides that, unless the charter (or bylaws, for certain corporations) provides otherwise, the presence, in person or by proxy, of the holders of a majority of all the votes entitled to be cast is necessary to constitute a quorum at a meeting of stockholders. The charter and bylaws should be reviewed to confirm the quorum requirements (although, of course, the quorum requirement should have been confirmed in connection with drafting the proxy statement). Including a routine matter, such as ratification of auditors, on the annual meeting agenda has assumed greater importance since the amendment to NYSE Rule 452, generally eliminating the authority of brokers to vote without instructions in uncontested director elections. Under Maryland law, abstentions and broker non-votes count toward a quorum.

Stockholder Nominations and Proposals. Most corporations require stockholder nominations and other proposals to be submitted in advance, in accordance with specific time and informational requirements in the bylaws. When a corporation has such advance notice provisions, no nominations or other business at a meeting may properly be proposed from the floor without prior compliance with such provisions. If these procedures have been satisfied, it is still necessary for the nomination or proposal to be properly presented at the meeting. The stockholder submitting the nomination or proposal, or his or her duly authorized proxy, must be at the meeting to present it; if not, the meeting can proceed without the nomination or proposal being presented and voted on. If present, the presenter may be required to produce satisfactory evidence that he or she is the stockholder of record or, if a proxy, evidence of authority to act as proxy for the absent stockholder.

Vote Requirements. In addition to the quorum requirements, the voting requirements for the election of directors and other proposals should be confirmed prior to the meeting (although, of course, this should also have been confirmed in connection with drafting the proxy statement). For the election of directors, the MGCL provides that, unless the charter or bylaws provide otherwise, a plurality of all the votes cast at a meeting at which a quorum is present is sufficient to elect a director. This is why, if a plurality requirement applies, the typical proxy card and ballot do not provide for a vote against a director or an abstention. However, many corporations have adopted or are considering adopting one form or another of "majority

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voting" in the election of directors. If the corporation has adopted some form of majority voting for electing directors, it should be carefully reviewed, as the forms of majority voting differ and the specific form adopted may affect the form of ballot and the tabulation of votes.

For some major actions, such as mergers, sales of all or substantially all of the corporation's assets, dissolution and charter amendments, the MGCL requires the affirmative vote of two-thirds of all the votes entitled to be cast on the matter, but permits the charter to increase this proportion or decrease it to not less than a majority of all the votes entitled to be cast on the matter. For all other actions (other than removal of a director), the MGCL provides that, unless the MGCL or the charter provides otherwise, action at a stockholders' meeting requires the affirmative vote of a majority of all the votes cast. This voting requirement, and the effect of abstentions and broker non-votes, differ from the Delaware standard of a majority of the votes present and it may be necessary to highlight the difference to the inspector of elections. Under Maryland law, while abstentions and broker non-votes count toward a quorum, they do not count as votes cast. For certain types of stockholder action, the NYSE and other exchanges or markets establish various vote requirements. The NYSE also takes the unwritten position that, counter-intuitively, abstentions are votes cast with respect to those matters for which stockholder approval is required by Section 312 of the Listed Company Manual.

Proxies. All proxies should be submitted and verified prior to opening the polls. The proxy card is the critical document under state law by which most votes are authorized to be cast. It is important to note that the MGCL defines "stockholder" as "a person who is a record holder of shares of stock in a corporation . . . ." The MGCL also requires that the proxy be in writing and signed by the stockholder of record or by the record stockholder's authorized agent. Authorization of an agent may be given electronically or telephonically to the proxy or to any other person authorized to receive the proxy authorization, including a proxy solicitor. The MGCL provides that the stockholder or the stockholder's authorized agent may sign (a) by actual signature or (b) by causing the stockholder's signature to be affixed to the writing by any reasonable means, including facsimile signatures.

Inspectors. In a time of increased stockholder activism, including contested stockholders' meetings, inspectors are increasingly important. However, inspectors are not required by statute and, because the inspector has no statutory powers or duties under the MGCL, the inspector has only the powers and duties specified in the corporation's charter or bylaws or by the chair of the meeting. These duties typically include: (a) determining the number of shares of stock represented at the meeting, in person or by proxy, and the validity and effect of proxies; (b) receiving and tabulating all votes, ballots or consents; (c) reporting the tabulation to the chair; (d) hearing and determining challenges and questions concerning the right to vote; and (e) doing other proper acts to fairly conduct the election or vote. Prior to the meeting, the charter and bylaws should be reviewed to identify any provisions governing the powers, duties and appointment of the inspector.

Ballots. Votes are cast at the meeting by ballot. In addition to any stockholder voting in person at the meeting, the proxy holders must complete and sign a ballot at the meeting. It is typical for there to be one form of ballot for stockholders voting in person and another for proxy holders to complete and submit. Ballots should be drafted to conform to the matters included in the notice of the meeting, with appropriate adjustment if a nomination or proposal has been withdrawn. It is also permissible to draft separate ballots for separate

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proposals, which may be particularly useful if the polls may be opened and closed at different times for different proposals, as may be the case with an adjournment.

Adjournment and Postponement. We believe that the chair of the meeting has broad power to conduct the meeting, including recessing and adjourning it, especially if a quorum is not present or if the chair's authority is specifically conferred by the bylaws. We have developed a form of bylaw provision expressly delegating broad power to the chair in this regard. In addition, proxy cards have traditionally conferred authority on the proxy holders to vote in their discretion on matters incidental to the conduct of the meeting. There is also an increasing tendency to include a separate proposal for adjournment in connection with an extraordinary action, such as a merger, as the Securities and Exchange Commission takes the position that an adjournment to solicit additional proxies is not a routine matter. Under the MGCL, a meeting that has been convened on the date for which it was called may be adjourned to a date not more than 120 days after the original record date.

Although it is typical to include references to postponement in the proxy statement, there has been little guidance under state law as to postponements, which occur when a meeting is delayed before it is convened. Some companies have established procedures for postponements in their bylaws, including procedures for notifying stockholders of the postponement. The Maryland legislature recently passed an amendment to the MGCL, which we drafted, providing that meetings may be postponed, as well as adjourned, to a date not more than 120 days after the original record date. This bill was signed by the Governor last week, but it will not become effective until June 1, 2010.

Minutes. After the meeting, minutes should be prepared by the secretary of the meeting and filed with the minutes of the proceedings of stockholders. This is in addition to the requirement to report the vote results by filing a Form 8-K with the SEC. Under the MGCL, these minutes may be inspected and copied by any stockholder of record or the stockholder's agent during usual business hours. The minutes should reflect compliance with all statutory requirements for the meeting, including the time, date and place of the meeting; the giving of notice; the chair and secretary; the presence of a quorum; the matters submitted for a vote and the results of the voting; and the times of convening and concluding the meeting. The minutes should also reflect all other significant matters, such as notable attendees (including directors), question-and-answer periods and motions made and their disposition.

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Other meeting issues involving Maryland law also frequently arise. We are available to discuss any questions you may have concerning Maryland law as it applies to your annual meeting.

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