

TRANSITIONING TO VIRTUAL SHAREHOLDER MEETINGS DURING COVID-19 PANDEMIC

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The spread of COVID-19 has altered how companies conduct business and highlights the need for flexibility brought about by the uncertainty. Just as measures have been taken across the United States to transition operations to a virtual workspace, many companies are now considering hosting their annual shareholder meetings in a virtual space. In implementing a transition to virtual meetings, both private and public companies should look to applicable state law, their governing documents, and, to the extent applicable, the recent guidance released by the Securities and Exchange Commission in their consideration of implementing virtual meetings.

EXAMINE STATE LAW AND GOVERNING DOCUMENTS TO ENSURE COMPLIANCE

Companies should confirm that their governing documents allow for virtual meetings. Oftentimes, a company's governing documents will state the requirements for a company's annual shareholder meeting and may need amendment to allow for virtual meetings. It is also important that the company review the laws of its state of incorporation and its governing documents for applicable procedural rules and guidance for holding virtual meetings.

The Delaware General Corporation Law, Section 211, states that a board, if authorized by its charter or bylaws, may determine the place of a meeting of shareholders, or, in its sole discretion, determine that the meeting should be held solely by means of remote communication. Shareholders may use the internet, video or teleconferencing, or another form of "remote communication" to (1) participate, (2) be deemed present, and (3) vote at an annual shareholder meeting if the following conditions are met: (a) the company takes reasonable measures to verify that each person deemed present and permitted to vote at the virtual meeting is a shareholder or the holder of a valid proxy from a company shareholder; (b) the company takes reasonable measures to provide such shareholders and proxy holders a reasonable opportunity to participate in the proceedings and to vote on matters submitted to the shareholders; and (c) the company maintains a detailed record.

Individual state laws regarding virtual meetings vary across the country and might preclude your virtual meeting. For example, Ohio allows virtual meetings under certain circumstances, Illinois allows only for in-person meetings or hybrid meetings, and California allows only for virtual meetings if the shareholders have previously consented to such action. In light of COVID-19, there is a possibility that the California standard may be relaxed given certain "Shelter In Place/Safer At Home" situations precluding in-person meetings, but, at this time, we do not have definitive legal authority to rely on. Companies that find themselves precluded from holding a virtual meeting may need to consider alternative measures in consultation with their legal representatives so that shareholders may continue to effect necessary shareholder actions.

EVOLVING SEC GUIDANCE

In response to the federal government recommendations to limit, postpone, or cancel large gatherings, the SEC released guidance on March 13, 2020 regarding the use of virtual meetings. A summary of the SEC Guidance (which applies to companies with securities registered under the Securities Exchange Act of 1934) is as follows.

Changing the Date, Time, or Location of an Annual Meeting

An issuer that has already mailed and filed its definitive proxy materials can notify shareholders of a change in the date, time, or location of its annual meeting without mailing additional soliciting materials or amending its proxy materials if it (1) issues a press release announcing such change, (2) files the announcement as definitive additional soliciting material on EDGAR, and (3) takes all reasonable steps necessary to inform other intermediaries in the proxy process (such as any proxy service provider) and other relevant market participants (such as the appropriate national securities exchanges) of such change.

If an issuer has not yet mailed and filed their definitive proxy materials, they should consider whether to include disclosures regarding the possibility that the date, time, or location of the annual meeting will change due to COVID-19.

Virtual Meetings

To the extent an issuer plans to conduct a virtual meeting or a hybrid meeting (i.e., an in-person, or physical, meeting in which shareholders are permitted to participate online), the issuer shall notify its shareholders, intermediaries in the proxy process, and other market participants of such plans in a timely manner and disclose clear directions as to the logistical details of the virtual meeting or hybrid meeting, including how shareholders can remotely access, participate in, and vote at such meeting.

For issuers that have not yet filed and delivered their definitive proxy materials, such disclosures should be in the definitive proxy statement and other soliciting materials. For issuers that have already filed and delivered their definitive proxy materials, if the issuer has followed the “Changing the Date, Time, or Location of an Annual Meeting” steps above, it does not need to mail additional soliciting materials (including new proxy cards) solely for the purpose of switching to a virtual meeting or hybrid meeting.

Presentation of Shareholder Proposals

The SEC encourages issuers, to the extent feasible under state law, to provide shareholder proponents or their representatives with the ability to present their proposals through alternative means.

The definition of “good cause” under Rule 14a-8(h) (should issuers assert Rule 14a-8(h)(3) as a basis to exclude a proposal submitted by the shareholder proponent for any meetings held in the following two calendar years) has been expanded to include a shareholder proponent or representative not able to attend the annual meeting and present the proposal due to the inability to travel or other hardships related to COVID-19.

The full SEC Guidance may be found [here](#).

NEXT STEPS AND FURTHER CONSIDERATIONS

After the company has evaluated its governing documents, applicable state law, necessary shareholder authorizations, and SEC Guidance (if applicable) in weighing the costs and benefits of conducting a virtual meeting in lieu of an in-person meeting, a company may want to consider taking steps to preserve their “business as usual” best practices and rights afforded to shareholders at in-person meetings. Such steps may include a review of their IT systems to ensure safeguards for virtual participation, giving consideration to a combination of online, telephone, and videoconferencing access to ensure the greatest number of shareholders are afforded the opportunity to ask questions during the meeting, and/or examining its shareholder base and determining what actions are needed to best maintain procedural fairness within the voting process.

Many transfer agents and other service providers, such as Broadridge, offer “off the shelf” platforms for virtual meetings, but the availability of these platforms does not do away with the need to address the issues raised above.

ADDITIONAL INFORMATION

For additional information or assistance, please contact:

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