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Options for Annual Shareholder Meetings

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With the vast uncertainty generated by the novel coronavirus (COVID-19) pandemic, one of the immediate challenges that Ohio's financial institutions must confront, especially at this time of year, involves how to handle their annual shareholder or member meetings. In the wake of social distancing mandates and stay at home orders, including federal and state directives restricting mass gatherings, Ohio's businesses are forced to act quickly and decisively. Given the fluid public health situation, and the delays and flexibility that it requires, practical considerations will likely require financial institutions and/or their holding companies to either delay their annual meetings or opt to conduct their meetings virtually.

The need for urgent action, however, does not relieve organizations from complying with relevant legal obligations imposed by applicable statutes and regulations as well as internal governing documents.

For stock holding companies, determining the options available for annual meetings requires an analysis of relevant state corporate law as well as the organization's governing documents. For stock financial institutions, it requires an analysis of applicable state or federal banking laws and regulations (depending on the nature of the charter) as well as the organization's governing documents. Similarly, for mutual holding companies (as well as mutual institutions), it requires an analysis of applicable state or federal banking laws and regulations (again depending on the nature of the charter) and the organization's governing documents.

Except where federal law provides otherwise, annual meetings of federally-chartered financial institutions will typically be governed by state corporate law in the state in which their main office is located, unless their governing documents provided otherwise. For the majority of federally-chartered financial institutions headquartered in Ohio, Ohio corporate law is the primary source of corporate guidance regarding annual meetings, in addition to their own governing documents. Federally-chartered mutual organizations, whether mutual holding companies or mutual depositories, can be somewhat more complex. Issues with respect to mutual organizations are addressed separately

below.

First and foremost, no matter the structure of the organization, organizations should review with their legal counsel the flexibility provided under their governing documents for holding virtual or telephonic meetings. Even if an organization's governing documents do not appear to specifically state that such alternatives for shareholder meetings are available, those alternatives nonetheless may be permissible under state law. For both stock companies and mutual organizations, the Ohio Revised Code (ORC), federal law and federal regulations are largely deferential to the organization's governing documents. If drafted appropriately, governing documents can provide boards of directors with much-needed flexibility to (1) set and adjust the date and time of the annual meeting and (2) conduct the annual meeting virtually, within the statutory and regulatory parameters discussed below. This flexibility becomes critical when situations arise that require boards to take action and make changes quickly. Those situations can arise for a multitude of reasons. By limiting a board's flexibility, governing documents can, unfortunately, tie directors' hands when dealing with crises and other unpredictable situations, resulting in unnecessary delays, costs and other unforeseen consequences.

If an organization determines in consultation with legal counsel that it does not have the flexibility to conduct this year's annual meeting other than in person, organizations are urged to prepare now for future issues by reviewing and, as necessary, updating their governing documents to provide the maximum flexibility permitted by applicable law to their boards of directors.

Stock Holding Companies Organized Under Ohio Law, Stock Ohio-Chartered Financial Institutions, and Stock Federally-Chartered Financial Institutions Electing Ohio Law

Setting the Date, Time and Location of the Annual Shareholder Meeting

For stock organizations incorporated in Ohio, or federally-chartered organizations otherwise governed by Ohio corporate law, applicable Ohio law requires that an annual shareholder meeting be held in order to elect directors and consider the reports of the corporation. Section 1701.39 of the ORC states that the annual meeting "shall be held *on a date designated by, or in the manner provided for in, the articles or in the regulations.*" In the absence of such designation, the annual meeting defaults to the first Monday of the fourth month following the close of each organization's fiscal year.

It is unlikely that an organization can amend its governing documents ahead of this year's annual meeting.^[1] However, this does not mean organizations should not prepare for the future in case similar situations arise. Since Ohio law grants corporations broad discretion to designate the date and time of the annual meeting in their governing documents, organizations should review their governing documents and determine, after consulting with legal counsel, (1) the available options in setting the date, time and location of the annual meeting this year and (2) whether revisions should be made in order to afford the board maximum flexibility in the future.

For example, a corporation's code of regulations could state that the annual meeting "shall be held on (date/time) at (location) or such other date and time and at such location as may be determined by the board of directors." This language gives directors maximum flexibility to determine the date, time and location of the annual meeting each year. Should circumstances arise, like the COVID-19 pandemic, that

necessitate scheduling or postponing the annual meeting to a later date, or moving the location (including holding the meeting virtually), directors are lawfully empowered to do so.

Virtual Meetings

Under Ohio corporate law, boards of directors determine the date, time and *place* of the annual shareholder meeting. Ohio law permits meetings to be held either (1) in-person, (2) in-person *and* via electronic communication (a “hybrid meeting”)[2] and (3) *solely* via electronic communications (a “virtual meeting”). Should circumstances necessitate corporations to hold a virtual meeting, ORC § 1701.40(B) provides that the “articles or regulations may authorize the directors to determine that the meeting shall not be held at any physical place, but instead may be held solely by means of communications equipment as authorized by division (C) of this section.” Additionally, ORC § 1701.40(B) provides even greater flexibility in authorizing virtual meetings to corporations that are “issuing public corporations”[3] so long as the articles or code of regulations “do not require that a meeting be held at a particular physical place and also authorize the directors to fix the place of the meeting.”[4]

If a corporation’s governing documents do not contemplate or permit virtual meetings consistent with ORC §1701.40(B), boards are restricted from calling a virtual meeting in the event that it is impractical, impossible or unsafe to hold the annual meeting in-person. This is severely limiting, forcing corporations to delay their annual meetings until they can be held in-person at a physical location. As COVID-19 has demonstrated, these delays can be indefinite, impeding necessary corporate action from taking place.

Changing the Annual Meeting

Once the date, time and place (if any) of the annual meeting has been designated by the board, and the corporation has sent shareholders a notice of meeting and proxy statement, the following questions remain: (1) can a company subsequently make changes to the annual meeting; and (2) if so, what type of notice is required?

Stock companies that are subject to the rules promulgated by the SEC and/or stock exchanges must be sure to understand and comply with these rules in the conduct of their shareholder meetings. Importantly, the SEC issued guidance on March 13, 2020 detailing specific requirements that issuers must comply with to make changes to their annual meetings in light of COVID-19.[5]

For non-reporting Ohio organizations, the guidance is not as clear. Neither the ORC nor Ohio case law addresses whether such changes are permissible, although Ohio law does not expressly restrict such changes from taking place. Thus, if an organization’s governing documents provide the flexibility discussed above, these corporations *are* entitled to make changes to their annual meeting, so long as they comply with the notice requirements specified in ORC §1701.41 (and their governing documents).

ORC §1701.41 specifies that notice must be given to shareholders not less than **seven days** nor more than **sixty days** before the meeting date (*unless* the articles or regulations specify a longer period). If a corporation has already mailed its notice of meeting and proxy statement, a corporation *can* send a new notice, assuming that the corporation has sufficient time (i.e., at least seven days), informing shareholders of the change in date, time and/or providing details on how to participate in the meeting virtually.[6]

Care must be taken to consider whether the information contained in the proxy materials remains appropriate for the later-dated meeting and whether a new record date must be set. Under Ohio law, the record date cannot be more than **60 days** prior to the annual meeting. Therefore, if the delay causes the annual meeting date to be more than 60 days after the record date, a new record date would need to be set by the board.

If there is insufficient time to send shareholders a new notice, or the organization's governing documents are otherwise too restrictive to permit a change, alternative solutions need to be considered. For example, the annual meeting could be held as planned, but the board could immediately adjourn the meeting to a new date and/or location (i.e. virtually) assuming it is otherwise permissible. Additional notice is generally not required under ORC §1701.41 if the new meeting details are fixed and announced at the original meeting (although practical considerations may dictate sending a new notice with information about how to access the meeting and participate electronically). However, if adjournment is impracticable, organizations may need to consider holding the meeting as planned, while relying on proxies for quorum and voting purposes.

In short, there are a number of considerations when stock organizations consider annual meeting issues and obligations, and care must be taken to handle those issues and obligations so as to avoid potential shareholder concerns, and possibly invalidating the meeting. Stock institutions are also advised to communicate with their regulatory authorities as they consider and address these issues.

State and Federal Mutual Organizations

For Ohio-chartered mutual institutions, member meetings are likewise required annually. ORC Chapter 1114 does not directly state that mutual institutions are required to have annual meetings, but the requirement can be inferred through ORC § 1114.12, which lays out the notice requirements for both *annual* and special meetings of the members of a mutual institution.

Since there are no statutory provisions governing the date, time, or place of a mutual institution's annual meeting, the governing documents of the organization will control. Again, like stock organizations, the governance documents can provide the mutual organization needed flexibility in setting the time, date, and place (if any) of the annual meeting or restrict its ability.

As with stock organizations, the ORC is silent regarding the requirements of changing the annual meeting of a mutual organization. Thus, mutual institutions may wish to follow the same procedures as stock organizations outlined above if they decide to change their annual meeting. The only difference with the procedures outlined above is that mutual organizations have a second option of giving notice under ORC § 1114.12. Ohio-chartered mutual institutions are still permitted under ORC § 1114.12 to follow the notice requirements as outlined in ORC § 1701.41 above in order to change the date, time, and/or place of the annual meeting, but mutual institutions are also provided a second option to provide notice – by publication in a newspaper for three consecutive weeks immediately preceding the date of the meeting.

Federally-chartered mutual institutions and holding companies likewise can consider the foregoing but should check with the Comptroller (for federal institutions) and the Federal Reserve (for federal mutual holding companies and affiliates) as to any agency policies in effect at the time.

Conclusions

At this point, global attention is squarely focused on the COVID-19 pandemic and its reverberating social, economic and political effects. Organizations should review their governing documents and consult with legal counsel to determine their available options under applicable law ahead of this year's annual meeting. If permitted by their governing documents, these options can include changing their annual meeting and/or holding their annual meeting virtually.

Nevertheless, as institutions tackle the numerous challenges that COVID-19 has created, it is important to understand that an unlimited number of issues can arise, short of a global health crisis that could require annual shareholder or member meetings to be changed.

Financial institutions and their holding companies should review their governance documents to ensure that they provide maximum flexibility to the board with respect to these and other organizational matters and governance issues. When unpredictable situations arise, directors should have the ability to respond by changing the date, time and place for the annual shareholder or member meeting, in accordance with the best interests of the institution. This includes allowing for virtual meetings to enable maximum participation when it is impractical, impossible or unsafe to hold the annual meeting in-person.

Boards of directors require maximum flexibility to address situations as they arise, including unpredictable and unforeseeable events like the COVID-19 pandemic, so that directors may, with the best interests of the institution in mind, act quickly, decisively and consistent with applicable law and regulation.

If you have any questions about this client alert, contact Jeff Smith, Kim Schaefer, Tony Weis, Matt Gutierrez, Scott Herkamp, or your Vorys attorney.

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Vorys COVID-19 Task Force

Vorys attorneys and professionals are counseling our clients in the myriad issues related to the coronavirus (COVID-19) outbreak. We have also established a comprehensive COVID-19 Task Force, which includes attorneys with deep experience in the niche disciplines that we have been and expect to continue receiving questions regarding coronavirus. Learn more and see the latest updates from the task force at vorys.com/coronavirus.

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[1] The process to amend an organization's governing documents can take some time – in most cases, a shareholder meeting must be held in order to amend the articles or code of regulations. Because annual meetings are closely approaching, it is unlikely organizations can modify their existing governing documents in time to give their boards the ability to change their annual meetings this year if a shareholder vote is required.

[2] If a meeting is held at a physical location, ORC § 1701.40(C) permits, in relevant part, directors to authorize that “the shareholders and proxyholders who are not physically present at a meeting of shareholders may attend a meeting of shareholders by use of communications equipment that enables

the shareholder or proxyholder an 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 and to speak or otherwise participate in the proceedings contemporaneously with those physically present.”

[3] An “issuing public corporation” is defined under ORC § 1701.01(Y) as a “a domestic corporation with fifty or more shareholders that has its principal place of business, its principal executive offices, assets having substantial value, or a substantial percentage of its assets within this state, and as to which no valid close corporation agreement exists.”

[4] Please note that if a corporation is not an “issuing public corporation,” Ohio law requires a corporation’s governing documents to expressly authorize virtual meetings.

[5] Staff Guidance for Conducting Annual Meetings in Light of COVID-19 Concerns, March 13, 2020, <https://www.sec.gov/ocr/staff-guidance-conducting-annual-meetings-light-covid-19-concerns>.

[6] If a corporation opts to move the date of their annual meeting, it should be sure to set the date within 60 days of sending the new notice.