Overview

On March 13, 2020, the Securities and Exchange Commission (SEC) provided staff guidance regarding compliance with federal proxy rules for upcoming annual shareholder meetings amidst the ongoing Novel Coronavirus 2019 pandemic (COVID-19). The guidance provides regulatory flexibility for issuers seeking to change the dates and locations of their annual meetings, including moving to virtual-only annual meetings, while ensuring shareholders and other market participants are informed of any changes and are still able to participate.

Changing the Date, Time or Location of the Annual Meeting

The staff guidance provides instructions on how issuers that have already mailed and filed their definitive proxy materials can change the date, time or location of their annual meeting without mailing additional materials or amending their proxy materials. Issuers that have not yet mailed their materials should consider including disclosure about the possibility of COVID-19 altering the meeting plans.

Issuers planning to change the meeting date should be aware of any potential impacts on the record date, and any applicable notification requirements. Record dates are dictated by the issuer’s governing document and are subject to state law requirements. Issuers generally should ensure any new meeting date falls within the required timeframe. For example, in Delaware, the record date must be not more than 60 and less than ten days before the shareholders’ meeting. In Maryland, the record date cannot be more than 90 and less than ten days before the date of the stockholder’s meeting; however, if the meeting is postponed, a new record date does not need to be set unless the new meeting date is more than 120 days after the original record date.

Additionally, the New York Stock Exchange (NYSE) requires immediate notification of shareholder meeting dates, including a minimum of ten days’ notice prior to the record date (including any change in record date). The NYSE does not require any interval between record and meeting dates, although it recommends a minimum of 30 days. The NASDAQ stock market (NASDAQ) does not have a notification requirement.

“Virtual” Shareholder Meetings

In light of public health concerns, many issuers may want to hold a “virtual” shareholder meeting through the internet to alleviate the need for a physical, in-person meeting. The SEC’s guidance provided relief for issuers that would like to convert their annual meetings to virtual-only meetings (e.g., not requiring such issuers to mail additional soliciting material solely for the purpose of switching to

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a virtual meeting), and guidance for companies seeking to include information about virtual meetings in their proxies. However, not every issuer is eligible to hold a virtual meeting.

- First, an issuer must ensure that the relevant state law permits virtual meetings, and that the meeting will be conducted in accordance with the requirements of the law. Approximately 30 states (including Delaware, California, Texas and Maryland) allow for virtual shareholder meetings. New York permits hybrid annual meetings where the virtual component supplements a required in-person annual meeting.

- Second, an issuer must ensure that the issuer’s own governing documents (e.g., the bylaws and articles of incorporation) allow for virtual meetings.

- Third, an issuer must timely notify (1) its shareholders; (2) intermediaries in the proxy process (including proxy advisory firms), and (3) other market participants (e.g., national securities exchanges) of the logistics of the virtual meeting.

- Fourth, issuers must provide a manner for shareholders to remotely access, participate in, and vote at the virtual meeting, and the issuer must clearly direct the shareholder on doing so.

Prior to holding an electronic stockholders meeting in lieu of a physical meeting, there are a number of issues that a company should consider, including whether the company has adequate technology to ensure that all shareholders can participate; whether shareholders are able to meaningfully engage with the company through a virtual setting; and whether there is a plan in place to ensure that shareholders have the opportunity to ask questions outside of the parameters of the virtual meeting. Issuers that have decided to transition to a virtual-only meeting for the first time should coordinate with a service provider to ensure that they have the proper resources for the meeting.

**Presentation of Shareholder Proposals**

The SEC’s guidance addresses circumstances in which the shareholder proponent of a proposal cannot attend the meeting. Rule 14a-8(h) under the Securities Exchange Act of 1934, as amended, requires shareholder proponents, or their representatives, to appear and present their proposals at the annual meeting. The guidance provides that issuers should make alternate means available for the shareholder to present the proposal. The guidance also provided that that the staff would treat COVID-19-related hardships as “good cause” for a shareholder proponent’s failure to appear to present their proposal. As a result, such shareholder may present the same proposals at the next annual meeting, notwithstanding that a company ordinarily would be able to exclude such proposal for two calendar years under Rule 14a-8(h)(3). Thus, the SEC’s guidance, while generally helpful to companies, may subject companies
Proxy Advisory Firms’ Views

Companies should reach out to proxy advisory firms regarding their views of virtual meetings. Although some commentators have noted that Institutional Shareholder Services, Inc. (“ISS”) and Glass, Lewis & Co. (“Glass Lewis”), two major proxy advisory firms, intend to relax their policies with regard to virtual-only meetings this year in light of the COVID-19 pandemic, companies should consider how their meeting plans compare to the proxy advisory guidelines.

For example, commentators have noted that ISS intends to be “very reasonable” about virtual-only meetings, and expects its clients will be more accommodating to virtual-only meetings in 2020. However, ISS generally will require the issuer to provide full disclosure, including transparency and two-way communication, for the meeting.

Commentators have noted that Glass Lewis intends to provide leniency to companies that clearly disclose that a virtual meeting option was chosen because of the COVID-19 outbreak. However, Glass Lewis intends to scrutinize an issuer’s proxy material disclosure regarding the logistics of the virtual meeting, including why proxy advisors that have announced physical meetings have decided to move to a virtual-only meeting.

SEC Press Release: SEC Staff Provides Guidance to Promote Continued Shareholder Engagement, Including at Virtual Annual Meetings, for Companies and Funds Affected by the Coronavirus Disease 2019 (COVID-19)

Staff Guidance: Staff Guidance for Conducting Annual Meetings in Light of COVID-19 Concerns

1 For more information, please see Cynthia M. Krus, Corporate Secretary’s Answer Book, Chapter 3.06.
2 Maryland law provides that at a stockholder’s request, the board of directors must “provide a place for a meeting of the stockholders.” Maryland General Corporate Law Section 2-503. However, if a stockholder so requests, the board need only provide a physical location for requesting stockholders to view the meeting webcast, the request does not convert the previously virtual-only stockholder meeting into a traditional in-person meeting.
3 The NYSE does not impose conditions on the ability to hold a virtual meeting. NASDAQ explicitly permits virtual meetings but notes the importance of allowing for shareholder questions of management.
4 For more information, please see Cynthia M. Krus, Corporate Secretary’s Answer Book, Chapters 3.27–3.34.

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