



Adjourning an annual shareholders meeting is always stressful. The meeting has been carefully planned and now we need to extend our misery. Adjourning a meeting can be legally tricky and the proper groundwork to allow for such a thing needs to be laid before the need is apparent. [A blog about postponements coming soon.]

### **Why meetings might be adjourned?**

One common reason for adjournments is when there is a proposal on the agenda that is hotly contested, so the voting results look close and management really doesn't want to lose this one. Or maybe there is nothing that is being contested, but you're having trouble bringing in the vote so you can't reach quorum. Ugh. Shareholder apathy. It's not uncommon for companies to experience a lack of interest by shareholders to vote.

There could be adjournments not related to soliciting more votes. Perhaps there is a change in senior management or maybe there was an adjourned meeting due to the special circumstances of a pandemic as we all experienced a few years ago.

### **Can we adjourn the meeting to solicit more votes?**

The short answer is that it will depend on the laws of the state in which your company is incorporated – and if your charter and bylaws allow for it – and you foresaw the possibility of an adjournment and baked that possibility into your proxy disclosure and your proxy card. If all that is in your favor, it may be possible.

Note that you might have a "partial" adjournment. A company might only adjourn the part of the meeting relating to that one proposal that needed soliciting.

#### **1. State law**

Let's start with the state law analysis. Let's say your company is incorporated in Delaware, as many public companies are. Under Delaware law, if a Delaware court determines that a meeting was delayed as a defensive tactic or to interfere with the shareholders' right to vote, the court will place the burden on the company seeking the delay to demonstrate that the delay was appropriate, regardless of the authority granted under the company's bylaws and charter.

In most cases, adjournment to simply solicit more votes should pass muster here. If problems arise, it's typically because a merger is involved – or perhaps a proxy fight. But if your facts are less contentious, it shouldn't be a Delaware law problem.

You have to be mindful about how long the adjournment lasts. Be aware that under Section 222(c) of the Delaware General Corporation Law, if notice of the date to which the meeting is adjourned is provided at the meeting - and if the adjournment is less than 30 days - no notice about the adjournment is required to be given to shareholders.

And you don't want a new record date if you can avoid it. Section 213(a) of the DGCL provides that unless the directors fix a new record date, the record date for the adjourned meeting will remain unchanged. If the record date doesn't change, proxies solicited for an adjourned meeting may be voted when the meeting reconvenes.

#### **2. Federal securities law**

To facilitate your ability to adjourn the meeting if necessary, you want to include a box on your proxy card (and VIF) asking shareholders to give you authority to adjourn the meeting – and then you need to remember to back up that box in your proxy statement disclosure, explaining what you're doing (e.g., we need to adjourn the meeting to solicit additional votes).

The SEC requires that companies provide shareholders with the ability to specifically vote on any such adjournment proposal on the proxy card. Rule 14a-4 grants a company the ability to solicit proxies conferring discretionary authority to management to vote on matters "incident to the conduct of the meeting." That's standard phrasing on all proxy cards. But the SEC doesn't consider adjourning a meeting to be "incident to the conduct." It's not part of the proxy holder's discretionary authority.

So if you don't have a proposal that allows for adjournment on your proxy card and described in the proxy statement, you are likely out of luck. This concept isn't the easiest one to understand in the securities laws – so it bears refreshing your memory every proxy season.

And remember that even if a company isn't obligated by state law to give shareholders notice about an adjourned meeting, if the company is adjourning to solicit more votes, the company will need to file any proxy supplements or additional soliciting material that are used with the SEC.

### **3. Bylaws and Charter provisions**

The authority to adjourn a meeting typically is in a bylaw provision. Maybe it's a bylaw provision that gives the board the right to adjourn the meeting. Maybe the provision gives a majority of the shares present at the meeting – even if less than a quorum – that adjournment right.

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