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Conducting Annual Meetings in Light of COVID-19 Concerns: SEC and Proxy Advisory Firms Weigh In

On March 13, 2020, the staff of the SEC’s Divisions of Corporation Finance and Investment Management published [guidance](#) to assist public companies, investment companies, stockholders, and other market participants affected by the novel coronavirus disease 2019 (COVID-19) with their upcoming annual stockholder meetings. The guidance is designed to facilitate the ability of companies to hold these important meetings, including through the use of technology at “virtual” meetings, while complying with the federal securities laws.

In this Alert, we summarize the staff’s guidance and the views of the proxy advisory firms and highlight other important considerations for any company that may be considering conducting a “virtual” annual meeting due to COVID-19 concerns.

SEC Staff Guidance

Changing the Date, Time, or Location of an Annual Meeting

The staff will take the position that an issuer that (i) has decided to change the date, time, or location of its annual stockholder meeting due to difficulties arising from COVID-19, and (ii) has already mailed and filed its definitive proxy materials can notify stockholders of the change without mailing additional soliciting materials or amending its proxy materials if the issuer:

- issues a press release announcing the change in the date, time, or location;
- files the announcement as definitive additional soliciting material on EDGAR; and
- takes all reasonable steps necessary to inform other intermediaries in the proxy process and other relevant market participants (such as any proxy service provider and the appropriate national securities exchanges) of the change.

The SEC staff expects an issuer to take the above actions promptly after making a decision to change the date, time, or location of its annual meeting and sufficiently in advance of the meeting so as to timely alert the market. If an issuer has not yet mailed and filed its definitive proxy materials, the guidance states that the issuer should consider, based on its particular facts and circumstances and the reasonable likelihood of any change in meeting date, time, or location, whether to include disclosures in its proxy materials regarding the possibility of such changes due to COVID-19. Issuers that have not yet filed a definitive proxy statement should take advantage of the opportunity to include the suggested disclosure of the possibility that the annual stockholder meeting will need to be changed to a virtual-only meeting.

“Virtual” Stockholder Meetings

The guidance acknowledges that an issuer’s ability to conduct a “virtual” stockholder meeting is governed by the law of an issuer’s state of incorporation and the issuer’s governing documents.

If an issuer plans to conduct a “virtual” or “hybrid” (i.e., an in-person meeting that also permits stockholder participation through electronic means) meeting, the SEC staff expects the issuer will notify its stockholders, intermediaries in the proxy process, and other market participants of such plans in a timely manner and disclose clear directions on the

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logistical details of the “virtual” or “hybrid” meeting, including how stockholders can remotely access, participate in, and vote at such meeting.

If an issuer has not yet filed and delivered its definitive proxy materials, the guidance indicates that these disclosures should be included in the issuer’s definitive proxy statement and other soliciting materials. If the issuer has already filed and mailed its definitive proxy materials, however, then the issuer could file additional soliciting material with the SEC but would not need to mail the additional soliciting materials (and in most cases would not need to mail new proxy cards) solely for the purpose of switching to a “virtual” or “hybrid” meeting if the issuer follows the steps described above for announcing a change in the meeting date, time, or location.

Presentation of Shareholder Proposals

Exchange Act Rule 14a-8(h) requires shareholder proponents, or their representatives, to appear and present their shareholder proposals at the annual meeting. In light of the possible difficulties for shareholder proponents to attend annual meetings in person to present their proposals, the SEC staff is encouraging issuers, to the extent feasible under state law, to provide shareholder proponents or their representatives with the ability to present their proposals through alternative means, such as by phone, during the 2020 proxy season.

In addition, the guidance clarifies that, if a shareholder proponent or representative is not able to attend the annual meeting and present the proposal due to the inability to travel or other hardships related to COVID-19, then the staff would consider this to be “good cause” under Rule 14a-8(h), which would prevent an issuer from asserting Rule 14a-8(h)(3) as a basis to exclude a proposal submitted by the shareholder proponent for the next two annual meetings.

Proxy Advisory Firms’ Views

Recently, ISS and Glass Lewis have reportedly provided additional color on the use of virtual meetings during the 2020 proxy season in light of COVID-19.¹

ISS. Although ISS does not have a specific proxy voting policy on the use of virtual meetings, it has indicated that it will require an issuer that intends to conduct a virtual meeting due to COVID-19 concerns to provide full disclosure ensuring that the meeting will not limit stockholders’ rights to participate. Specifically, ISS expects virtual meetings to be transparent and organized in a manner that will allow a company’s stockholders to communicate with management, ask questions, and present shareholder proposals. The way in which companies manage virtual meetings this year will likely impact ISS’s policy position on virtual meetings in the future.

Glass Lewis. Glass Lewis’s existing voting policies generally recommend voting against governance committee members where the company plans to hold a virtual-only meeting and the company does not provide robust disclosure in its proxy statement that assures stockholders that they will be afforded the same rights and opportunities to participate as they would at an in-person meeting. Examples of such disclosure include: (i) addressing the ability of stockholders to ask questions during the meeting, including time guidelines, rules on permissible topics, and rules for how questions and comments will be recognized and disclosed to meeting participants; (ii) procedures, if any, for posting appropriate questions received during the meeting and the company’s answers on the investor page of their website; (iii) addressing technical and logistical issues related to accessing the virtual meeting platform; and (iv) procedures for accessing technical support to assist in the event of any difficulties accessing the virtual meeting. For issuers that have already filed their definitive proxy materials and later decide to switch to a virtual-only meeting, Glass Lewis indicated that it expects companies to disclose that the reason for the change is due to COVID-19, provide information addressing how

¹ Kingsdale Advisors, *Proxy Advisors’ Views on Virtual Meetings*, available [here](#).

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stockholders may access the virtual meeting, and confirm the ability for stockholders to ask questions during the meeting.

Other Considerations

An issuer that is considering a potential switch from an in-person meeting to a virtual meeting should contact a service provider about hosting its annual meeting if it has not already done so. Because of the large number of companies that are likely to explore virtual-only meetings during this proxy season and the relatively limited number of service providers who have experience hosting virtual-only meetings, issuers should reach out to the relevant service providers well in advance of making the decision to switch to a virtual-only meeting in order to ensure that the logistics can be worked out without the need to delay the annual meeting. In addition, we understand that Broadridge is recommending that any issuer should make a final decision as to whether to hold a virtual meeting at least three weeks prior to the meeting date.

An issuer that determines to move forward with an in-person or hybrid meeting should continue to monitor public health developments, including any local regulations on holding gatherings given the risks posed by COVID-19.

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The situation surrounding the COVID-19 outbreak is a rapidly evolving one and issuers should continue to monitor current developments while evaluating alternatives for annual stockholder meetings in 2020. If you would like to learn more about the issues in this Alert, please contact your usual Ropes & Gray attorney.