

KIRKLAND M&A UPDATE

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Setting the Record (Date) Straight

Compliance with technical requirements and an awareness of strategic implications are necessary to ensure that parties don't fall prey to pitfalls inherent in treating setting the record date as a mere administrative task.

A record date, often viewed in the merger context as a mere mechanic to be quickly checked off a “to do” list, creates a frozen list of stockholders as of a specified date who are entitled to receive notice of, and to vote at, a stockholders’ meeting. A tactical approach to the timing of the record date can have strategic implications on the prospects for a deal’s success, while the failure to comply with the rules relating to setting a record date could cause a significant delay in holding the vote, leaving the door open for a topping bidder or dissident stockholder to emerge or gather support. As a result, it is important that dealmakers understand the basic mechanics and rules of setting a record date and the tactical repercussions of the record date construct.

Starting first with the legal requirements, there are several key inputs that inform the mechanics of setting a record date, including laws of the company’s state of incorporation, the company’s organizational documents, federal securities laws, rules of the applicable securities exchange and the relevant merger agreement. Taken together, these requirements dictate the necessary procedural and governance steps for setting the record date and establish the minimum and maximum time periods between the record date and the meeting, as well as between the board action setting the record date and the record date itself.

The perils of failing to comply with formalistic legal requirements were highlighted in the *Staples* decision in 2001. Then-VC Strine, in a fact-intensive decision, enjoined the impending vote and required Staples to fix a new record date before proceeding with its meeting because he found that the power to set the record date had not been properly delegated by the board and contemporaneous documentation of the action setting the record date was absent. Similarly, failure to comply with technical SEC broker-search requirements in a timely manner for the requisite period ahead of the record date can have unforeseen consequences. In a number of cases, particularly where the deal is being contested, the SEC has commented on the failure to comply with these rules, resulting in a potential requirement to establish a new record date and postponement of the vote (see, e.g., *Midwest/AirTran*, *Dollar Thrifty/Hertz*).

Beyond the technical requirements, there are also strategically significant considerations in setting the record date because of its role in determining which stockholders are entitled to vote. On the most basic level, locking in the stockholder list provides the company and its advisers with a settled group of stockholders from whom they can solicit votes. More broadly, an early freezing of the voter base can impede dissident stockholders or competing bidders from buying in (or further buying in) after the record date and thereby seeking to influence the outcome of the vote because, as a general matter, the right to vote does not transfer with shares acquired after the record date. On the flip side, an early record date can exacerbate the risk of “empty voting” where stockholders who have sold their shares after the record date but before the meeting continue to have the right to vote for or against a deal despite lacking a corresponding economic interest in the company.

Motivated in part by a perceived need to address the potential mischief that can result from “empty voting”, in 2009 Delaware adopted amendments to the DGCL allowing companies to bifurcate their record dates, setting one earlier record date for notice of the meeting and a later record date for the right to vote. While a later voting record date may alleviate the empty voting issue (or at least shorten the exposure period), the benefit might be outweighed by offsetting considerations. For example, the ability to solicit votes may be partially impaired because of the failure to get an early and fixed snapshot of the stockholder base and setting a bifurcated record date may (rightly or wrongly) signal to the market that the company is concerned about its ability to obtain the requisite vote.

The potential strategic implications of setting a record date become apparent when the record date has ramifications on the ability to delay a scheduled meeting date. The need or desire to delay a meeting can arise in a number of different circumstances — e.g., where a competing bid or other new information surfaces close to the scheduled meeting date or where the company has concerns about obtaining the required vote. As seen in the maneuvering over the delays in the stockholder votes at Dynegy and Cedar Fair in 2010, the ability of a company to delay the stockholder vote in the face of opposition to the proposed merger is significantly impacted by the effect of the delay on the existing record date as well as somewhat intricate legal distinctions under state law and the company's organizational documents. While producing the same outcome in terms of delaying the scheduled vote, the mechanic of delay — i.e., whether termed a postponement, adjournment or recess — may in fact determine whether the delay results in the need to set a new record date (and therefore a refreshed list of stockholders entitled to vote on the

deal) and whether stockholder approval for the delay itself may be required. Parties should also be mindful that courts may critically review a decision to delay a meeting (and to preserve or, alternatively, update the record date) if the court determines that the intent of the delay and its impact on the record date, by postponement, adjournment or otherwise, was to frustrate the stockholder franchise or was an improper defensive tactic.

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The inevitably unique facts of each deal will likely dictate the optimal record date for the stockholder meeting. Early attention to the record date question is advisable given the long lead-time under some of the procedural legal requirements mentioned above. Compliance with technical requirements and an awareness of strategic implications are necessary to ensure that parties don't fall prey to pitfalls inherent in treating setting the record date as a mere administrative task.

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