

Goodwin Alerts

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SEC Provides Guidance on Virtual Annual Meetings in View of COVID-19 Concerns

by John O. Newell

On March 13, 2020, the Securities and Exchange Commission (SEC) [announced](#) that the staff of the SEC's Division of Corporation Finance and the Division of Investment Management (Staff) have published [guidance](#) to assist public companies, investment companies, shareholders and other market participants in dealing with the impact of COVID-19 on upcoming annual shareholder meetings. The guidance clarifies how the Staff will view the obligations of companies under the federal securities laws when companies decide (1) to change the date, time or location of an annual meeting or (2) to conduct a "virtual" annual meeting through the internet or other electronic means to supplement an in-person meeting, also referred to as a "hybrid" meeting, or to conduct a virtual meeting in lieu of the company's in-person meeting. The guidance also discusses the views of the Staff on presentation of shareholder proposals when the proponent cannot attend an in-person annual meeting.

BACKGROUND

The law of the state in which a company is organized generally requires the company to hold an annual meeting of its security holders, and to provide notice of the time and date of the meeting and the place where it will be held. Companies that solicit proxies to vote at the meeting from holders of a class of voting securities registered under Section 12 of the Securities Exchange Act of 1934 (Exchange Act) must comply with federal proxy rules, which require (among other things) the company to physically deliver and/or provide electronic access to the company's proxy materials, such as the definitive proxy statement, proxy card and annual report.

The Staff guidance addresses only specific questions that may arise under federal proxy rules as a result of COVID-19 impacts. When considering changes in the date, time or location of its annual meeting, or adopting a virtual or hybrid annual meeting format, a company should remember that the company may need to review other legal, regulatory and practical considerations. These include state law requirements for notice and conduct of the meeting; requirements of the company's charter, bylaws or other organizational documents; and stock exchange requirements.

If the company is considering a virtual-only meeting, it may also wish to consider the voting policies of proxy advisory services and investor groups. Glass Lewis, which has generally issued negative voting recommendations on directors who serve on the company's governance committee unless the company makes specified disclosures that comply with the [Glass Lewis proxy guidelines](#), has [updated](#) its position for this proxy season. In the case of companies that have already mailed their definitive proxy materials, Glass Lewis has reportedly indicated that it expects public disclosure that describes the rationale for the change and how shareholders can access and participate in the virtual meeting. ISS has historically not taken a position on virtual meetings, but companies moving to a virtual or hybrid meeting should consider disclosures similar to those outlined by the SEC and Glass Lewis.

Institutional and activist investors have historically opposed virtual-only meetings, but opposition to virtual-only meetings may be tempered this year in light of COVID-19 concerns. For example, the New York City Comptroller's office, which oversees the City pension system's large holdings, has historically [opposed](#) virtual-only meetings. However, *The New York Times* [reported](#) on March 13, 2020 that the Comptroller has said that the funds it oversees "will not take action against boards holding virtual-only annual meetings due to the

coronavirus that disclose their rationale and affirm their commitment to holding in-person meetings in the future.” A representative of the Council of Institutional Investors has been [reported](#) as saying that “CII generally has opposed virtual-only shareholder meetings, in favor of a hybrid approach. Given coronavirus concerns, it is reasonable that some companies will go to virtual-only this spring. But we hope they will make it clear that this decision was one-off, and that they follow best practices for making any virtual meeting participatory.”

CHANGE OF DATE, TIME OR LOCATION OF ANNUAL MEETING

COVID-19 impacts, such as restrictions on travel or gatherings of groups, may result in a company changing the date, time or location of its annual meeting. The guidance describes how the Staff will view the company’s obligations under federal proxy rules when it makes these changes.

Companies That Have Already Filed and Sent Proxy Materials. If a company has already filed and sent its definitive proxy materials, the guidance indicates that the Staff will take the position that the company can notify its shareholders and others of a change in the date, time or location of the annual meeting **without mailing additional soliciting materials or amending its previously-filed proxy materials** if the company:

- Issues a press release announcing the change;
- Files the announcement as definitive additional soliciting material on the SEC’s EDGAR system; and
- Takes “all reasonable steps necessary to inform” other intermediaries in the proxy process, such as any proxy service provider, and any other relevant market participant (for example, the relevant nation stock exchange) of the change.

Companies That Have Not Yet Filed and Sent Proxy Materials. If a company has not yet mailed and sent its definitive proxy materials, the company should consider whether to include disclosure about the possibility that it may need to change the date, time or location of its annual meeting due to COVID-19 concerns. This determination will depend on the company’s particular facts and circumstances and the reasonable likelihood of such changes.

VIRTUAL AND HYBRID ANNUAL MEETINGS

The Staff guidance says that if a company plans to conduct a virtual-only meeting or a hybrid meeting, the company should:

- notify the company’s shareholders, proxy intermediaries, and other market participants of the plan in a timely manner; and
- disclose clear directions about the logistical details of the virtual or hybrid meeting, including how shareholders can remotely access, participate in, and vote at the meeting.

Companies That Have Already Filed and Sent Proxy Materials. The Staff guidance says that companies that have already filed and mailed the definitive proxy materials do not need to mail additional soliciting materials (including new proxy cards) solely to switch to a virtual or hybrid meeting if the company follows the steps in the preceding section for announcing a change in the date, time or location of the annual meeting.

Companies That Have Not Yet Filed and Sent Proxy Materials. The Staff guidance says that companies that have not yet filed and sent their definitive proxy materials when the company decides to conduct a virtual or hybrid meeting should include the disclosure described above in this section in the company’s definitive proxy statement and other soliciting materials.

PRESENTATION OF SHAREHOLDER PROPOSALS

Shareholders who satisfy applicable conditions can seek to include a proposal in the company’s proxy statement under Exchange Act Rule 14a-8. Exchange Act Rule 14a-8(h)(1) requires the shareholder proponent or a representative to appear and present the proposal at the annual meeting. Rule 14a-8(h)(3) provides that a

company may exclude a proponent's proposals for two calendar years if (1) the company included one of the proponent's proposals in its proxy materials for a shareholder meeting, (2) neither the proponent nor the proponent's qualified representative appeared and presented the proposal and (3) the proponent did not demonstrate "good cause" for failing to attend the meeting or present the proposal. COVID-19 impacts may make it difficult for shareholder proponents to attend annual meetings in person to present their proposals.

To address these difficulties, the Staff guidance encourages companies to provide shareholder proponents or their representatives with the ability to present proposals through alternative means, such as by phone, during the 2020 proxy season, to the extent feasible under state law.

The Staff guidance also states that, to the extent 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, the Staff would consider this failure to be "good cause" under Rule 14a-8(h) should a company assert Rule 14a-8(h)(3) as a basis to exclude a proposal submitted by the shareholder proponent for any of the company's meetings held in the following two calendar years.

ADDITIONAL SEC ASSISTANCE

The Staff guidance states that any company or other person that needs additional assistance related to deadlines, delivery obligations, or public filings under federal proxy rules should contact the Division of Corporation Finance at (202) 551-3500 or at https://www.sec.gov/forms/corp_fin_interpretive. Investment companies registered under the Investment Company Act of 1940 and business development companies, or their shareholders, that need additional assistance should contact the Division of Investment Management at (202) 551-6825 or at IMOCC@sec.gov.

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