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WEIGHING FIDUCIARY DUTIES WITH 21ST CENTURY REALITIES—EVALUATING THE VIABILITY OF REMOTE PARTICIPATION FOR BOARDS OF DIRECTORS

The laws governing a board of directors are grounded in the principle that directors owe certain fiduciary duties to the companies they serve.¹ Those same laws, determined by states, are often outdated and fail to take into account the ways in which modern technology can help boards operate more efficiently. One way that modern technology could have a large impact on a board is by enabling remote participation in formal board activities.² This use of remote participation, similar to that which is currently used for remote stockholder meetings, should be accepted as standard in the corporate law of all states.

In a majority of states, remote participation is already allowed for stockholder or shareholder meetings.³ For instance, Delaware, a recognized leader in corporate law, with over half of all Fortune 500 companies incorporated within the state,⁴ codified standards for remote participation in stockholder meetings.⁵ Stockholders who are not able to be present in person now have the opportunity to participate through the utilization of video or telephone conferencing.⁶ Of states that allow for remote participation, some require that the company's board of directors first approve the use of the remote participation for stockholder meetings.⁷

¹ See Thomas Lee Hazen & Lisa Love Hazen, *Punctilios and Nonprofit Corporate Governance—A Comprehensive Look at Nonprofit Directors' Fiduciary Duties*, 14 U. PA. J. BUS. L. 347, 349 (2012).

² For purposes of this article, a formal board activity is any action done by a board of directors requiring a quorum.

³ See Lisa M. Fairfax, *Securities Regulation and the Global Economic Crisis: What Does the Future Hold?: Article: Virtual Shareholder Meetings Reconsidered*, 40 SETON HALL L. REV. 1367, 1368 (2010). As of 2010, thirty-two states addressed the issue of remote stockholder participation.

⁴ See Robert Daines, *The Incorporation Choices of IPO Firms*, 77 N.Y.U. L. REV. 1559, 1566 (2002) (citing Marcel & Ehud Kamar, *Price Discrimination in the Market for Corporate Law*, 86 CORNELL L. REV. 1205, 1211, 1225, 1251 (2001)).

⁵ 8 Del. C. § 211 (2014). Some corporations in Delaware already use this existing provision to apply to remote board of directors meetings.

⁶ See *id.*

⁷ See *id.* Delaware requires the board of directors to first approve of remote communication for stockholder meetings.

Directors have specific duties owed to the corporation that do not apply to mere stockholders, including the duties of care and loyalty.⁸ Directors who cannot participate in board meetings risk breaching these duties and, as a result, face substantial legal consequences.⁹ There is an understandable fear that directors who participate remotely would not be as actively invested in a board meeting, and thus might risk violating the duties they owe to a corporation. These concerns are misplaced, however, as a director who chooses to participate remotely would be held to the same standard as a director who attends the meeting in person. Thus, the remotely participating director would be required to be actively involved. Furthermore, new technology would actually serve to protect stockholder interests because director involvement could increase through remote participation. It would allow directors, many of whom may not live near the location of director meetings, to participate and contribute to board activities. Rather than face the possibility of missing meetings entirely, directors could choose to participate remotely.

Additionally, corporations—and as a result, their stockholders—could save money by not having to pay the expenses for each board member to attend each board activity or meeting. This method of participation allows directors to more fully maintain their duty of care, which requires them to exercise good business judgment.¹⁰ Reducing costs is a sound way to uphold this obligation while simultaneously increasing director engagement.

One way to balance the risks associated with having directors use remote participation is to require stockholders to approve the board's policies and use of remote participation. This would create a system of checks and balances between directors and stockholders, as many states already require boards of directors to approve stockholder remote participation.¹¹

While state laws may not expressly forbid remote participation for boards of directors, it is in the best interest of states to include language that clearly allows for remote participation. States that fail to enact explicit remote participation statutes create an unnecessary burden for the companies incorporated within its borders, and therefore run the risk of losing business to states with more progressive corporate protections.

⁸ Julian Velasco, *How Many Fiduciary Duties are There in Corporate Law?*, 83 S. CAL. L. REV. 1231, 1233 (2010).

⁹ *See id.*

¹⁰ *See* Demetrios G. Kaouris, *Is Delaware Still A Haven For Incorporation?*, 20 DEL. J. CORP. L. 965, 982 (1995) (citing *Aronson v. Lewis*, 473 A.2d 805, 812 (Del. 1984)).

¹¹ *See* 8 Del. C. § 211 (2014).

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