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Board action: meetings vs. written consents

Setting the Stage

Holding regular meetings of the board of directors is a great practice for any startup company. Meetings allow management to describe in detail the company's current and projected performance and highlight potential opportunities to grow the business, all of which allows the board to make better informed decisions.

But what if a critical, time-sensitive business opportunity arises that requires the board to act quickly before a meeting can be scheduled? What if routine matters like granting options needs to be approved and none of the directors' schedules line up for a meeting? In these cases, board action by written consent can permit companies to take these actions more quickly.

This post explore the nuts and bolts of these two options, with a focus on Delaware corporate law, and discusses some of the advantages and disadvantages of each.

Nuts and Bolts – Board Meetings

The Delaware General Corporation Law (DGCL) has very flexible requirements for board meetings. There is no prior notice requirement for calling a board meeting; the minimum number of directors for a quorum is one-third of the directors; and actions by the board require a simple majority vote of the directors at a meeting with a proper quorum. Under the DGCL, board meetings may be held telephonically if all participants can speak and be heard, and meetings need not be held in the State of Delaware.

Our best practices recommend that the company's by-laws require at least 24-hour notice to directors that a meeting will be held and that a meeting may be called by either the CEO or by the number of directors that would constitute a quorum.

Practically, if a company has a seven-member board, this means the CEO can send an email to all seven directors the day before the proposed meeting, and if 3 of the 7 show up (or join by phone), affirmative votes from only two of those directors at the meeting are needed to take any proposed action at the meeting.

Nuts and Bolts – Written Consents

Section 141(f) of the DGCL allows a company's board to take any action without a meeting of the board if all of the company's directors consent to the action in writing or by electronic transmission. This means a director's consent can be represented by a PDF or facsimile of an executed signature page, an e-signature (such as DocuSign) or even an email transmission indicating approval.

The upshot is that if a company needs a matter approved quickly or if a company's directors are scattered around different time zones, the Board can still take action without needing to plan a meeting in advance or to notify directors in advance. It is important to remember that ***all*** of the directors' signatures or electronic approvals must be obtained for the actions to be effective – no director can abstain or fall to deliver their consent.

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How to Implement a Written Consent

While not required, best practices are to replicate the DGCL 141(f) language in the company's by-laws to leave no doubt as to whether the company permits action by written consent.

Comparison – Meetings vs. Written Consents

Written consents are a great way for companies to take action quickly and are also good for companies with directors scattered across the country and/or whose schedules are difficult to line up for a meeting. Since written consents must be unanimous, they are also good evidence to third parties doing due diligence that a company's Board solidly supported a particular action. For day-to-day matters such as approving option grants and ordinary course contracts, written consents allow for quick, efficient action without the scheduling hassle that comes with meetings.

But the unanimity requirement means that if even a single director opposes a particular action, then a meeting must be called to approve it, in which case the company must make sure to follow its bylaws procedures for prior notice, quorum and required vote. In any situation involving controversy or a potentially divided board, best practices suggest holding a meeting instead of using a written consent, both to provide for greater discussion of the issues and to mitigate against the risks of one or more directors failing to sign the written consent. In addition, a meeting provides a chance for management to go on the record with its support of a particular action, since management's participation in a meeting would be reflected in the minutes.

Finally, keep in mind that building a good rapport between management and the board at in-person meetings is essential to a startup's success. Even if only routine actions are on the slate, it may be a good idea to schedule a meeting, even if by phone, to make sure management and board relations stay friendly and productive. Some companies find that routine biannual or quarterly meetings are a great way to build the management-board relationship. But in any case, the management team can rest easy knowing that in case of emergency, the option for action by written consent is always there if holding a meeting isn't feasible.