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SEC Provides Relief for Public Company Annual Shareholder Meetings: Considerations Around Implementing Virtual Meetings

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With much of the country shut down due to COVID-19, many U.S. companies are facing difficult questions when scheduling their annual shareholder meetings, including whether to delay or move such meetings or hold them virtually. In response to the uncertainty COVID-19 has injected during the busiest time for annual meetings, the Securities and Exchange Commission Staff recently published guidance to assist public companies with their upcoming shareholder meetings, providing regulatory flexibility to companies seeking to change the date and location of the meetings, or proposing to use new technologies, such as virtual shareholder meetings that avoid the need for in-person shareholder attendance, while at the same time ensuring that shareholders and other market participants remain sufficiently informed. Reporting companies must understand their obligations with respect to annual shareholder meetings so that they can safely and effectively fulfill their responsibilities under applicable law while continuing to monitor this evolving situation and the related public health concerns.

Key Takeaways from the SEC Guidance

- Companies need to be proactive in deciding whether to delay their annual shareholder meetings or move to a virtual format.
- With proper notice to shareholders, companies can delay annual meetings or switch to virtual meetings without incurring the cost of mailing additional soliciting materials.
- Companies should consider including disclosure about the possibility of changes to the date, time, or location of their annual meetings in proxy materials that have not yet been filed.
- Shareholders should be permitted to present proposals at annual meetings remotely and any failure to present such proposals due to hardships related to COVID-19 will not be a valid basis to exclude future proposals.

Background

A U.S. company's requirements with respect to annual shareholder meetings will be governed by the law of its state of incorporation and its organizational documents. For example, Delaware law requires an annual shareholder meeting every 13 months (though the failure to timely hold a meeting does not



render corporate actions invalid). State law also governs the manner and procedure for annual meetings, including notice requirements and whether such meetings must be held in person. Issuers with securities registered under the Securities Exchange Act of 1934, as amended (the “Exchange Act”), must also comply with federal securities laws governing the disclosure in proxy materials used to solicit shareholders’ votes in annual or special meetings held for the approval of any corporate action requiring shareholder approval.

Change of Date, Time or Location of Annual Meeting

As the COVID-19 situation evolves, and as many state and local governments impose restrictions on gatherings, many companies have had to evaluate how to navigate the implications on annual meeting season and may decide to delay their meeting dates, change locations to limit travel requirements, or move to a virtual format. The March 13, 2020 guidance from the SEC is intended to assist companies, shareholders, and other market participants in dealing with the impact of COVID-19 on upcoming annual shareholder meetings.¹ Pursuant to that guidance, the Staff confirmed that, under federal securities laws, a company 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:

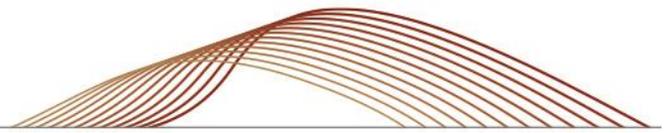
- issues a press release announcing such change;
- files the announcement as definitive additional soliciting material on EDGAR; and
- takes all reasonable steps necessary to inform other intermediaries in the proxy process (such as any proxy service provider) and other relevant market participants (such as the appropriate national securities exchanges) of such change.

These actions should be taken promptly after making a decision to change the date, time, or location of the meeting and should be sufficiently in advance of the meeting so the market is alerted to the change in a timely manner.

On March 4, 2020, the SEC issued an exemptive order that, among other things, provides an exemption (subject to certain conditions and exceptions) from the Exchange Act requirements to furnish proxy statements, annual reports, and other soliciting materials, as well as providing information statements to security holders when mail delivery is not possible.²

The SEC guidance and the exemptive order described above relate to federal securities laws only and do not address requirements under applicable state law, issuer organizational documents, or stock exchange listing standards.

Under Delaware law, a change in the meeting date, location, or format of a meeting generally does not require a new record date as long as the meeting is held within 60 days of the original record date, but a new notice may be required. State law notices typically must be given at least 10 days prior to the meeting date, although longer periods of time could be required depending on state law and the matters to be voted on. Companies considering changing to a virtual meeting after their proxy statement has already been mailed should consider the factors described below, under “Virtual Meetings.”



Considerations for Companies That Have Not Yet Disseminated Their Proxy Statements

If a reporting company has not yet filed and mailed its definitive proxy materials, it should consider whether to include disclosure about the possibility that it may need to change the date, time, or location of its annual meeting due to COVID-19 concerns. This determination will depend on the company's particular facts and circumstances and the reasonable likelihood of such changes. Alternatively, companies may seek to implement a virtual meeting, as described below, in their definitive proxy materials. Any company that reserves the right to change the date, time, or format should be ready to consider the steps necessary to switch to a virtual meeting, which are described below under "Virtual Meetings."

Presentation of Shareholder Proposals

Under Rule 14a-8 of the Exchange Act, shareholders who have owned at least \$2,000 in market value, or 1%, of a company's securities "entitled to be voted on the proposal at the meeting" for at least one year may submit proposals for inclusion in a company's proxy statement.³

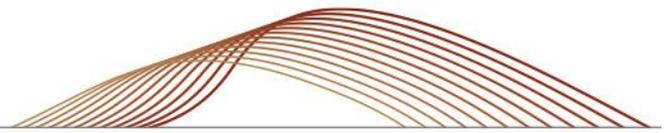
Exchange Act Rule 14a-8(h) requires shareholder proponents, or their representatives, to appear and present their proposals at the annual meeting. The SEC guidance notes that, in light of the possible difficulties for shareholder proponents to attend annual meetings in person to present their proposals, issuers are encouraged by the Staff, to the extent feasible under state law, to provide shareholder proponents or their representatives with the ability to present their proposals through alternative means, such as by phone, during the 2020 proxy season. Furthermore, to the extent a shareholder proponent or representative is 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 Staff would consider this to be "good cause" under Rule 14a-8(h), which means that issuers would not be able to use the absence as a basis to exclude a proposal submitted by the shareholder proponent for any meetings held in the following two calendar years.

Virtual Meetings

As public health concerns with respect to COVID-19 intensify, many companies are contemplating holding their annual shareholder meeting virtually through the internet or other electronic means or via a hybrid method that would allow participants (including directors, employees, and shareholders) to choose between in-person attendance and remote participation. Such approaches could help prevent the spread of the virus, while also providing access to shareholders that would otherwise not be able to attend an in-person meeting.

Virtual meetings have been a hot topic in the corporate governance space over the years, and they are not without detractors. Companies should also be aware that, while hybrid meetings (which combine an in-person meeting with the ability to attend virtually) generally have been viewed favorably, they are unlikely to completely mitigate the concerns around COVID-19.

Further, investors have raised concerns that virtual-only meetings may reduce access to the board and management, consideration of shareholder proposals, and the overall rights of shareholders.⁴ As a result of these concerns, Glass Lewis, for instance, historically has recommended voting against governance committee members if the company plans to hold a virtual-only shareholder meeting and does not provide robust disclosure assuring shareholders that they will have the same participation rights as in an in-person meeting.⁵ ISS has not yet adopted a formal policy on virtual-only meetings in



the United States. However, in light of the COVID-19 outbreak, both ISS and Glass Lewis have indicated that, for this year, they will relax their policies with regard to virtual-only meetings.⁶

Procedural Considerations under State Law

The ability to conduct a virtual meeting is governed by state law and the issuer's organizational documents. Companies wishing to hold virtual or hybrid meetings should:

- review applicable provisions of state law and confirm that virtual and/or hybrid meetings are permissible. Many states, including Delaware (the state in which most U.S. public companies are incorporated), permit companies to hold virtual-only meetings. However, some of these states (including California) impose onerous conditions, including shareholder consents, to hold a virtual-only meeting;
- review their organizational documents to confirm that such meetings are permitted; and
- contact telecommunications or video providers as soon as possible to confirm details and ensure availability of the desired meeting option.

Companies moving to virtual or hybrid meeting formats will need to work with their telecommunications providers to establish limits on attendance, if any, and to determine how shareholder proposals will be presented, how shareholders will be permitted to ask questions, and which shareholder questions will be answered by management during the meeting.

Stock Exchange Considerations for Virtual Meetings

Both the New York Stock Exchange and Nasdaq require listed companies to hold annual meetings, but they generally do not prescribe how annual meetings must be conducted. Nasdaq permits the use of webcasts instead of, or in addition to, an in-person meeting, provided such webcasts are permissible under the relevant state law and shareholders have the opportunity to ask questions of management.

SEC Compliance Considerations

In its guidance issued on March 13, the Staff stated that, to the extent an issuer plans to conduct a virtual or hybrid meeting, the SEC expects the issuer to 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 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. Issuers that already have filed and mailed their definitive proxy materials would not need to mail additional soliciting materials (including new proxy cards) solely for the purpose of switching to a virtual or hybrid meeting if they follow the steps described above for announcing a change in the meeting date, time or location.

Investor Relations Considerations

Switching to a virtual meeting for the first time—particularly in light of the circumstances—likely will create many questions for shareholders, and companies are well advised to anticipate these types of questions and answer them in the proxy statement. The ability of shareholders to interact with management and the board of directors at the annual shareholder meeting has been a hallmark of corporate governance principles for some time. Companies should consider including information in



their proxy statements that makes clear how they are facilitating—and not blocking—such communications. For instance:

- explain clearly how shareholders will be able to participate in a virtual meeting: what procedures they will follow to submit questions; how much time management will devote to answering questions; and who has the ability to decide which questions get answered;
- explain clearly what additional shareholder engagement the company has conducted and will continue to conduct to ensure continued access to management and the board of directors before and after the annual meeting; that is, consider committing to meeting with shareholders by telephone, webinar, or other acceptable forum, and continue to develop shareholder engagement mechanisms throughout the year. In establishing such mechanisms, companies also should be mindful of Regulation FD, which prohibits selective disclosure of material non-public information;⁷ and
- state the company’s intentions for the 2021 annual meeting, and make clear if this is a one-time accommodation for COVID-19. Whenever a company decides to switch to a virtual meeting, it should indicate to shareholders whether they can expect virtual meetings in the future, or if the 2020 season is being conducted virtually solely due to COVID-19. Reiterating the intention to return to in-person meetings will help shareholders better understand the implications of the change on the company’s historical shareholder outreach practices and intentions going forward.

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¹ SEC, Staff Guidance for Conducting Annual Meetings in Light of COVID-19 Concerns (Mar. 13, 2020), <https://www.sec.gov/ocr/staff-guidance-conducting-annual-meetings-light-covid-19-concerns?auHash=zrsDVFen7QmUL6Xou7EIHov4Y6IfrRTjW3KPSVukQs>.

² SEC Release No. 34-88318 (Mar. 4, 2020), <https://www.sec.gov/rules/other/2020/34-88318.pdf>.

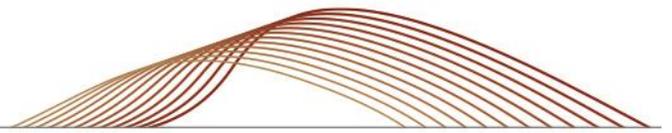
³ 17 CFR § 240.14a-8 - Shareholder proposals.

⁴ See, e.g., Jessica DiNapoli & Svea Herbst-Bayliss, *Spread of virus drives Corporate America into cyberspace for annual meetings*, REUTERS (Mar. 10, 2020), <https://www.reuters.com/article/us-health-coronavirus-shareholdermeeting-idUSKBN20X2EK>; see also, Glass Lewis, *Coronavirus Fears Impacting Annual Shareholder Meetings* (Mar. 6, 2020) <https://www.glasslewis.com/s-fears-impacting-annual-shareholder-meetings/>.

⁵ Glass Lewis, 2020 Proxy Paper Guidelines, An overview of the Glass Lewis Approach to Proxy Advice, United States https://www.glasslewis.com/wp-content/uploads/2016/11/Guidelines_US.pdf.

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- ⁶ ISS will require the issuer to provide full disclosure ensuring that the meeting will not limit shareholders' rights to participate. Specifically, ISS will expect virtual meetings to be transparent and include two-way communication, allowing shareholders to ask questions, be critical of a company's performance or governance, and present shareholder proposals. For virtual-only meetings, Glass Lewis will scrutinize an issuer's proxy material disclosure about the logistics of accessing a meeting and a shareholder's ability to ask questions. See, e.g., Kingsdale Advisors, <https://mailchi.mp/kingsdaleadvisors/hlibt2xqzu-1071635?e=5bbb8b827b>.
- ⁷ SEC, Regulation FD, Question 101.11 (June 4, 2010), <https://www.sec.gov/divisions/corpfin/guidance/regfd-interp.htm>.