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CRAVATH, SWAINE & MOORE LLP

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# COVID-19: Considerations for 2020 Annual Shareholders Meetings

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# Overview

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- **U.S. state laws and stock exchanges require public companies to hold annual meetings of shareholders, most of which are held each year between March and May**
- **In light of the growing global concern surrounding the coronavirus (COVID-19) outbreak and the recommendations that public health officials and federal, state and local governments have to date issued in response, or may issue in the near future, U.S. companies are considering the impact the outbreak may have on their ability to host their annual meeting of shareholders**
- **This presentation reviews the various factors to consider and the options available to U.S. public companies in addressing this concern**

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# Options for 2020 Annual Shareholders Meeting

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- **In-Person Meeting – Shareholders and company representatives meet in a physical location without the option of remote access**
  - The Company can subsequently make a decision to adjourn (or possibly postpone)
  
- **Virtual-Only Meeting – Shareholders and company representatives meet via remote communication, which can be audio-only or include video, without the option of in-person attendance**
  - At least 30 states, including Delaware, Minnesota, Ohio, Pennsylvania, Virginia, Washington, Wisconsin and Texas, allow virtual-only meetings. However, some of those states impose significant conditions on virtual-only meetings that make them impractical or unrealistic (e.g., requiring shareholder consent to hold a virtual-only meeting)
  
- **Hybrid Meeting – Shareholders and company representatives meet in a physical location and shareholders have the option to attend via remote communication**
  - More than 40 states and U.S. territories, including New York, permit hybrid meetings, while eight states, including Georgia and South Carolina, only permit in-person meetings
  - As a result of COVID-19 concerns, several states, including New York, New Jersey, Connecticut, Georgia and Massachusetts, have amended or suspended laws that previously prevented companies incorporated in those states from holding virtual-only meetings. For example, on June 17, New York amended the New York Business Corporation Law to provide companies incorporated in the state the option to hold virtual-only meetings for the duration of New York’s state of emergency declared in response to the COVID-19 pandemic
  
- **Plan to hold an in-person meeting, but advise shareholders of the possibility of changing to a virtual-only meeting**
  
- **Delay (postpone) the meeting date now**

**Note: For all options with a physical meeting component, companies can consider restricting access for attendees who have recently travelled to areas with significant exposure to COVID-19 or adopting other reasonable screening rules**

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# COVID-19 Related Considerations

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## ▪ Travel Restrictions

- In response to the COVID-19 outbreak, many governments, businesses and other institutions have placed travel restrictions on their constituents, with some nations going so far as to close their borders completely. Companies cannot predict what the status of these restrictions will be at the time of their annual meeting. Allowing the use of remote communications would limit the potential impact of these travel restrictions on shareholder participation in the annual meeting

## ▪ Large Gatherings Discouraged

- In order to prevent the continued spread of COVID-19, communities are discouraging large gatherings and government officials in some regions have instituted bans on gatherings. The U.S. Centers for Disease Control and Prevention (the “CDC”) has issued guidelines discouraging large gatherings in order to slow the spread of COVID-19. While some communities have begun to ease these restrictions, a company cannot know how long these restrictions will remain in place in any given location or whether they will be rescinded in full or reinstated by the date of the company’s annual meeting. In addition, shareholders may prefer to avoid large gatherings for some time after restrictions are lifted

## ▪ Impact on Company Attendees

- Many companies are strongly discouraging employees from congregating. An in-person meeting would be inconsistent with that position

## ▪ Exposure for Shareholder Attendees

- According to the CDC, the virus that causes COVID-19 spreads easily and sustainably. The virus can spread from person to person (even from an asymptomatic individual) and from contact with a contaminated surface or object. Accordingly, the presence of an infected person or a contaminated object at the annual meeting could cause the virus to spread among attendees, especially older adults, who are at a higher risk for serious illness from COVID-19

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# Investor Relations Considerations

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## ▪ Institutional Investor and Shareholder Advocates Make COVID-19 Exception

- In past proxy seasons, many shareholder advocacy groups and institutional investors have expressed significant opposition to virtual-only meetings based on the notion that the format diminishes the quality of the interaction between shareholders, on the one hand, and management and directors, on the other
  - For the 2019 proxy season, Glass Lewis's policy was to recommend voting against a company's governance committee members if a company's virtual meeting format did not ensure that shareholders would be afforded the same rights and opportunities to participate as they would be for an in-person meeting
- In light of the COVID-19 situation, ISS and Glass Lewis have indicated that they will not oppose a company's decision to hold a virtual-only meeting so long as the company's proxy disclosure explains the reason for changing the meeting format and assures shareholders' participation rights, including allowing shareholders to ask questions, present shareholder proposals and comment on the company's performance or governance
- In light of these investor concerns, we suggest that any decision to switch to a virtual-only meeting should be approved by the board of directors

## ▪ Shareholder Access and Confidence

- The success of a hybrid or virtual-only meeting depends, in large part, on a company's ability to ensure that shareholders who participate via remote communication have the same access, in terms of participation, as all other participating shareholders and confidence in the meeting format. Shareholders need to be able to access and test the platform prior to the start of the meeting and to virtually present shareholder proposals of which they are proponents. Companies obviously should not use a format that requires membership or payment on the individual participants' part, but companies can take reasonable steps to restrict attendance to shareholders. (The meeting does not have to be publicly available like earnings calls, for example.) Most importantly, companies need to ensure that shareholders participating in their annual meeting via remote communication have the ability to participate in the Q&A. This can occur through live questions or pre-submitted questions. Companies could consider taking real-time questions over email or Twitter, or other social media platforms, and then having those read aloud by a company representative

## ▪ Nature of Items to Be Voted On

- The nature of the items to be voted on at the annual meeting can affect the likelihood that a shareholder or shareholder advocacy group might bring a challenge based on a company's decision to change the meeting format or otherwise criticize a company for that decision. If the items to be voted on at the annual meeting are limited to routine and noncontroversial proposals (e.g., uncontested director elections, ratification of auditors, annual say-on-pay vote), an argument that the directors changed the format to affect the outcome of the vote is not as strong as it could be if the items up for vote were contested or otherwise controversial among shareholders

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# Legal Considerations

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## **Federal Securities Law**

- **The location of a corporation’s annual shareholder meetings and the ability to conduct a virtual meeting are matters of state law and a company’s governing documents**
- **On March 13, the SEC staff published guidance on conducting annual meetings in light of COVID-19 concerns this year**
  - Virtual-Only or Hybrid Meeting: Issuers should notify shareholders, intermediaries in the proxy process, and other market participants of their plans in a timely manner and disclose clear directions as to the logistical details of the meeting format, including how shareholders can remotely access, participate in, and vote at the meeting
  - Changing Date, Time or Location of Meeting: For issuers seeking to change the date, time or location of their meeting (including switching to a virtual-only meeting), after having filed their proxy, the SEC staff recommends:
    - issuing a press release announcing the change
    - filing the announcement as definitive additional soliciting material on EDGAR
      - issuers would not need to mail the definitive additional soliciting material
    - taking 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 the appropriate national securities exchanges) of the change
  - Presentation of Shareholder Proposals: Issuers are encouraged to provide shareholder proponents who must appear and present their proposals at the annual meeting the ability to do so through alternative means, such as by phone, during the 2020 proxy season
    - If hardships related to COVID-19 result in a shareholder proponent or their representative being unable to attend the annual meeting and present their proposal as required by Rule 14a-8(h), the staff would consider this to be “good cause” if an issuer asserts 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. Rule 14a-8(h)(3) permits such exclusion if the shareholder proponent or their representative fails to appear and present the proposal “without good cause”

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# Legal Considerations

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## **Delaware Law**

### **▪ Format of Annual Meeting**

- Under the Delaware General Corporation Law (“DGCL”), if a company’s board is authorized, whether by the DGCL or the company charter or bylaws, to determine the place of a shareholder meeting, then the board may, in its sole discretion, determine that the shareholder meeting will be a virtual-only meeting, allowing shareholders to participate, be deemed present and vote by remote communication; provided that:
  - the company takes reasonable measures to verify that each person deemed present and permitted to vote at the meeting by means of remote communication is a shareholder or proxyholder;
  - the company takes reasonable measures to provide such shareholders and proxyholders a reasonable opportunity to participate in the meeting and to vote on matters submitted to the shareholders, including an opportunity to read or hear the proceedings of the meeting substantially concurrently with such proceedings; and
  - the company maintains a record of votes or other actions taken at the meeting by shareholders or proxyholders participating by means of remote communication

### **▪ Notice of Switch to Virtual-Only Meeting**

- A decision to switch to a virtual-only meeting prior to giving notice of the meeting would not ordinarily raise any special state law notice requirements
  - On April 6, the Governor of Delaware issued the Tenth Modification of the Declaration of a State of Emergency for the State of Delaware Due to a Public Health Threat (the “Order”). Pursuant to Section 4.a.i. of the Order, a Delaware public company that, as of April 6, has already given notice for an in-person meeting may notify shareholders of the switch to a virtual-only meeting with a document publicly filed with the SEC and a press release issued and promptly posted to the company’s website
- Companies should consider the possible implications of DGCL 222 and 232 (regarding notice requirements for shareholders’ meetings) if implementing a switch to a virtual-only meeting after notice of an in-person meeting has been given

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# Legal Considerations

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## **Delaware Law (cont.)**

### **▪ Quorum and Voting Requirements**

- Shareholders who participate via remote communication will be considered present at that meeting

### **▪ Shareholder List**

- If the annual meeting is to be held solely by means of remote communication, then the list of shareholders entitled to vote at the meeting must be open for examination during the entire meeting on a reasonably accessible electronic network, and the information required to access such list must be provided with the notice of the meeting

### **▪ Adjourning or Postponing the Meeting**

- Unless the bylaws require otherwise, if the annual meeting is adjourned to a different date, time, or place (e.g., virtual location), notice need not be given of the new date, time, or place if the new date, time, or place is announced at the meeting before adjournment, unless the adjournment is for more than 30 days or a new record date is fixed for shareholders entitled to vote at the reconvened meeting, in which case new notice must be given
  - Pursuant to Section 4.a.ii. of the Order, if, as result of the COVID-19 outbreak, it is impracticable for a Delaware public company to convene an in-person meeting for which notice has been given as of April 6, the company may adjourn the meeting to another date or time, to be held by remote communication by providing notice of the new date and time and the means of remote communication in a document publicly filed with the SEC and a press release issued and promptly posted to the company's website
- Generally, a reconvened meeting is considered a continuation of the adjourned meeting and no new record date is required. However, the DGCL requires that the record date for a meeting be no more than 60 days before the date of such meeting. Thus, the company may need to set a new record date if the reconvened meeting is to be held significantly later than the date of the original meeting
- Postponement, on the other hand, of a meeting that has already been called and noticed results in a new meeting date or time, meaning new notice must be given. The company should also consider whether a new record date must be set, as discussed above



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# Legal Considerations

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## Delaware Law (cont.)

### ▪ **Delay in Calling the Meeting**

- A company is required to hold an annual meeting every 13 months; however, failure to hold a meeting within that time period does not affect an otherwise valid corporate action
  - The Court of Chancery may summarily order an annual meeting to be held upon the application of any stockholder or director if the 13-month period has lapsed, although it is likely that the Court would take into account the unusual circumstances the COVID-19 situation has presented in determining whether and when to grant such an order
- A delay of more than 30 days may reopen the Rule 14a-8 (regarding shareholder proposals) periods

## Stock Exchanges

- **NYSE and NASDAQ require listed companies to hold annual meetings but do not specify a particular format. However, NASDAQ requires that shareholders be afforded the opportunity to discuss company affairs with management**

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# Timing and Disclosure Considerations

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- **Aim to Determine the Meeting Format Before Giving Notice**

- The date, time and location of the annual meeting must be included in the notice
- Under the DGCL, companies must give notice of their annual meeting at least 10 days and no more than 60 days before the anticipated meeting date. However, SEC rules require that notice be given at least 40 days before the meeting date if the company is a “notice and access” issuer (meaning that it satisfies its proxy delivery requirements by posting its proxy materials to a website, notifying shareholders of the availability of such materials and sending paper or email copies upon request)

- **Subsequent Changes to the Date, Time or Location**

- Generally, subsequent changes to the date, time or location are subject to the notice and timing restrictions listed above
- To avoid having to give a new notice, a company could:
  - include in their initial meeting notice a statement encouraging shareholders to monitor the company’s press releases and website for important changes that might be made to the meeting, including shifting to a virtual meeting, as a result of the COVID-19 situation; or
  - convene the in-person meeting as scheduled, but immediately adjourn to a later date, time or place, including a virtual location
- The ability to adjourn a meeting (other than to solicit additional proxies) is normally covered by general discretionary proxy authority

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# Pursuing a Hybrid or Virtual-Only Meeting Format

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- **Contact a Platform Provider as Soon as Possible**

- In light of the COVID-19 outbreak, many public companies are considering incorporating remote communications in their annual meeting during this proxy season. As a result, platform providers may have limited capacity to support this significant increase in demand
- In addition, the platform provider can help companies work through the significant logistical considerations that will need to be addressed in pursuing either a hybrid or virtual-only annual meeting, including the following:
  - Does the company have adequate technology to reach all shareholders, as well as management, who wish to participate?
  - Does the company have the capacity to thoroughly test the platform prior to the meeting?
  - Does the company have a plan in place to give equal opportunities for interaction to both in-person and online participants (in the case of a hybrid meeting)?
- There are substantial logistical benefits to making a decision to implement a hybrid or virtual-only meeting from the outset

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