

From the Public Company Advisory Group of Weil, Gotshal & Manges LLP

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SEC Issues Guidance on COVID-19 Impact on Annual Meetings

*Provides flexibility for
Virtual Meetings and
Changes to Date and
Location*

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On March 13, 2020, the Securities and Exchange Commission (SEC) published SEC staff guidance available [here](#) to assist public companies as they prepare for their upcoming annual shareholder meetings and respond to the public health concerns related to the coronavirus (COVID-19). The SEC guidance provides flexibility to companies seeking to change the date and location of annual shareholder meetings and to use a “virtual” shareholder meeting to avoid the need for in-person shareholder attendance, without incurring the cost of additional physical mailing of proxy materials, including the proxy card.

Virtual meetings generally come in two forms – (1) virtual-only meetings are held solely by remote communication and (2) hybrid meetings provide shareholders with both a physical location and the ability to participate by remote communication. In this alert we address state law issues, SEC proxy rules and practical considerations for companies deciding whether to change the location of their meetings, or hold virtual-only or hybrid annual meetings.

Key Considerations for Annual Meetings At a Glance

- ✓ Determine whether virtual-only or hybrid meetings are permissible under state law and governing documents, and obtain board approval
- ✓ Consider whether to change meeting date or location, or go “virtual”: SEC says no need to amend proxy materials
- ✓ Analyze whether new state law notice to shareholders is required
- ✓ Consider proxy advisor and investor positions and best-practices on virtual-only meetings
- ✓ Don’t forget about shareholder proponents

Determine whether Virtual-Only or Hybrid Meetings are Permissible under State Law and Governing Documents; Obtain Board Approval

Companies should first check to ensure that applicable state law permits the annual meeting to be held by remote communication. A majority of states, including Delaware, permit virtual-only annual meetings, with another substantial number of states, such as New York, permitting hybrid annual

meetings so long as there is still an in-person component. Some states such as California permit virtual meetings, but add difficult conditions such as obtaining prior consent from shareholders. A few states, such as Georgia, preclude virtual-only or hybrid meetings all together. Companies should also review their bylaws and certificate of incorporation to evaluate whether there are any restrictions or conditions on the company's ability to hold the annual meeting remotely. Many states also require that the board of directors authorize a virtual or hybrid meetings. Neither NYSE nor NASDAQ rules are prescriptive with respect to the format of annual shareholder meetings.

Consider Whether to Change Meeting Date or Location, or Go “Virtual”: No Need to Amend Proxy Materials

The guidance issued by the SEC on March 13th provides flexibility for companies that have already filed and mailed their proxy materials. For such companies, the SEC Staff will take the position that the company can notify its shareholders of a change in the date, time, or location of the annual meeting without mailing additional soliciting materials or amending its proxy materials, including the proxy card, if the company:

- issues a press release announcing such change;
- files the announcement as definitive additional soliciting material (DEFA) on EDGAR; and
- takes all reasonable steps necessary to inform other intermediaries in the proxy process (such as proxy service provider) and other relevant market participants (such as the appropriate national securities exchanges) of such change.

The SEC expects companies to take the above steps promptly after the decision to change the date, time, or location of the meeting or to shift to a virtual-only or hybrid meeting and sufficiently in advance of the meeting to alert investors in a timely manner.

The guidance also clarifies that companies that decide to change the format of the annual meeting to a virtual-only or hybrid meeting do not need to mail additional soliciting materials (including new proxy cards) as long as the companies follow the steps outlined above.

Companies that decide to hold virtual-only or hybrid meetings should clearly disclose the logistical details of the virtual meeting, including how shareholders can remotely access, participate in, and vote. For example, companies should remind shareholders to keep the individual control number which appeared in the previously mailed proxy materials in order to confirm the shareholder's identity when accessing the meeting remotely.

For Companies Still Working on the Proxy Statement

Companies that have not yet filed or delivered proxy materials should consider incorporating contingency language into their proxy materials for the possibility that the date, time or location of the annual meeting will change due to COVID-19, or the possibility of a virtual-only meeting (subject to state law and other considerations discussed in this alert). The SEC guidance provides that such determination should be based on each company's particular facts and circumstances and the reasonable likelihood of such a change.

Analyze Whether New State Law Notice is Required

State corporation statutes typically require companies to provide shareholders written notice of annual meetings, which include, among other things, the place of the meeting and the means of remote communications (if permitted) by which shareholders may participate in the meeting. Companies that have already delivered the notice of meeting with just a physical location may need to provide a new notice of meeting – and do so within the time period prescribed by state law (e.g., no fewer than 10 nor more than 60 days before the meeting date in Delaware).

Consider Proxy Advisor and Investor Positions and Best-Practices on Virtual-Only Meetings

While in the context of COVID-19 virtual-only meetings may appear to be the obvious choice for annual shareholder meetings, companies should note that virtual-only meetings have in the past met with significant resistance from proxy advisors and investors, including the Council of Institutional Investors (CII) and Glass Lewis. CII recently suggested, however, that while it generally opposes virtual-only shareholder meetings, given coronavirus concerns, it is reasonable that some companies will go to virtual-only this spring, but that it hopes that such companies will make it clear that this decision was one-off, and that they follow best practices for making any virtual meeting participatory. Furthermore, Glass Lewis, which sometimes recommends against members of the governance committee based on decisions to hold virtual-only meetings has suggested that a company's decision to hold a virtual meeting due to COVID-19 fears may be reasonable. Glass Lewis identifies the following as examples of robust disclosure that it continues to expect for virtual-only meetings:

- Addressing the ability of shareholders to ask questions during the meeting, including time guidelines for shareholder questions, rules around what types of questions are allowed, and rules for how questions and comments will be recognized and disclosed to meeting participants;
- Procedures, if any, for posting appropriate questions received during the meeting and the company's answers, on the investor page of their website as soon as is practical after the meeting;
- Addressing technical and logistical issues related to accessing the virtual meeting platform; and
- Procedures for accessing technical support to assist in the event of any difficulties accessing the virtual meeting.

Companies should ensure that their virtual meeting platform satisfies current best-practices for shareholder participation and should provide adequate disclosure of the practices implemented in connection with the virtual meeting.

Don't Forget about Presentation of Shareholder Proposals

The SEC guidance encourages companies, to the extent feasible under state law, to provide shareholder proponents or their representatives with alternative means (such as by telephone) to attend the meeting to present their proposals as is required by SEC Rule 14a-8(h). Furthermore, to the extent a shareholder proponent 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 Staff would consider such lack of attendance to be for "good cause" under Rule 14a-8(h) should a company later assert Rule 14a-8(h)(3) as a basis to exclude a proposal submitted by the shareholder proponent for any meetings held in the following two calendar years.

Furnishing Proxy and Information Statements

As we discussed in more detail [here](#), on March 4th, the SEC issued an Order granting companies affected by the coronavirus an additional 45 days to make certain SEC filings, such as Form 10-Ks and Form 10-Qs, that would otherwise have been due between March 1 and April 30, 2020 and providing exemption from the requirements to furnish to shareholders certain proxy and other soliciting materials when mail delivery has been suspended due to the coronavirus.

Pursuant to the March 4th Order, companies are also exempt from the requirements to furnish to shareholders (i) proxy statements, annual reports and other soliciting materials and (ii) information statements and annual reports, provided that:

- The shareholder must have a mailing address located in an area where, as a result of the coronavirus, the common carrier has suspended delivery service of the type or class customarily used by the registrant or other person making the solicitation; and
- The company or other person making the solicitation has made a good faith effort to furnish the materials to the shareholder.

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