

COVID-19: DELAWARE AND THE SEC FACILITATE VIRTUAL STOCKHOLDER MEETINGS AS THE COVID-19 OUTBREAK SPREADS

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As concern over COVID-19, the novel coronavirus, increases and restrictions are being imposed on public gatherings, U.S. public companies have been weighing risks associated with holding in-person annual stockholder meetings. While the vast majority of U.S. public companies continue to hold annual stockholder meetings at a physical location, in light of the COVID-19 outbreak, many corporations are now considering whether to hold the meeting solely by means of remote communication or to hold a hybrid meeting in which stockholders may choose to participate either in person or remotely. Several states, including Delaware, have adopted emergency legislation designed to facilitate virtual meetings of stockholders, and the Securities and Exchange Commission (the “SEC”) has issued guidance for companies that have already mailed proxy materials to stockholders but, in light of worsening COVID-19 conditions, now wish to modify the schedule or format of their annual meetings.

If a corporation determines that it should hold its annual meeting either entirely by means of remote communication or both in person and remotely, management should carefully consider applicable state law establishing the procedural requirements for holding a virtual or hybrid meeting, as well as the form and timing of the notice that must be sent to stockholders. Special consideration should be given when an annual meeting has already been noticed as a meeting to be held at a physical location and later moved to a virtual location. Considerations for Delaware corporations in connection with the holding of a virtual meeting as well as for corporations incorporated in other states are set forth below in light of recent guidance from the SEC and an emergency [order](#) issued by the Governor of the State of Delaware on April 6, 2020 (the “Order”). The Order allows corporations subject to the reporting requirements of §13(a) or §15(d) of the Securities Exchange Act of 1934 (the “Exchange Act”) to change the format of a meeting currently noticed for a physical location to a virtual meeting solely by filing a document with the SEC pursuant to §13, §14 or §15(d) of the Exchange Act and issuing a press release, which release shall be promptly posted on the corporation's website.

VIRTUAL MEETING CONSIDERATIONS FOR DELAWARE CORPORATIONS

Procedural Requirements for Holding a Virtual Meeting under Delaware Law

If a corporation's organizational documents grant the corporation's board of directors the discretion to determine the place of the meeting or do not otherwise prohibit the holding of a virtual meeting, a corporation's annual meeting can be held online or telephonically. However, Delaware law requires corporations to implement

reasonable measures to ensure that stockholders may meaningfully participate in virtual stockholder meetings through a secure and verifiable process. These measures focus on meeting access and voting as well as access to the stockholder list.

Meeting Access and Voting.

In connection with a meeting held solely by means of remote communication, such as a webcast, a Delaware corporation must:

- Implement reasonable measures to verify that each person deemed present and permitted to vote at the virtual meeting is a stockholder or proxyholder;
- Implement reasonable measures to provide stockholders and proxyholders a reasonable opportunity to participate in the virtual meeting and vote on matters, including an opportunity to read or hear the proceedings of the meeting substantially concurrently with such proceedings; and
- Maintain a record of a stockholder or proxyholder's vote or other action taken at such meeting.

Stockholder List.

If an annual meeting of stockholders is held solely by means of remote communication, the list of stockholders entitled to vote at the meeting must be open for examination during the entire meeting on a reasonably accessible electronic network. The information required to access the electronic list of stockholders must be provided with the notice of the annual meeting, and the corporation must take reasonable steps to ensure that the list of stockholders entitled to vote at the meeting is available only to stockholders of the corporation. The list of stockholders also must be available for inspection by any stockholder during the 10-day period prior to the date of the meeting either at the corporation's principal place of business or on an electronic network provided that the information required to gain access to such list is included with the notice of meeting.

Corporations which are unable to make the list available for the 10-day period prior to the meeting on a secure electronic network or at their principal place of business should consider making the list available prior to the meeting by e-mail provided that the requesting stockholder submits information, verifying his, her or its status as a stockholder or, in the case of a beneficial holder, submits a legal proxy from a stockholder of record.

Contents and Timing of Notice.

Under Delaware law, stockholders must be given between 10 and 60 days' notice of an annual meeting of stockholders except for meetings held to vote on the adoption of a merger agreement, which require at least 20 days' notice. Where the meeting is to be held virtually, the notice of meeting must include the date and time of the meeting, as well as:

- The means of remote communication by which stockholders and proxyholders may be deemed present in person and vote at such meeting;
- Instructions on how to join the meeting, vote, and verify that such participant is a stockholder or proxy holder; and
- Information required to access the list of stockholders entitled to vote at the meeting.

How It Works.

Stockholder services companies are able to assist in setting up virtual platforms to accommodate Delaware law requirements and ensure that:

- Stockholders receive meeting invitations and instructions for accessing the virtual meeting in their proxy mailings;
- Using a control number, stockholders can conveniently sign into the virtual meeting from their home, office, or mobile device;
- A meeting page delivers streaming audio or video of the meeting, and also allows stockholders to access the list of stockholders, cast votes, enter questions, and view messages; and
- Meeting pages are also able to include welcome letters, video bios, call-in numbers or links to other stockholder materials.

Changing from an In-Person Meeting to a Virtual or a Hybrid Meeting

While some corporations may have determined prior to sending a notice of meeting and proxy statement to hold a virtual meeting of stockholders, others that decide to change the format from an in-person to a virtual meeting will be required to distribute an additional notice informing their stockholders of the change of format of the meeting and details on how to participate in the meeting.

- If the corporation has already mailed the notice of meeting, and the corporation has sufficient time to give its stockholders 10 days' notice of the virtual meeting, a new notice ordinarily must be distributed to stockholders by a physical mailing or by e-mail [1]. However, pursuant to the Order, any Delaware corporation that is subject to the reporting requirements of §13(a) or §15(d) of the Exchange Act may notify stockholders of the change of the format of the meeting solely by filing a document with the SEC and issuing a press release, which shall be promptly posted on the corporation's website after release. The notice should contain the information required for a notice of a virtual meeting described above.
- If the corporation has mailed the notice of the annual meeting and there are fewer than 10 days' before the meeting or it is otherwise impracticable to convene a currently noticed meeting, the meeting could be held but adjourned to another place (i.e., a virtual location). Ordinarily, notice of an adjourned meeting is not required so long as the date, time and place or means of remote communications by which stockholders and proxyholders may be deemed to be present in person and vote at such adjourned meeting are announced at the meeting at which the adjournment is taken and the adjournment is for no more than 30 days. Pursuant to the Order, a public company also may adjourn the meeting by providing notice of the date and time of the virtual meeting and the means of remote communication by which stockholders may participate in the meeting solely by filing a document with the SEC and issuing a press release, which shall be promptly posted on the corporation's website after release.
- Where there is insufficient time to send out a new notice and/or it is impracticable to adjourn or postpone the meeting, another option for corporations is to simply hold the physical meeting as planned, but to stream the meeting over the internet so that stockholders have the opportunity to hear or view the meeting remotely. Because the meeting is considered a meeting held at a physical place, stockholders, who do not come to the physical meeting but participate in the webcast, must submit their proxies in

advance of the meeting according to the instructions set forth in the original proxy materials in order to have their votes count for quorum and voting purposes.

Other Considerations.

In addition to concerns about notice, corporations should carefully consider when moving the location of a meeting for which proxy materials have already been mailed whether the original proxy cards sent to stockholders grant the proxyholders sufficient agency to vote the proxy at the corporation's annual meeting irrespective of its location. Often proxy cards reference a physical location, but the proxyholder's discretionary authority is broad enough to allow the proxies to vote at a virtual meeting. If a corporation intends to use the original proxy cards at the virtual meeting, the supplemental materials should expressly inform the stockholders of the corporation's intention to do so.

Another concern is whether the record date for the annual meeting may be maintained when a meeting is adjourned or postponed to a later date. A Delaware corporation is not required to set a new record date for an adjournment under Section 213 of the General Corporation Law of the State of Delaware.

OTHER STATES

Corporations organized in jurisdictions other than Delaware must review relevant state law to determine whether virtual or hybrid meetings are permissible. According to [a 2018 white paper](#) published by the Best Practices Committee for Shareowner Participation in Virtual Annual Meetings:

- Virtual-only meetings are allowed in 30 states, including Massachusetts, Minnesota, Ohio, Pennsylvania, Texas, Virginia and Washington (although certain states impose conditions on virtual-only meetings that make them impractical or unrealistic);
- Forty-two states in total, including New Jersey, North Carolina and Connecticut, as well as the District of Columbia, permit remote participation in stockholder meetings (i.e., hybrid meetings); and
- The remaining fewer than 10 states preclude virtual or hybrid stockholder meetings and require in-person meetings.

While there is variance from state to state, most states that permit virtual stockholder meetings require that the corporation:

- Verify each person deemed present and permitted to vote at the virtual stockholder meeting is a stockholder or proxyholder;
- Maintain a record of the vote or other action taken at the stockholder meeting; and
- Implement reasonable measures to provide a stockholder participating virtually with the ability to:
 - Participate in the meeting and vote on matters submitted at the meeting;
 - Maintain a record of the vote or other action taken at the stockholder meeting; and
 - Communicate with the other participants of the meeting contemporaneously.

In addition, corporations that conduct virtual stockholder meetings in these other states generally must make their stockholders lists available for examination by stockholders during the meeting. In response to COVID-19, states such as [Connecticut](#), [Georgia](#), [New Jersey](#), [New York](#) and [North Carolina](#) have taken steps to remove barriers to virtual annual meetings under existing state law.

RECENT SEC GUIDANCE

On March 13, 2020, the SEC issued guidance describing certain accommodations for public companies that have already mailed proxy materials to stockholders but, in light of worsening COVID-19 conditions, now wish to modify the schedule or format of their annual meetings. Specifically, those public companies may change the date, time, or location of their meeting—or change from an in-person meeting to a hybrid or virtual meeting—without mailing additional materials to stockholders if they (1) issue a press release announcing the change, (2) file the announcement as definitive additional soliciting material (i.e., a DEFA14A) on EDGAR, and (3) take reasonable steps to inform other intermediaries in the proxy process and other relevant market participants (such as securities exchanges) of the change. These actions are to be taken “promptly” after a decision to change is made, but no specific deadlines are imposed.

Public companies must of course also continue to comply with state law requirements regarding the timing, content, and manner of delivery of proxy solicitation materials, including notices of meetings, as well as state law restrictions on whether meetings may be held virtually. For Delaware corporations, the SEC's new guidance, when considered together with the Order, allow a Delaware corporation to change the format of a stockholders meeting from an in-person meeting to a hybrid or virtual meeting by the filing with the SEC of a supplemental notice and a press release and the prompt posting of the press release on the corporation's website. The corporation must also take reasonable steps to inform other intermediaries in the proxy process and other relevant market participants of the change in format of the meeting.

The SEC encourages public companies that have not yet mailed proxy materials to consider including disclosures regarding the possibility that the date, time, or location of their annual meetings will change due to COVID-19.

The SEC guidance acknowledges challenges that may be faced by stockholder proponents that need to attend a meeting in order to present a proposal, as required by Rule 14-8(h) of the Exchange Act. Public companies are encouraged, to the extent feasible under state law, to provide stockholders with alternative means, such as telephone conferencing, by which to present their proposals. If COVID-19 complications preclude a stockholder proponent from attending an annual meeting, the SEC will consider this to be “good cause” should a public company assert Rule 14a-8(h)(3) as a basis to exclude a proposal made by the stockholder proponent for any meeting held in the next two calendar years.

NOTES

1. Delaware generally permits the sending of notices by electronic mail. However, U.S. publicly-traded corporations will also need to comply with the rules of the SEC relating to the distribution of proxy materials.

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