Client Alert

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Coronavirus/COVID-19: Considerations for Shareholder Meetings

Many public companies are considering how the outbreak of COVID-19, caused by the novel coronavirus, and the related public health concerns may affect their shareholder meetings. In particular, many companies are considering whether to change meeting dates or locations or even host "hybrid" in-person/virtual shareholder meetings or virtual-only shareholder meetings. This memorandum addresses issues for these companies to consider.

Key Take-Aways

- Hosting a hybrid meeting will preserve a company's ability to allow attendees (including directors, employees, and shareholders) to participate remotely.

- Depending on the spread of COVID-19, a company may decide to delay its meeting date, change the meeting location (*e.g.*, because of reported cases nearby), or shift the format of the meeting from an in-person meeting to a hybrid or virtual-only meeting.

- A decision after a company distributes its proxy materials to change the meeting date, location, or format should not require the company to redistribute its proxy materials under federal securities laws. Rather, the company should be able to satisfy its obligations by filing additional definitive solicitation materials with the Securities and Exchange Commission (SEC).

- In many jurisdictions, postponing the meeting date may require a company to give a new notice of the meeting. Changing the location or format of the meeting (*i.e.*, from an in-person meeting to a hybrid or virtual-only meeting) while retaining the original meeting date may also require the giving of a new notice depending on state law. A company that is unable or unwilling to give a new notice should consider various factors, including whether there are important or contested items being considered at the meeting. In addition, a company could avoid giving a new notice by convening the meeting as originally scheduled but then immediately adjourning it to a later time or different place or format.

- A company that has not previously considered a hybrid or virtual-only shareholder meeting but now wishes to do so should contact a virtual meeting platform provider as soon as possible.

Overview

Although many annual shareholder meetings are sparsely attended, many public companies this year have concerns about hosting large gatherings at their annual shareholder meetings or imposing unnecessary travel obligations on their directors, employees, and shareholders that could expose them to health risks. Thus, some companies may wish to hold hybrid shareholder meetings to give attendees (including directors, employees, and shareholders) an option to participate remotely. Other companies may decide to change their meeting date or location or to hold virtual-only meetings.

Key Legal Issues if a Change is Made after Distribution of Proxy Materials

Companies have flexibility in delaying shareholder meetings. Under Delaware law, a corporation is required to hold an annual meeting every 13 months; however, the failure to hold a meeting within that time period does not render corporate action invalid.

Under federal securities laws, a company that decides to change its annual meeting date, location, or format should not need to redistribute its proxy materials. Instead, the announcement can be made by filing additional proxy solicitation materials with the SEC via EDGAR.

Under state law, a change in the meeting date, location, or format generally does not require a new record date as long as the meeting is held within 60 days of the original record date.

Companies may, however, need to give a new notice to their shareholders under state law. State law notices typically have to 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 upon. Generally, a postponement of a shareholder meeting is typically viewed as requiring a new notice. It is less clear under state law whether a company must give a new notice if it keeps its meeting date and time but announces via an SEC filing and/or press release a change in location or decides to hold a virtual-only meeting.

While the conservative approach will always be to give a new notice, some companies may find themselves in situations in which mailing a new notice is impractical (*e.g.*, because the decision to change the meeting location or format is made less than 10 days before the meeting). In that situation, companies should consider whether there are important or contested items to be voted upon that might be challenged later because of the change (*e.g.*, due to alleged inadequate notice or claims that the directors were acting inequitably to affect the outcome of the vote). In the absence of contested items, companies may have strong equitable arguments that a public announcement of the change is sufficient, especially when done to protect the public health. In addition, even if a court held that a company did not give adequate notice, the "holdover rule" provides that the incumbent directors would continue to hold office until their successors are duly elected.

Companies could mitigate the risk of legal challenge by proactively including in their meeting notices a statement informing shareholders that they should monitor the company's press releases and website for important changes that might be made to the meeting as a result of the COVID-19 outbreak. For example, the notice could indicate that should the company decide to hold the meeting virtually, the company will issue a press release and update its website. In addition, as further described below, companies that give notice of hybrid meetings might similarly reserve the right to shift to a virtual-only meeting and advise shareholders that such shift will be announced via press release and on the company's website.

Finally, companies could avoid having to give a new notice by convening the meeting as originally scheduled and then immediately adjourning it to a different time, place, and/or format. Companies typically would publicly announce their intention to adjourn the meeting to reduce the chance that shareholders attend. Ultimately, a company that decides not to give a new notice will need to consider applicable state law and the risk that the meeting is later determined to have been improperly convened.

Going Virtual-Only

As we have previously discussed, there are numerous considerations in deciding whether to host a hybrid or virtual-only meeting, including whether to permit attendance by non-shareholders, how shareholders will present permitted shareholder proposals, how shareholders can ask questions, and how to decide which shareholder questions will be answered. This year, many companies may find that managing the risks relating to COVID-19 supports a decision to hold a virtual-only meeting.

It is not too late for companies to shift to a hybrid or virtual-only meeting, but we advise companies considering whether to hold a hybrid or virtual-only meeting to contact platform providers as soon as

possible. We understand that the leading platform providers are receiving numerous inquiries on this matter, which may create scheduling difficulties or ultimately lead to more hybrid or virtual-only meeting requests than they can accommodate. Moreover, we have heard that at least one of the leading platform providers is requiring companies that want to preserve the option to have a hybrid or virtual-only meeting to pay an upfront fee.

To provide maximum flexibility, many companies may want to proceed at the outset with a hybrid meeting or refer to the possibility of converting an in-person meeting to a hybrid or virtual-only meeting in the initial meeting notice, along with the method the company will undertake to communicate the change and, if known, the means of remote communications. This could make it easier to transition to a virtual-only meeting. Companies wishing to hold virtual-only meetings, however, should review their organizational documents to confirm this is permitted under applicable state law or whether bylaw amendments are necessary. In addition, companies should consider the views of their shareholders and the proxy advisory firms on virtual-only meetings. Institutional Shareholder Services does not have a formal policy on virtual-only meetings, whereas Glass Lewis will generally recommend 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 at an in-person meeting.

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