

SEC Staff Provides Guidance For Conducting Annual Meetings in Light of COVID-19

I. Overview

On March 13, 2020, the staff of the Division of Corporation Finance and the Division of Investment Management (the “Staff”) of the Securities and Exchange Commission (the “SEC”) issued guidance in response to questions from issuers and shareholders regarding compliance with the federal proxy rules for upcoming annual meetings.¹ In light of the public health and safety concerns surrounding the on-going, widespread outbreak of coronavirus disease 2019 (“COVID-19”), the Staff’s guidance discusses (i) changing the date, time or location of annual meetings, (ii) holding virtual meetings, and (iii) presentation of shareholder proposals.

II. Background

Under state law, issuers are generally required to hold meetings of shareholders annually. Additionally, issuers of securities registered under Section 12 of the Securities Exchange Act of 1934, as amended (the “Exchange Act”), must solicit proxies from their shareholders in connection with their annual meetings in accordance with the federal proxy rules, including those relating to the delivery of proxy materials. Due to the concerns arising from the transmission of COVID-19, the public has been advised by the U.S. Centers for Disease Control and various government officials to avoid large gatherings.² These concerns have resulted in issuers and others asking for guidance on how to comply with the federal proxy rules while at the same time being mindful of the logistical issues raised by COVID-19.

III. Staff Guidance

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

In the guidance, the Staff states it will take the position that an issuer that has already mailed and filed its proxy materials can notify shareholders of a change in the date, time or location of its annual meeting without mailing additional soliciting materials or amending its proxy materials if, promptly after reaching its decision regarding any such change, it (i) issues a press release announcing the change, (ii) files the announcement as definitive additional soliciting material on EDGAR, and (iii) takes all reasonable steps necessary to inform other intermediaries (such as proxy solicitors) and relevant market participants of the changes. For issuers who have not yet mailed and filed their definitive proxy materials, the Staff recommends that they consider including disclosure regarding the possibility of these changes due to COVID-19.

B. Virtual Shareholder Meetings

Although acknowledging that the ability to conduct “virtual” meetings is governed by state law and the issuer’s charter documents, the Staff’s guidance indicates that issuers planning virtual or “hybrid” meetings in lieu of in-person meetings are expected to timely notify their shareholders, intermediaries and other market participants and provide clear details of the logistics for participating. The Staff also advises that issuers who have already filed their definitive proxy materials before changing their plans to include such a meeting would not be required to mail

¹ See <https://www.sec.gov/ocr/staff-guidance-conducting-annual-meetings-light-covid-19-concerns?auHash=zrsDVFen7OmUL6Xou7EIHov4Y6IfrRTjW3KPSVukQs>.

² See <https://www.cdc.gov/coronavirus/2019-ncov/community/large-events/mass-gatherings-ready-for-covid-19.html>.

additional proxy materials if they follow the same steps outlined in Section III.A. above to notify the parties of the change.

C. Presentation of Shareholder Proposals

Under Rule 14a-8(h) of the Exchange Act, the proponent of a shareholder proposal, or their representatives, is required to appear and present their proposal at the annual meeting. In light of the possible difficulties facing proponents due to COVID-19, the Staff encourages issuers, to the extent permitted under state law, to allow shareholders or their representatives to present their proposals through alternative means, including telephonically. Additionally, the guidance states that the Staff will consider the inability to attend and present the proposal due to hardships posed by COVID-19 to constitute “good cause” under Rule 14a-8(h)(3) in the event an issuer seeks to rely on that rule to exclude such a proposal in the next two calendar years based on the proponent’s failure to attend and present at the meeting.

IV. Conclusion

The Staff has offered guidance to assist issuers in navigating some of the issues surrounding annual meetings during the COVID-19 outbreak. However, the guidance itself states that it has no legal force or effect and that the Staff’s views expressed therein do not alter or amend the applicable law or create obligations for any person.

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If you have any questions about the issues addressed in this memorandum, or if you would like a copy of any of the materials mentioned, please do not hesitate to email publications@cahill.com or call or email Geoffrey E. Liebmann at 212.701.3313 or gliebmann@cahill.com; or Bruna Amaral at 212.701.3389 or bamaral@cahill.com.