

CLIENT ALERT

SEC Guidance and Other Considerations for Conducting Virtual Annual Meetings in Light of Coronavirus

March 19, 2020

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In light of the ongoing coronavirus pandemic and the upcoming proxy season, the SEC staff recently issued guidance regarding the conduct of annual shareholder meetings, reminding issuers about the flexibility provided under the federal proxy rules to change the venue of the meetings.¹ In the guidance, the staff clarified that, subject to state law requirements and the company's governing documents, a company may change the time, date or location of an already-announced shareholders meeting, including changing from an in-person meeting to a "virtual" or "hybrid" meeting.² If the proxy statement relating to the meeting has not yet been mailed, the staff advises issuers to include disclosure regarding the possibility of a change in the meeting format.

Changing the Date, Time or Location of an Annual Meeting

Under the SEC guidance, if an issuer has already mailed and filed its definitive proxy materials, it 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 it:

- issues a press release announcing such change;

¹ See Staff Guidance for Conducting Annual Meetings in Light of COVID-19 Concerns, March 13, 2020, available [here](#).

² In a "virtual" shareholder meeting, shareholders participate through the internet or other electronic means in lieu of an in-person meeting; a "hybrid" meeting refers to an in-person meeting that also permits shareholder participation through electronic means.

SEC Guidance and Other Considerations for Conducting Virtual Annual Meetings in Light of Coronavirus

- 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 any applicable national securities exchange) of such change.

Any such changes should be made promptly and sufficiently in advance of the meeting so that shareholders are notified in a timely manner. To the extent that issuers have not yet mailed and filed their definitive proxy materials, they are encouraged to include disclosure regarding the possibility that the date, time or location of the annual meeting will change due to the coronavirus pandemic.

Virtual or Hybrid Shareholder Meetings

If an issuer plans to conduct a virtual or hybrid meeting, the issuer should notify its shareholders, intermediaries in the proxy process and other market participants of such plans in a timely manner, with clear directions as to the logistical details of the meeting, including how shareholders can remotely access, participate in and vote at such meeting. Issuers that have not yet filed and delivered their definitive proxy materials should include such disclosures in their definitive proxy statement and other soliciting materials. At a minimum, given the current situation, we recommend that issuers include disclosure in their proxy materials regarding the *possibility* of a virtual meeting and where information relating to any such change will be available. Under the SEC guidance, issuers that have already filed and mailed their definitive proxy materials do not need to mail additional soliciting materials (including new proxy cards) solely for the purpose of switching to a virtual or hybrid meeting if they follow the steps described above for announcing a change in the meeting date, time or location.

Although certain proxy advisors and shareholders have opposed virtual meetings as a means of shareholder disenfranchisement, we believe those concerns should be alleviated this year, as long as the issuer clarifies that the change in meeting format is due to the unique consequences presented by coronavirus, and is not intended as a permanent change.

Presentation of Shareholder Proposals

Rule 14a-8(h) under the Securities Exchange Act requires shareholder proponents, or their representatives, to appear and present their proposals at the annual meeting. In light of the possible difficulties for shareholder proponents to attend annual meetings in person and present their proposals, the SEC staff encourages issuers, to the extent feasible under state law, to provide shareholder proponents or their representatives with the ability to present their proposals through alternative means, such as by phone, during the 2020 proxy season.

SEC Guidance and Other Considerations for Conducting Virtual Annual Meetings in Light of Coronavirus

Under Rule 14a-8(h)(3), if a shareholder proponent fails to appear at the meeting to present his proposal without “good cause,” the issuer may exclude the proponent’s proposals for any meetings held in the following two calendar years. The SEC guidance states that a shareholder proponent’s failure to attend the annual meeting and present the proposal due to the inability to travel or other hardships related to coronavirus would be considered a “good cause” justification under Rule 14a-8(h).

State Law Requirements

In deciding among alternatives, companies should make sure to check both applicable state law and their governing documents. Delaware law (Section 211 of the Delaware General Corporation Law) permits virtual meetings in which stockholders participate, provided that the company (i) implements reasonable measures to verify that each person voting at the meeting by means of remote communication is a stockholder or proxyholder, (ii) implements reasonable measures to provide stockholders and proxyholders a reasonable opportunity to participate in the meeting and vote, including an opportunity to read or hear the proceedings of the meeting substantially concurrently with such proceedings, and (iii) records any such stockholder or proxyholder vote. New York, however, permits only hybrid meetings; although California permits virtual meetings, it requires prior shareholder consent.³ In addition, in the event of a virtual-only meeting, under Delaware law the list of stockholders entitled to vote at the meeting must be open to the examination of any stockholder during the meeting on a reasonably accessible electronic network, and the information required to access such list must be provided with the notice of the meeting.⁴

Companies that have already delivered notice of the meeting to record holders specifying only a physical location may need to provide a new notice regarding the virtual meeting within the requisite time frame (e.g., under Delaware law, at least 10, and not more than 60, days prior to the meeting date).

Assuming applicable state law permits a virtual or hybrid meeting, companies should also review their charter and bylaws to confirm that such documents do not prohibit the use of remote communications in shareholder meetings.

SEC Conditional Regulatory Relief for Companies Affected by Coronavirus

Earlier this month, the SEC issued an Order⁵ providing that a registrant unable to meet a filing deadline due to coronavirus-related circumstances may seek relief, by filing on Form 8-K, a brief description of the reasons why it could not file the required report or form on a timely basis and certain related disclosures. The deadline for such filings are then extended to 45 days after their original due date.

³ New York Business Corporation Law, Section 602; California General Corporation Law, Section 600.

⁴ Delaware General Corporation Law, Section 219.

⁵ See SEC Release No. 34-88318, March 4, 2020, available [here](#).

SEC Guidance and Other Considerations for Conducting Virtual Annual Meetings in Light of Coronavirus

The Order also provides relief under the proxy rules regarding the delivery of proxy materials to shareholders where mail delivery is not possible. Registrants are exempt from furnishing proxy statements, annual reports and other soliciting materials where (a) the shareholder has a mailing address located in an area where, as a result of coronavirus, the common carrier has suspended delivery service, and (b) the registrant has made a good faith effort to furnish the materials to the shareholder.

Willkie has multidisciplinary teams working with clients to address coronavirus-related matters, including, for example, contractual analysis, litigation, restructuring, financing, employee benefits, SEC and other corporate-related matters. Please click [here](#) to access our publications addressing issues raised by the coronavirus. For advice regarding the coronavirus, please do not hesitate to reach out to your primary Willkie contacts.

If you have any questions regarding this client alert, please contact the following attorneys or the Willkie attorney with whom you regularly work.

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