

Alert

SEC Staff Issues COVID-19 Guidance Relating to Annual Shareholder Meetings and Compliance with Federal Proxy Rules

March 17, 2020

In view of the “health, transportation, and other logistical issues raised by the spread of the coronavirus,” the respective staffs of the Division of Corporation Finance and Division of Investment Management of the Securities and Exchange Commission (“Commission”) have jointly issued guidance addressing a number of issues pertaining to annual shareholder meetings of public companies, including registered investment companies and business development companies (each, an “Issuer”), as well as to related federal proxy rules (“Staff Statement”).¹ The guidance provided reflects a continued focus by the staff on the impact that the coronavirus may have on in-person meetings generally, both at the board and shareholder level.² In particular, the Staff Statement addresses:

- Filing and disclosure requirements relating to any change in the date, time or location of an annual shareholder meeting subsequent to the mailing of an Issuer’s definitive proxy materials;
- The use of “virtual” shareholder meetings by Issuers; and
- Presentation obligations for proponents of shareholder proposals submitted to Issuers pursuant to Rule 14a-8 under the Securities Exchange Act of 1934, as amended (“Exchange Act”).

The Staff Statement also encourages “all parties and intermediaries involved in the proxy voting process — including broker-dealers, transfer agents, and proxy service providers — to be flexible and work collaboratively with one another” in view of the disruptions that will likely continue to occur as a result of the coronavirus.³

Changes in the Date, Time or Location of an Annual Shareholder Meeting

As a number of Issuers have already filed their definitive proxy materials with the Commission and commenced delivery to their shareholders, the Staff Statement clarifies that these Issuers may change the date, time or location of their previously announced annual shareholder meeting, without formally amending their proxy materials or delivering an amendment to their shareholders, as long as such Issuers:

- Issue a press release announcing the change;

¹ Staff Guidance for Conducting Annual Meetings in Light of COVID-19 Concerns (March 15, 2020), <https://www.sec.gov/ocr/staff-guidance-conducting-annual-meetings-light-covid-19-concerns> (“Staff Guidance for Conducting Annual Meetings”).

² See Division of Investment Management Staff Statement on Fund Board Meetings and Unforeseen or Emergency Circumstances Related to Coronavirus Disease 2019 (COVID-19) (March 4, 2020), <https://www.sec.gov/investment/staff-statement-im-covid-19>

³ Staff Guidance for Conducting Annual Meetings.

- File the announcement with the Commission as definitive additional soliciting material; and
- Take all reasonable steps to inform other intermediaries in the proxy process (such as proxy service providers), other relevant market participants and the national securities exchange where an Issuer’s securities are listed, if any, of the change.

The Staff Statement further clarifies that Issuers should take such steps promptly after making any decision to change the date, time or location of an annual shareholder meeting, and do so “sufficiently in advance of the meeting so the market is alerted to the change in a timely manner.”⁴ The staff also encourages Issuers who have not yet mailed their definitive proxy materials to consider including disclosures regarding the possibility that the date, time or location of an Issuer’s annual shareholder meeting may be changed from that included in its proxy materials delivered to shareholders, depending on an Issuer’s particular circumstances and the reasonable likelihood of such a change.

The nature of the guidance provided by the staff appears focused on balancing the need to streamline the process for Issuers to change the date, time or location of their annual shareholder meeting in view of the impact of the coronavirus with a desire to ensure that no shareholders are disenfranchised as a result of such change. As a result, Issuers should be mindful about ensuring adequate disclosure and dissemination of any change in the date, time or location of their annual shareholder meeting subsequent to mailing of their definitive proxy materials, even if no amended definitive proxy materials are mailed to shareholders. In addition, Issuers who have not yet mailed definitive proxy materials may wish to include language regarding the possibility of a change, including to a “virtual” shareholder meeting format, to preserve optionality in the event current plans for an in-person shareholder meeting no longer remain viable.

“Virtual” Shareholder Meetings

The Staff Statement also addresses the use of “virtual” shareholder meetings, held using the internet or other electronic means in lieu of an in-person meeting, and “hybrid” shareholder meetings, which involve an in-person meeting that also permits shareholder participation through electronic means. In particular, the Staff Statement emphasizes the need for Issuers that intend to utilize a “virtual” or “hybrid” shareholder meeting structure to:

- Provide adequate notice of the meeting structure to their shareholders, intermediaries in the proxy process and other relevant market participants; and
- Ensure that the logistical details of the meeting, including how shareholders may remotely access, participate in, and vote at the meeting, have been adequately disclosed.

Notably, the guidance on “virtual” shareholder meetings remains focused on ensuring that shareholders continue to have the same access as they would with a traditional in-person meeting. To that end, the Staff Statement clarifies that the detailed information with respect to any “virtual” or “hybrid” shareholder meeting structure should be included in an Issuer’s definitive proxy materials and other soliciting materials. However, to the extent an Issuer that has previously filed and mailed its definitive proxy materials desires to switch to a “virtual” or “hybrid” shareholder meeting structure, it may do so

⁴ *Id.*

utilizing the same procedures as described above for a change in the date, time or location of an Issuer's annual shareholder meeting.

Issuers contemplating a switch to a "virtual" or "hybrid" shareholder meeting format should first confirm that applicable state law permits them to forgo a traditional in-person meeting structure. In addition, in view of the guidance provided in the Staff Statement, Issuers who contemplate utilizing a "virtual" or "hybrid" shareholder meeting format should ensure that they include sufficient information in their definitive proxy materials regarding the process for shareholders to attend, participate in and vote at such shareholder meeting. Issuers considering holding a "virtual" or "hybrid" meeting must also assess the feasibility of doing so from a technological and logistical standpoint, and should work closely with proxy service providers to help ensure a seamless meeting experience for shareholders. Given the fast-moving developments relating to the coronavirus outbreak, even Issuers who do not currently plan to utilize a "virtual" or "hybrid" shareholder meeting framework may wish to include language regarding the possibility of such a change in their definitive proxy materials, to the extent holding a traditional in-person shareholder meeting becomes untenable.

Presentation of Shareholder Proposals at Annual Shareholder Meetings

The Staff Statement also addresses the requirement set forth in Rule 14a-8(h) under the Exchange Act that a shareholder proponent, or a representative thereof, appear and present the proponent's proposal at an Issuer's annual shareholder meeting. Specifically, in view of the difficulties proponents may have attending an Issuer's annual shareholder meeting in view of the coronavirus outbreak, the Staff Statement encourages Issuers to allow proponents to present their proposals through alternative means, including telephonically, during the 2020 proxy season, to the extent permitted under applicable state law.

Notably, however, the Staff Statement does not expressly require Issuers to make such accommodations for shareholder proponents, which may make it more difficult for potential proponents to meet the requirements of Rule 14a-8(h) in the event travel restrictions or other factors arising from the coronavirus outbreak prevent them from attending an Issuer's in-person annual shareholder meeting. To that end, the staff indicates that it will consider the inability of a shareholder proponent to travel or other hardships related to the coronavirus to constitute "good cause" under Rule 14a-8(h), should an Issuer seek to assert Rule 14a-8(h)(3) as a basis for excluding a proposal submitted by such shareholder proponent for any shareholder meetings held during the following two calendar years.⁵

In view of the impact of the coronavirus generally, Issuers may wish to provide the type of accommodations suggested by the staff to shareholder proponents to avoid even the appearance of taking advantage of the current circumstances, particularly to the extent a shareholder proponent's proposal is merely precatory in nature. In addition, shareholder proponents who have submitted proposals under Rule 14a-8 should seek clarification from Issuers regarding what accommodations, if any, they intend to provide to shareholder proponents with proposals pending at upcoming annual shareholder meetings.

⁵ Under Rule 14a-8(h)(3), if a shareholder proponent, or a representative thereof, fails to appear and present the proponent's shareholder proposal at an Issuer's annual shareholder meeting, the Issuer may exclude any proposals that proponent may submit during the following two calendar year periods.

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