Changing to Virtual Annual Shareholder Meeting in Response to COVID-19 Coronavirus

The Coronavirus pandemic is causing U.S. public companies to reevaluate whether to hold in-person annual shareholder meetings or instead switch for the first time to a virtual annual meeting or hybrid meeting in which shareholders can choose to participate either in person or remotely. In making this determination, public companies need to consider not only the SEC’s recent guidance on the topic, but also applicable state law procedural requirements. Described below is a brief summary of steps to be taken or considered when changing an annual meeting location or date. The required steps vary depending on the jurisdiction of incorporation and the current status of a publicly-traded company’s proxy statement for its annual shareholder meeting.

Changing Annual Meeting Location or Date After the Proxy Has Been Mailed:

SEC Guidance:

Publicly-traded companies that have already mailed a proxy statement and want to change their annual meeting location or date should issue a press release as early as possible and file the release with the SEC on EDGAR as supplemental proxy materials. The SEC has issued guidance stating that public companies do not need to remail the proxy statement. The SEC’s guidance does not preempt or otherwise alter the notice requirements under state law, and the issuance of a press release announcing the change pursuant to the SEC’s guidance may not constitute adequate notice for state law purposes.

Delaware Corporations:

Delaware law expressly permits Delaware corporations to hold virtual annual shareholder meetings. Delaware corporations should review their bylaws to confirm there is no prohibition in the corporation’s bylaws on holding a virtual-only meeting, and the board of directors may amend the bylaws if any change is necessary. A Delaware corporation that has already mailed its notice of meeting has a choice to either mail a revised notice to its shareholders or to take some statutory risk by relying only on the press release. We believe that the best practice for Delaware corporations is to mail a revised notice, but we expect that some Delaware corporations may decide simply to issue a press release for routine meetings that do not involve contentious matters.

Maryland Corporations:

A Maryland corporation is permitted under the Maryland General Corporation Law to hold virtual-only shareholder meetings, provided that under its organizational documents, the board is authorized to determine the place of annual meetings. A Maryland corporation faces the same choice as a Delaware corporation in how to communicate a change to a virtual-only or hybrid meeting.
Maryland REITs:

The Maryland REIT Law, which governs so called “Title 8 REITs,” is silent with respect to virtual annual shareholder meetings, although a Maryland Title 8 REIT is required in its Declaration of Trust to “provide for an annual meeting of shareholders at a convenient location and on proper notice.” It is unclear whether cyberspace is a legitimate “location” for a shareholder meeting. If a Maryland Title 8 REIT nonetheless would like to hold a virtual-only or hybrid meeting in response to the global health crisis, it should confirm that its Declaration of Trust does not contain any restrictions and it should ensure that its bylaws explicitly provide authority to hold a virtual-only or hybrid meeting. Although there is some statutory risk, Maryland Title 8 REITs may decide that it is a risk worth taking in light of the Coronavirus pandemic. As noted above for Maryland corporations, a Maryland Title 8 REIT also will need to determine whether to issue a press release or mail a revised notice of meeting to communicate a change to a virtual-only or hybrid meeting.

Other Jurisdictions:

Public companies organized in jurisdictions other than Delaware or Maryland should consult counsel to review relevant state law to determine whether virtual or hybrid meetings are permissible and to discuss the required procedural steps.

Changing or Potentially Changing Annual Meeting Location or Date Before the Proxy Statement Has Been Mailed:

Publicly-traded companies that have not yet mailed their proxy statement should disclose the annual meeting location or date change or the possibility of a change in their proxy statement. We do not believe there is a need to change the proxy card to provide for the possibility of a change or to add a new voting item to authorize the change.

If a public company discloses in its proxy statement that it may potentially change its annual meeting location or date, it also will need to subsequently communicate the final decision regarding meeting location or date in a manner that addresses the notice requirements under applicable state law, as discussed above.

Presentation of Shareholder Proposals:

The SEC also has provided guidance encouraging public companies holding virtual meetings to permit shareholder proponents or their representatives to present their proposals through virtual or telephonic means. The SEC also has stated that it would consider a shareholder's inability to travel due to COVID-19 as “good cause” under Rule 14a-8(h) if a public company asserted Rule 14a-8(h)(3) as a basis to exclude a shareholder proposal.

Views of Proxy Advisory Firms:

To date, virtual-only meetings have been criticized for limiting shareholder engagement and participation. Glass Lewis has historically recommended voting against governance committee members when a company holds a virtual-only meeting and does not provide robust disclosure. Institutional Shareholder Services (“ISS”) has not adopted a formal policy in its 2020 Proxy Guidelines, and historically has not recommended against directors for holding virtual-only meetings. We understand that ISS is convening a global policy board meeting later this week to address the issue. Both Glass Lewis and ISS have underscored the importance of adequate disclosure regarding the reasons for conducting a virtual
meeting and the need to ensure that any virtual or hybrid meeting provides shareholders the same opportunity to participate as would be the case for an in-person meeting. We expect that institutional shareholders will be similarly accommodating for the 2020 proxy season.

**Virtual Meeting Platform Recommendations:**

As public companies consider moving to virtual-only meetings in response to the Coronavirus pandemic, they should take steps to enable shareholders to participate with the same rights and opportunities as they would receive in an in-person meeting. Disclosure should include the following:

1. Procedures for shareholders to participate remotely, including asking questions, voting, presenting shareholder proposals, etc.;
2. Logistical and technical guidance to enable shareholders to successfully access the virtual meeting platform;
3. Availability of technical support in case of difficulties participating in the virtual meeting;
4. Policy regarding posting information, including shareholder questions, on the company's website following the virtual meeting.

**Assistance in Developing Virtual Platforms:**

Shareholder services companies like Broadridge Financial Solutions are available to work with public companies to develop virtual platforms that address state law requirements and provide the logistics necessary to successfully hold a virtual-only shareholder meeting. Given the likely spike in demand for virtual-only or hybrid annual meetings this year, companies need to be mindful of the possibility that providers will be resource-constrained and make appropriate arrangements well in advance.

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This memorandum is not intended to provide legal advice, and no legal or business decision should be based on its contents. If you have any questions about the contents of this memorandum, please call your regular Fried Frank contact or an attorney listed below:
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