

Insights

NAVIGATING ANNUAL STOCKHOLDER MEETINGS IN A SEA OF COVID-19 STAY-AT-HOME ORDERS

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As the COVID-19 pandemic disrupts life across the United States with lockdowns and stay-at-home orders in many states and cities, directors and officers wrestle with alternatives for holding annual stockholder meetings in a manner that complies with SEC rules and guidance and state corporate laws, while still honoring stay-at-home orders for the health and welfare of their stockholders, employees and communities.

While the actions taken at annual stockholder meetings generally don't rise to the level of "Essential Activities" as defined in state and local emergency orders, some companies may be designated "Essential Businesses" so their directors and officers technically could attend an in-person annual meeting (so long as they have sanitizer available and practice social distancing). Moving forward with an in-person meeting in an environment where stockholders cannot attend because of stay-at-home orders or other COVID-19 health concerns, however, may raise issues under federal securities and state corporate laws and Nasdaq regulations that require stockholders to have a meaningful opportunity to participate in the meeting.

Two notable companies announced plans to move forward with an in person meeting, but discourage or bar stockholders from attending because of COVID-19 concerns. Instead, they plan to simply broadcast the meeting via a webcast where stockholders can listen but not ask questions or vote during the meeting. While webcasts are commonly used to supplement a typical in-person meeting, consideration should be given as to how to ensure that stockholders would have a meaningful opportunity to participate in the meeting, as contemplated by SEC rules and guidance and state corporate laws, as well as stock exchange rules, in cases where stay-at-home orders have been issued or in-person gatherings are restricted.

During this period, it would be appropriate for companies to strive to balance and respect state and local stay-at-home orders and in-person gathering restrictions, while still fulfilling their obligations to hold, and allow stockholders to participate in, annual stockholder meetings.

Should we postpone the meeting in light of COVID-19 stay-at-home orders?

One possibility is to postpone the annual meeting prior to commencement of the meeting to allow time for the stay-at-home orders to lift and social distancing requirements to subside. Ideally, a company's bylaws would provide that the board of directors is authorized to postpone, adjourn or cancel an annual meeting. Many bylaws, however, are often silent on postponement or cancellation.

State laws also often are silent on the issue of stockholder meeting postponement. For example, Delaware law does not specifically address postponement, but Delaware courts have held that the board can postpone an annual meeting when there is a compelling reason to do so. If a postponement is challenged by a stockholder, the burden is on the board to show the postponement is in the best interests of the stockholders. In some cases, Delaware courts have considered whether a board acted in accordance with its fiduciary duties when it delayed a stockholder meeting (such as for purposes of delaying a vote on a merger, etc.), which would likely not be the case with a COVID-19 postponement.

Under Section 211(c) of the DGCL, if the annual meeting for election of directors is not held on the date designated therefor or action by written consent to elect directors in lieu of an annual meeting has not been taken, the directors must cause the meeting to be held as soon as is convenient. If the directors fail to hold the annual meeting or to take action by written consent to elect directors in lieu of an annual meeting for a period of 30 days after the date designated for the annual meeting, the Court of Chancery may summarily order a meeting to be held upon the application of any stockholder or director.

Section 213(a) of the DGCL provides that the record date for a stockholders' meeting must be not more than 60 nor less than 10 days prior to the date of the annual meeting. Depending upon the record date listed in previously distributed proxy materials, postponing the meeting may require setting a new record date.

In general, under Delaware law, a postponement typically is treated as a new meeting date, triggering the requirements to mail a new notice, set a new record date (if outside the 60-day window) and provide notice to stockholders not less than 10 nor more than 60 days before the meeting date. The postponement would result in additional time and expense, including for a new, updated proxy and new mailing (including broker search cards, which pushes the date out even further) and also raises the question of whether the new meeting requires a new deadline for shareholder proposals.

Overall, stockholders may question whether there is a compelling reason to postpone the meeting because of COVID-19 and related stay-at-home orders, given the option to pivot to a virtual-only annual meeting, in reliance on the March 13, 2020, SEC staff guidance.

How can we quickly make the switch to a virtual-only annual meeting?

The SEC recently issued guidance for issuers considering the possibility of conducting a "virtual-only" annual meeting in lieu of an in-person meeting because of COVID-19 health and safety concerns. The staff position stated if a company has already mailed and filed its definitive proxy materials, it can notify stockholders 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 and provide clear notice of how stockholders can remotely access, participate in and vote at a virtual-only meeting;
- 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.

In addition to SEC guidance, companies need to ensure that virtual-only meetings are permitted by state law. The majority of state statutes permit virtual-only meetings, and in recent weeks, some states (including Connecticut, Georgia, New Jersey and New York) that did not permit virtual-only meetings quickly enacted emergency orders or legislation to permit virtual-only meetings in light of COVID-19 and stay-at-home orders. A company's charter and bylaws also must permit virtual-only meetings. In the case of the bylaws, the board may be able to quickly act through a special meeting or act by written consent to permit virtual annual meetings.

Practical action steps for changing to a virtual-only annual meeting include:

- Hire a virtual meeting platform vendor - ***time is of the essence***. Demand is high and in some cases, pricing depends in part on the amount of notice given to the vendor. Vendors have platforms in place to identify stockholders and manage votes placed during the meeting, including but not limited to ensuring that such votes are from valid stockholders.
- Nasdaq rules require that stockholders have the opportunity to discuss company affairs with management. This can be accomplished through the virtual stockholder meeting services described above, with questions submitted through the virtual meeting website or if desired, prior to the meeting. Section 302 of the NYSE Listed Company Manual states that a listed company must have an annual stockholders' meeting during each fiscal year, but doesn't expressly address stockholder participation in the meeting. In a 2018 guidance memo, the NYSE noted that if a meeting is postponed or adjourned, the NYSE does not consider the company to have met the Section 302 requirement to hold an annual meeting.
- If required by company bylaws, the board will need to consider and approve holding a virtual-only meeting (this can be accomplished using a written consent, rather than calling a special meeting).

- The notice of change to a virtual meeting must be filed at least 10 days before the meeting date, although the SEC guidance above states that the notice should be given promptly after making the decision to make the change.
- Although not required by SEC guidance, some companies either have representatives at the former physical meeting site and/or post notices for any stockholders who mistakenly come to the former physical meeting site.

What are potential downsides of virtual annual meetings?

Proxy advisory firms and institutional investors traditionally have not viewed virtual-only meetings favorably because of limited stockholder participation. In recent weeks, however, ISS, Glass Lewis, Vanguard, CII and others have issued statements confirming that so long as a company clearly discloses that the change to a virtual-only meeting is expected to be a one-time change driven by the COVID-19 pandemic, and the virtual-only meeting provides full opportunities for stockholders to participate, ask questions and provide feedback to the company, they likely will be more accommodating of virtual annual meetings this year.

For further information on this topic, please contact Vicki Westerhaus, Randy Wang or any other BCLP Securities and Corporate Governance lawyer.

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