

Does Delaware Corporate Law Permit Director Proxy Voting?

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Proxies are common in the world of shareholder voting. But, can *directors* also vote by proxy at board meetings under Delaware corporate law? No, they cannot. Following relevant Delaware case law, directors are prohibited from voting by proxy at board meetings.

Background

Proxies are often used by shareholders of a corporation to vote at meetings. A general proxy is the instrument that grants the authority (or the individual or entity that is given such authority) to attend the meeting on the shareholder's behalf and take any action that the shareholder would be permitted to take if they were present at the meeting. In a director's case (if it were permitted by law, which it is not), it might involve the director asking another director to vote on their behalf at a board meeting or sending some other representative in their place.

Delaware Law and Reasoning

The first Delaware case law precedent prohibiting directors from voting by proxy was the result of the decision in *Lippman v. Kehoe Stenograph Co.*, a case decided in 1915 by the Delaware Court of Chancery. In *Lippman*, the Court determined that "the personal presence of each director at a

meeting of directors as a board is obligatory" and directors could not send a proxy in their place.^[1] In arriving at its decision, which remains controlling law today, the Court considered the following three principles:

First, in making a proper decision, a director must use their *personal* judgment. Directors are chosen to be on a board based on their personal judgment, experience, and expertise and they are expected to base their decisions on such knowledge. A proxy taking the place of a director at a board meeting will base their decisions on their own personal knowledge and experience, which is an inadequate substitute for the elected director's judgment.

Second, Delaware corporate law prohibits director proxy voting because directors are not only supposed to attend board meetings to cast a vote, but also to *discuss* the matters presented to the board. Board meetings are intended to be a collective and collaborative decision making process. This is reflected in Delaware corporate law, which gives the whole board, and not an individual director, the authority to make decisions for the corporation. For that reason, every director should personally participate in these meaningful discussions before making a final decision on any matters before the board. These discussions are important for two reasons: (i) directors should take into consideration the thoughts and opinions of other directors before voting, which they will be unable to do if they are not present at the meeting, and (ii) if there are absent directors, the directors who are present at the meeting will be deprived of hearing the thoughts and opinions of such absent directors before making their own decisions. The board meeting is intended to be a space where a director both offers and receives valuable information from their colleagues before making any decisions, and this environment would be lost if proxies were allowed.



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Third, directors cannot assign their power or delegate their duties to another person, even another director, because this would be a breach of their fiduciary duties. Under Delaware corporate law, each director has fiduciary duties to the corporation and its shareholders. These duties include a duty of loyalty and a duty of care. The duty of care can be fulfilled if a director exercises care in making decisions, and such decisions should be based on adequate information. Directors are, therefore, required to attend board meetings and vote on board issues while basing their decisions on adequate information. In *Lippman*, the Delaware Chancery Court determined that allowing a proxy to vote for a director would be a breach of such director's duty of care, because a director cannot receive adequate information to make proper decisions without personally participating and being present at the board meeting.

What Does This Mean for Delaware Corporations?

If your corporation is incorporated in Delaware and your corporation's certificate of incorporation or bylaws currently allow for directors to vote by proxy, it is important that you amend those documents to remove such provisions. If you have allowed proxy voting at past board meetings, the corporation may be subject to claims of improper voting and actions taken at such meetings may be deemed invalid if an insufficient number of directors voted on such matters and the board failed to achieve a quorum. To help mitigate these potential claims, the board should hold a properly attended board meeting and ratify all past decisions that were voted on by proxies.

[1] This rule has been confirmed numerous times in subsequent cases. See *OptimisCorp v. Waite* (2016), *Klassen v. Allegro Dev. Corp.* (2013), and *In re Acadia Dairies, Inc.* (1927).

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