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UPDATE: The Coronavirus' Impacts on Your Annual Meeting

As we enter the run-up to peak proxy season and with travel restrictions and “social distancing” measures increasing, companies face challenges on how to address the coronavirus (COVID-19) outbreak in the context of their annual shareholders meetings. In this memo, we answer important questions that we have been asked with respect to annual meeting contingency planning.

What are our options if our previously announced annual meeting cannot be held in its current location because of the COVID-19 outbreak?

If you find that you are unable to hold your annual meeting in its currently planned location, options include switching locations (either physically or by going virtual) or delaying the meeting. All of these options will implicate similar issues, including federal proxy disclosure and state law notice requirements and, for delays, possible record date requirements.

Switching locations (increasingly by going to a virtual-only meeting) may be the best option for many companies facing this issue because, notwithstanding the obvious disruption, this is the most “business as usual” option. Keeping the same meeting date but with a changed location allows the remainder of the corporate and board meeting calendar (which is often set months in advance) to stay on track.

If we want to switch meeting locations (including by switching to a virtual-only meeting), what are the key considerations?

If you have already filed and mailed your definitive proxy materials and would like to switch locations, you will need to:

- Issue a press release announcing the change, file the announcement as definitive additional soliciting material on EDGAR and take reasonable steps to inform other intermediaries in the proxy process (such as proxy service providers) and other relevant market participants (such as your listing exchange) of the change. The SEC staff has issued guidance confirming that companies do not have to otherwise amend or mail additional soliciting materials if they take these steps. The guidance also states that these measures should be taken promptly after the decision to change locations and sufficiently in advance of the meeting so the market is alerted to the change in a timely manner.¹

¹ For the staff guidance, please click [here](#). The SEC separately issued an order granting conditional relief from the requirement to furnish a proxy statement or other soliciting materials, information statement or annual report, subject to certain conditions.

- Consider shareholder notice requirements under state law. Delaware corporations are required to provide notice of the place (if any), date and time of any shareholder meeting to record holders (but not beneficial owners who hold their shares in “street name”) at least 10 days before the meeting. This notice is typically included in the proxy statement. Accordingly, even if federal securities laws do not require distribution of the proxy amendment, state law may require delivering a revised notice to record holders. State law may permit notice by email or other electronic transmission in addition to or in lieu of mailing; however, these options may not be viable for all of the shareholders at public companies due to the difficulties in obtaining email addresses and/or permissions for other means of electronic transmission.²

Provisions in the company’s charter and bylaws may also impose additional notice requirements, so those should be reviewed as well. Boards often have the ability to unilaterally amend the company’s bylaws. Therefore, to the extent the bylaws impose significant restrictions on procedures necessary to address the COVID-19 outbreak, boards may decide to amend the bylaw provisions as needed, either permanently or on a “one-off” or “emergency” basis applicable only to this year’s annual meeting.³

If we want to switch to a virtual-only meeting, are there additional considerations?

Yes. Importantly, not all states permit virtual-only meetings. Delaware law expressly permits a virtual-only meeting if you (1) adopt reasonable measures to verify shareholder or proxy holder identity, (2) provide such shareholders and proxy holders with a reasonable opportunity to participate in the meeting and to vote on a substantially real-time basis and (3) maintain voting records. In addition, only the board can decide to hold a virtual-only meeting. That decision cannot be delegated to officers even if they previously were authorized to determine the meeting venue. Other states, including New York, permit their corporations to add the option of remote participation to its meetings but do not allow the holding of shareholder meetings on a virtual-only basis. Companies should also check their charters and bylaws to

including that (1) the relevant shareholder has a mailing address in an area where, as a result of the coronavirus, common carriers have suspended delivery service of the type or class customarily used by the company or other soliciting person and (2) the company or other soliciting person has made a good faith effort to furnish such materials to the shareholder, as required by the rules applicable to the particular method of delivering such materials to the shareholder. As of now, it is unclear what would constitute a “good faith effort” to furnish such materials to the shareholder. For the SEC order, please click [here](#). For our client memorandum on this development and other public disclosure considerations, please click [here](#).

² For example, Delaware permits email notice if the company has email addresses for its record holders and the holder has not opted out, and notice by other electronic transmission if a holder has opted in.

³ Note that material bylaw amendments are required to be disclosed on a Form 8-K filing with the SEC.

confirm that no provisions would prohibit a virtual meeting, but again, the board may have the ability to amend the bylaws if necessary.⁴

As a further consideration, some institutional investors have objected to virtual-only meetings. For example, the NYC pension funds have a policy of voting against governance committee members at companies with virtual-only meetings. While ISS does not have a policy on virtual-only meetings, Glass Lewis will recommend against governance committee members holding virtual-only meetings without disclosure assuring shareholders that they will be afforded the same rights and opportunities to participate as they would at a physical meeting. While these policies have yet to be revised or otherwise addressed in light of the COVID-19 outbreak, we note that the voting impact of these policies has been mild, and, absent special facts, companies should not be overly concerned with them when making a decision to move to a virtual-only meeting in light of public health and shareholder benefits.

If you do switch to a virtual-only meeting, the SEC staff guidance states that you should notify your shareholders, proxy intermediaries and other market participants of the change in a timely manner and disclose clearly the logistical details of the virtual-only meeting, including how shareholders can remotely access, participate and vote. Companies adopting a virtual option for their annual meetings (i.e., a “hybrid” virtual and physical meeting) should also provide this same information, and review applicable state law. For example, the same requirements and need for express board authorization outlined above for virtual-only meetings are also required for Delaware corporations to add a virtual option to their physical meeting.

What if we want to delay our meeting instead? How should we do that?

If a properly appointed chair is able to be present at the previously disclosed location of the shareholder meeting, he or she may open the meeting and then have a vote to, or otherwise on his or her own determine to (as permitted by state law and the company’s governing documents), adjourn the meeting to a new date, time and/or location. Under Delaware law, when adjourning a meeting and reconvening, the reconvened meeting is considered a continuation of the initial meeting rather than an entirely new meeting so the record date, notice and quorum established at the initial meeting continue to apply to the reconvened meeting. The power to adjourn the meeting belongs to the shareholders under default Delaware law, but many companies’ bylaws also give the chair of the meeting the power to adjourn the meeting. In any event, at most annual meetings, company management will hold proxies for a sufficient number of shares to approve the adjournment if the chair is not otherwise authorized to unilaterally adjourn the meeting.

In addition, under Delaware law, a meeting can be serially adjourned and re-adjourned several times, which provides companies with significant flexibility. If any particular adjournment exceeds 30 days, however, new notice must be sent to shareholders. Further, if the number of adjournments and the cumulative delay

⁴ Both NASDAQ and NYSE permit listed companies to have virtual-only meetings, with NASDAQ noting that shareholders should be given the opportunity to discuss company affairs with management at the meeting.

become extensive, the board may deem it appropriate to set a new record date so as to avoid having a shareholder vote with an arguably stale shareholder base. In the event a new record date is established, then you would need to amend your proxy statement and send notice to the new record holders. Other record date implications are discussed below.

Both NASDAQ and the NYSE have requirements for annual shareholder meetings, so early coordination with your company's exchange listing agent in the event of a significant delay in the annual meeting timing is recommended.

What if we can't get someone to open the meeting to adjourn or aren't otherwise permitted to adjourn?

Another option to delay an annual meeting is through postponement before the time of the meeting. Postponement, unlike adjournment, constitutes the adoption of a new meeting date (as opposed to an extension of the original meeting). Unlike an adjournment, a new record date may be required. Under Delaware law, companies may rely on the previously disclosed record date as long as the postponed meeting date falls within 60 days after the original record date (or any shorter period specified in a company's charter or bylaws). Given tight proxy season timelines, however, some record dates may hit the maximum 60-day period if the meeting is postponed for any significant time. If the meeting date is more than 60 days after the record date, a new record date must be set. Also, the same disclosure and notice considerations as discussed under a change in location apply to a change in meeting date.

Neither NASDAQ nor the NYSE sets requirements regarding how far in advance of a meeting a record date should be set, although the NYSE recommends a record date of at least 30 days before the meeting date. The NYSE also requires that a minimum of ten days' notice be given to the exchange of any record date, but states that companies should contact their representative as soon as possible if they are unable to meet the ten-day notice requirement to discuss possible alternatives.

If we have not yet announced our annual meeting logistics, what preparations should we consider now?

Companies should reexamine whether a virtual-only meeting is viable for them, including examining their particular state law and governing documents and other requirements surrounding adjournment. If you have not filed your definitive proxy materials, the SEC staff guidance states that companies should consider whether to include disclosures regarding the possibility of changed meeting logistics, depending on each company's particular facts and circumstances and the reasonable likelihood of changes. For example, companies may wish to add disclosure to the effect that they are monitoring the COVID-19 outbreak, and, if it becomes inadvisable or impossible to hold a physical meeting, will announce alternatives as soon as possible. Companies may wish to direct their shareholders to their annual meeting websites (if any, keeping

in mind securities laws considerations for linking to websites) or state that such announcements will be issued in a press release or other filing.

What if we have a shareholder proposal up for vote at the annual meeting? Are there any special considerations there?

Yes. For shareholder proposals included in a company's proxy statement under Rule 14a-8, the SEC's rules require that the shareholder proponent (or a properly appointed representative) must attend the meeting to present the proposal in a manner permitted under state law. If the proponent or representative fails to present the proposal without good cause, the company is allowed to exclude from its proxy statement all proposals from that proponent for the next two years. Due to increasing travel restrictions related to the COVID-19 outbreak, the SEC staff guidance states that companies should, if permitted under state law, allow proponents the ability to present their Rule 14a-8 proposals without physically attending the meeting. If the company does not provide for such alternative means, this would constitute "good cause" for why a proponent failed to present his or her proposal. The SEC staff guidance only applies to Rule 14a-8 proposals, and does not purport to apply to other shareholder proposals that may come before the meeting. Many companies' bylaws impose an analogous requirement to present such proposals in person, and companies should plan ahead whether to enforce that requirement this year or allow exceptions in line with the SEC staff guidance.

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This memorandum is not intended to provide legal advice, and no legal or business decision should be based on its content. Questions concerning issues addressed in this memorandum should be directed to:

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