



ALERTS

Conducting Virtual Shareholder Meetings – SEC Guidance, State Law Considerations

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In light of the COVID-19 pandemic and its related public health concerns, many state governors have issued executive orders declaring public health emergencies, which restrict most in-person meetings. Given the public health and safety concerns related to COVID-19, many public companies and large privately-held companies are considering holding “virtual” or “hybrid” annual shareholder meetings this year, as opposed to having in-person annual meetings at a physical location.

In response to numerous inquiries from companies and shareholders regarding compliance with the federal proxy rules for upcoming annual meetings, on March 13, 2020, the Securities and Exchange Commission (SEC) provided guidance on holding virtual shareholders meetings to assist U.S. public companies in satisfying their annual meeting proxy solicitation obligations. In addition, the guidance addresses the notifications and the filings necessary to change the date, time and location of an annual meeting, as well as transitioning from an in-person to a virtual or hybrid annual meeting format.

This legal insight alert describes the SEC virtual shareholder meeting guidance, as well as certain state law and logistical considerations when companies are considering changing to a virtual or hybrid meeting.

SEC GUIDANCE

General Requirements

Companies are generally required to hold annual meetings of shareholders pursuant to applicable state law. When a company has a

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class of securities registered under Section 12 of the Securities Exchange Act of 1934 (Exchange Act), it must comply with the SEC's proxy rules, which require, among other things, the delivery of proxy statements and proxy cards (proxy materials) when soliciting proxy voting authority from its shareholders.

Virtual Shareholder Meetings

The ability to conduct a virtual meeting is governed by state law, where permitted, and the company's governing documents. Accordingly, every company considering a virtual meeting must first review (i) the relevant law of its state of incorporation, and (ii) the company's charter document (articles or certificate of incorporation) and bylaws to determine if virtual meetings or meetings held by means of "remote communication" are permitted.

In its guidance the SEC states that robust disclosures facilitating informed shareholder voting are just as important for a virtual meeting or "hybrid" meeting (i.e., an in-person meeting that also permits shareholder participation through electronic means) as they are for an in-person meeting. In this regard, the SEC guidance makes it clear that companies planning to conduct a virtual or hybrid meeting should take the following steps:

1. Notify the company's 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.
2. For those companies that have not yet filed their annual proxy statement, this notification is accomplished through disclosure in the definitive proxy statement itself, and more particularly in the notification of shareholders meeting section of the proxy statement, as well as the relevant disclosures in the proxy card and internet availability of proxy materials (for those issuers using an e-proxy process), all of which are filed with the SEC and delivered to shareholders.
3. For those companies that have already filed their annual proxy statement and desire to change to a virtual or hybrid meeting, this notification is accomplished through the specific process described below.

Changing to a Virtual Meeting

For those companies that have already filed their definitive proxy statements with the SEC and delivered their proxy materials to shareholders contemplating that an in-person meeting will be held, the SEC guidance provides direction on how companies can change to a virtual or hybrid meeting. The SEC guidance provides that these companies 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 the company does the following:

- Issues a press release announcing the change to a virtual



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- Files the press release/announcement as definitive additional soliciting material on EDGAR (tagged as a DEFA14A filing), and
- Takes all reasonable steps necessary to inform other intermediaries in the proxy process (i.e., proxy service providers such as Broadridge and transfer agents such as Computershare) and other relevant market participants (i.e., the NYSE or NASDAQ) of the change

The SEC expects companies to take these actions “promptly after making a decision to change the date, time or location of the meeting, and sufficiently in advance of the meeting so the market is alerted to the change in a timely manner.” As a practical matter, this means that companies should announce the change to a virtual meeting and issue the related press release no later than one business day after the company’s board of directors or management formally approves the change, and then file the announcement with the SEC that same day. All of these steps should be taken within the required notice periods for shareholder meetings under relevant state law and the company’s governing documents.

If a company has not yet filed and mailed its definitive proxy materials, the SEC encourages companies to consider including disclosures in their proxy materials regarding the possibility that the date, time, or location of the annual meeting will change due to COVID-19. This determination should be made based on each company’s particular facts and circumstances and the reasonable likelihood of such change. To date, many companies have already provided such disclosure, and it appears this will become the standard practice for proxy statements filed during the remainder of the 2020 proxy season.

Presentation of Shareholder Proposals

The SEC guidance also provides direction to companies and shareholders regarding the presentation of shareholder proposals at annual meetings for the 2020 proxy season. Under Exchange Act Rule 14a-8(h), shareholders or their representatives are required to appear in person and present their proposals at the annual meeting. In light of the possible difficulties of appearing in person to present their proposals (whether because of COVID-19-related travel concerns or because of a change to a virtual meeting), the SEC encourages companies, to the extent feasible under state law, to provide shareholders or their representatives with the ability to present their proposals through alternative means, such as by phone, during the 2020 proxy season. Companies in this situation should coordinate and communicate in advance with shareholders regarding the means of presenting their proposals and any necessary technical requirements or limitations.

Furthermore, to the extent a shareholder 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 SEC considers this to be “good cause” under Rule 14a-8(h), and therefore, issuers cannot assert a shareholders’ absence as a basis under Rule 14a-8(h)(3) to exclude a proposal submitted by the shareholder for any meetings held in the following two calendar years.

STATE LAW CONSIDERATIONS

As noted above, companies are encouraged to review the relevant law of the state in which they are incorporated to determine whether they are permitted to hold virtual or hybrid shareholder meetings. Following are high-level summaries of selected state law requirements for virtual meetings.

- **California.** Although the California Corporations Code generally permits shareholder meetings to be conducted, in whole or in part, by electronic transmission or electronic video screen communication, California law also requires that corporations receive the consent of all shareholders to hold a virtual or electronic meeting. Otherwise, the corporation must hold the meeting at a physical location. As a result, California corporations will likely not be able to hold solely virtual meetings if they have not already received such shareholder consent or cannot obtain such consent quickly. As a practical matter, this seems unlikely for widely held public and private companies.
- **Delaware.** The Delaware General Corporation Law permits Delaware corporations to hold virtual meetings. Under these provisions, if a corporation's organizational documents do not require holding the annual meeting at a physical location, the annual meeting can be held virtually (i.e., online or telephonically). Delaware corporations should review their bylaws to confirm there is no prohibition in the bylaws to holding a virtual meeting. Additionally, Delaware law requires corporations to implement reasonable measures to ensure stockholders may meaningfully participate in the virtual meeting through a secure and verifiable process, which focuses on access to the meeting, voting, and access to the stockholder list.
- **Indiana.** Under the Indiana Business Corporation Law, Indiana corporations are permitted to hold virtual shareholder meetings. Under the relevant Indiana statute, annual shareholder meetings may be held at the place stated in or fixed in accordance with the bylaws. However, the bylaws of an Indiana corporation may provide that the meeting will not be held in a physical place, but may, instead, be held solely by means of remote communication. There are provisions in the statute for the board of directors to approve the holding of the meeting by remote communication if no place is stated in or fixed in accordance with the bylaws, but it is rare for the bylaws of corporations not to contain such a provision. Therefore, this board approval provision is not typically relevant, and the bylaws need to permit meetings by remote communication in order to hold a virtual meeting. Corporations are required to follow certain conditions relating to reasonable shareholder identity and voting verification, among others, in order to take advantage of the remote communication meeting provisions.
- **Other States.** Virtual meetings are permitted in many other states, including but not limited to Minnesota, Ohio and

Texas. Other states, such as New York, permit a virtual component, subject to certain conditions, while still requiring an in-person meeting to be held. Still some other states, such as Georgia, do not currently permit a meeting to be held virtually, with or without an in-person meeting.

LOGISTICAL CONSIDERATIONS

There are also several best practices for companies planning to conduct a virtual or hybrid annual meeting as a result of COVID-19 or otherwise, including the following:

- Companies should engage an experienced remote communication services provider (such as Broadridge or Computershare) to host the virtual or hybrid meeting.
- Companies must ensure that the remote communication method allows shareholders to vote, ask questions and make comments, hear answers to questions, and otherwise exercise all of the rights shareholders have under state law for participation in shareholder meetings.
- Companies should develop protocols for facilitating the process for shareholder proposal proponents to present their proposals.
- Companies must also ensure that the technology platform used to conduct the virtual meeting will accommodate all of the shareholders, board members, members of management, and other persons participating in the meeting.
- Companies also should make shareholders aware of the procedures necessary to access and participate in the virtual meeting.

To obtain more information, contact the Barnes & Thornburg attorney with whom you work or any of the following attorneys:

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