

CORPORATE

ALERT

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COVID-19: SEC Guidance Regarding Annual Shareholder Meetings

By Sarah Hewitt

The staff of the Division of Corporation Finance of the U.S. Securities and Exchange Commission (“SEC”) issued guidance on March 13, 2020 regarding annual shareholder meetings during the COVID-19 crisis period. A copy of the SEC’s March 13 guidance may be found here - <https://www.sec.gov/ocr/staff-guidance-conducting-annual-meetings-light-covid-19-concerns>.

The SEC released the guidance after receiving inquiries from issuers and shareholders regarding compliance with the federal proxy rules for upcoming annual meetings in light of various logistical issues raised by the spread of COVID-19. Most states have now issued stay at home orders and are mandating social distancing through April 30 and possibly beyond in light of the pandemic. April and May are popular times of year for both public and private companies to hold their annual shareholder meetings as required by state law. Public companies have the additional obligation of preparing, filing, and distributing proxy materials to their shareholders for such meetings.

According to the guidance, those issuers now contemplating possible changes in the date, time, or location of their annual meetings due to the difficulties arising from COVID-19, after previously mailing and filing their definitive proxy materials, can notify shareholders of a change in the date, time, or location of their annual meeting without mailing additional soliciting materials or amending their proxy materials. However, issuers must act promptly and sufficiently in advance of the meeting to:

- Issue a press release announcing such change;

- File the announcement as definitive additional soliciting material on EDGAR; and
- Take 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 such change.

To the extent that issuers have not yet mailed and filed their definitive proxy materials, they should consider whether to include in their proxy materials disclosures regarding the possibility that the date, time, or location of the annual meeting will change due to COVID-19.

Some state corporation laws such as those of Delaware permit companies incorporated in their state to conduct a “virtual” meeting through the internet or other electronic means in lieu of an in-person meeting if the issuer’s governing documents so allow. Other state corporation laws permit companies incorporated in their state to conduct an in-person meeting that also includes shareholder participation through electronic means (known as a “hybrid” meeting). The SEC notes that “robust disclosures that facilitate informed shareholder voting are just as important for a ‘virtual’ meeting or ‘hybrid’ meeting as they are for an in-person meeting.”

The new SEC guidance further provides that, “to the extent an issuer plans to conduct a ‘virtual’ or ‘hybrid’ meeting, the staff expects the issuer to notify its shareholders, intermediaries in the proxy process, and

other market participants of such plans in a timely manner and disclose clear directions as to the logistical details of the ‘virtual’ or ‘hybrid’ meeting, including how shareholders can remotely access, participate in, and vote at such meeting.” For issuers that have not yet filed and delivered their definitive proxy materials, such disclosures should be in the definitive proxy statement and other soliciting materials. Issuers that have previously filed and mailed their definitive proxy materials would not need to mail additional soliciting materials (including new proxy cards) solely for the purpose of switching to a “virtual” or “hybrid” meeting if they follow the steps described above for announcing a change in the meeting date, time, or location.

Public companies should consider seeking guidance from legal counsel if they have shareholder meetings planned during this uncertain time. They may want to consider changing the date and location of the meetings and/or using new technologies such as “virtual” or “hybrid” shareholder meetings that avoid the need for in-person attendance by the board, management, and shareholders. Companies should be sure that shareholders are properly informed of any such changes through press releases and SEC and other filings as described above.

This Alert is based on information available at the time of publishing. It is subject to change. Business leaders should consult with counsel and refer to government websites and publications for the most up-to-date information.

For more detailed analysis on a wide range of legal issues, please see Schnader’s COVID-19 Resource Center at www.schnader.com/blog/covid-19-coronavirus-resource-center. ◆

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