

LEGAL UPDATES AND NEWS

Virtual Annual Meetings in Response to COVID-19

Due to the increasing restrictions placed by federal, state and local governments on the size of in-person gatherings and public movement to reduce the health risks associated with COVID-19, many companies are evaluating whether to change their upcoming annual shareholder meetings, which are traditionally held-in person, to either a meeting held exclusively online (a “virtual meeting”) or a meeting held at a physical location that would allow shareholder participation via the Internet or other forms of remote communication (a “hybrid meeting”). For companies contemplating holding a virtual or hybrid annual meeting, discussed below are legal and practical considerations.

I. Law of the Applicable Jurisdiction and Organizational Documents.

Law of the Applicable Jurisdiction. Companies must first confirm that a virtual or hybrid meeting is permitted under relevant law. For most banks, the corporate law of the state of incorporation of their stock holding companies would determine whether virtual or hybrid annual meetings are permitted. For all other banks, whether a virtual or hybrid meeting is permissible would be determined by: (1) state banking law if the bank is a state-chartered institution without a holding company; (2) applicable regulations of the Office of the Comptroller of the Currency (“OCC”) if the bank is either a federal savings association or national bank without a holding company; or (3) applicable regulations of the Board of Governors of the Federal Reserve System (the “Federal Reserve”) if the bank has a holding company (in mutual or stock form) chartered under federal law.

Approximately 31 states, including Delaware, Maryland, Pennsylvania and New Jersey, allow virtual meetings. An additional 12 states, including New York, permit hybrid meetings but not virtual-only meetings, although New York State Governor Andrew Cuomo issued an Executive Order allowing virtual-only meetings until April 19, 2020. Eight states currently do not permit virtual or hybrid meetings. Generally, for virtual or hybrid meetings to be acceptable under a state’s corporate law, shareholders must have the opportunity to participate in the meeting, read or hear the proceedings, vote and pose questions.

The Federal Reserve and OCC regulations do not explicitly contemplate virtual meetings. However, we have discussed this matter with Federal Reserve Board staff and have received confirmation that there would be no objection to virtual meetings under the circumstances as long as shareholders and members are provided sufficient notice and information on how they can participate.

Organizational Documents. Companies must also confirm that their articles of incorporation/charters and bylaws permit a virtual or hybrid meeting. For most companies, their organizational documents provide the board with discretion to determine the appropriate venue and arrangement for annual meetings.

II. Securities and Exchange Commission (“SEC”) Rules and Guidance.

Assuming that a virtual or hybrid meeting is permissible as described above, publicly-traded companies holding such a meeting must also properly notify shareholders of their virtual or hybrid meeting. Below is a discussion of the guidance issued by the SEC on March 13, 2020 to assist companies affected by COVID-19 with satisfying such obligations.

Changing the Date, Time or Location of an Annual Meeting. If a company has not filed or mailed its definitive proxy materials for its upcoming annual meeting and is considering changing to a virtual or hybrid meeting, then the company should disclose in its proxy materials the possibility of, and the reasons that may result in, such a change, and that the meeting may be delayed, postponed or adjourned due to COVID-19.

If the company has already filed or mailed its definitive proxy materials for the upcoming meeting, the guidance provides that a company may change the date, time or location of the meeting without mailing additional solicitation materials or amending its proxy materials if the company: (1) issues a press release announcing such a change; (2) files the announcement as definitive additional soliciting materials 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. The SEC would expect these actions to be taken promptly after a decision to change to a virtual or hybrid meeting has been made and sufficiently in advance of the scheduled meeting to ensure that the market is timely alerted to the change.

Notwithstanding the SEC's guidance, the company must also ensure that it is satisfying all notice requirements under relevant state or federal law and its organizational documents in changing the date, time or location of the meeting.

Information about Virtual or Hybrid Meetings. To the extent that a company plans to have a virtual or hybrid meeting, the SEC expects the company to timely notify its shareholders and other intermediaries in the proxy process of such plans and to 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 the meeting. If the company has not yet filed or mailed its definitive proxy materials, the proxy materials should disclose the logistical details for the virtual or hybrid meeting. If the company has already filed or mailed its definitive proxy materials, the guidance notes that as long as the company follows the steps outlined above for changing the date, location or time of the annual meeting, the company would not need to mail additional soliciting materials (including new proxy cards) solely to switch to a virtual or hybrid meeting.

Presenting Shareholder Proposals. Rule 14a-8(h) of the Securities Exchange Act of 1934 requires a shareholder or his or her qualified representative to appear and present a proposal at the annual meeting. In light of the difficulties of attending the annual meeting due to COVID-19, the guidance encourages companies, to the extent feasible under state law, to provide shareholders or their qualified representatives with ability to "present their proposals through alternative means, such as by phone, during the 2020 proxy season." In addition, the SEC clarifies that to the extent that a shareholder or his or her qualified representative is unable to attend due to COVID-19, the SEC would consider this to be "good cause" under Rule 14a-8(h) if the company asserts Rule 14a-8(h) as the reason for excluding a proposal submitted by the shareholder for any meetings held in the following two calendar years.

III. Other Considerations.

In addition to the legal considerations discussed above, companies should consider the following before moving to a virtual or hybrid meeting:

Logistics. To the extent that companies do not have the necessary infrastructure to conduct a virtual or hybrid meeting, they will need to work with their stock transfer agents or other vendors that have the technology to implement a virtual or hybrid meeting. Particular logistical discussion points should include: (1) costs; (2) the format of the meeting (i.e., video or audio); (3) authenticating attendees; (4) enabling

shareholders or members to submit questions and vote at the meeting; (5) technical support for shareholders or members experiencing technological issues during the meeting; (6) ensuring that shareholders and members receive sufficient information about participating and voting at the meeting; and (7) cybersecurity safeguards to ensure the integrity of the meeting and voting process.

Potential for More Questions and Comments at the Meeting. For many companies, their annual meetings are held in-person and attendance is typically low. By having a virtual or hybrid meeting, companies may see an increase in attendance, which may result in more questions and comments than usual.

Timing and Ongoing Assessment of the Impact of COVID-19. Due to the evolving COVID-19 restrictions being imposed by federal, state and local governments on public gatherings, companies planning to have in-person annual meetings should have contingency plans in place to implement a virtual meeting (or if prohibited under applicable law to postpone or delay the in-person meeting) to the extent that having the in-person meeting is impractical or prohibited. Accordingly, companies should continuously be in contact with their transfer agents or other vendors so that they are ready to timely implement a virtual meeting to the extent such change is warranted based on the circumstances.

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