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Recent Developments Regarding Virtual Shareholder Meetings

Legal Considerations in Light of COVID-19 and New SEC Guidance

SUMMARY

As 2020 annual shareholder meeting dates draw closer, many companies are considering the feasibility of implementing virtual shareholder meetings due to the public health concerns associated with the COVID-19 pandemic (“Coronavirus”). Several high-profile companies have recently filed proxy statements stating that they will conduct their annual meetings virtually, or that they preserve their option to switch from a physical meeting to a virtual meeting at a later date. As companies evaluate these approaches, it is important to consider the legal requirements under federal regulations (particularly the latest SEC guidance), state law and a company’s own governing documents. In the past, institutional investors and proxy advisors have published policies objecting to virtual-only meetings on the ground that such meetings may deprive shareholders of meaningful participation rights. In light of the uncertainty caused by Coronavirus, companies should monitor regulatory and other developments, and work closely with their advisors to determine the appropriate approach to their annual meetings given the company’s particular circumstances and investor base.

OVERVIEW

On March 13, the SEC [published](#) new guidance to clarify the notice requirements for virtual-only meetings, hybrid meetings (*i.e.*, an in-person meeting that also permits shareholder participation through electronic means) and changes to annual meetings for purposes of the federal proxy rules under the Securities Exchange Act of 1934 (“Exchange Act”). The March 13 guidance also discussed the treatment of shareholder proposals at annual meetings.

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After Filing Proxy Materials

The new SEC guidance states that, if an issuer has already mailed and filed its definitive proxy materials, then the issuer can notify its shareholders of a change in the date, time or location of the annual meeting without mailing additional soliciting materials or amending proxy materials, so long as the issuer:

- (1) issues a press release announcing such change;
- (2) files the announcement as definitive additional soliciting material on EDGAR; and
- (3) takes all reasonable steps necessary to inform other intermediaries in the proxy process and other relevant market participants of such change.

The SEC expects the issuer to take these actions promptly after deciding to change the date, time or location of its annual meeting, and sufficiently in advance so the market is alerted in a timely manner. If the issuer has followed the above steps, it does not need to mail additional soliciting materials (including new proxy cards) solely for the purpose of switching to a virtual-only or hybrid meeting. However, the SEC also expects that issuers will disclose the logistical details of any virtual-only or hybrid meeting, including how shareholders can access the meeting, participate and vote. Therefore, an issuer that is announcing a switch to a virtual-only or hybrid meeting after it has filed its proxy statement should provide such logistical details – including whether shareholders will be able to ask questions at the meeting and instructions for attending and voting at the virtual meeting – in a press release, which should be filed as additional soliciting materials with the SEC.

Before Filing Proxy Materials

If an issuer has not yet mailed and filed its definitive proxy materials, the SEC advises the issuer to consider whether to include disclosures regarding the possibility of changes to its annual meeting due to Coronavirus, and make determinations based on the issuer's particular facts and circumstances and the reasonable likelihood of such a change. The SEC expects issuers contemplating the switch to a virtual-only or hybrid meeting to notify shareholders, intermediaries in the proxy process and other market participants of such plans. For an issuer that has not yet filed and delivered its definitive proxy materials, disclosures on the logistical details of a virtual-only or hybrid meeting should be included in the definitive proxy statement and other soliciting materials.

Shareholder Proposals

The SEC also provided guidance on how to accommodate shareholder proposals to be presented at the annual meeting in light of travel challenges posed by Coronavirus. The SEC encourages issuers to provide shareholder proponents or their representatives with the ability to present proposals through alternative means to the extent feasible under state law. Normally, if a shareholder proponent or its representative is unable to attend a company's shareholder meeting to properly present its proposal, the company may rely on Exchange Act Rule 14a-8(h)(3) to exclude proposals submitted by the shareholder proponent for any meetings held in the following two calendar years. However, under the new guidance, for the 2020 proxy

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season, the SEC staff will consider a shareholder proponent's failure to present its proposal in person or by representative at a shareholder meeting due to the inability to travel or other Coronavirus-related hardships to be "good cause" under Rule 14a-8(h), and the company will not be able to exclude the shareholder's proposal from future meetings on that basis, especially if the company has not attempted to provide the shareholder proponent with alternative means to present its proposal (such as by phone).

Other Legal Requirements

In addition to any SEC rules regarding virtual meetings, it is important for companies to check whether the laws of the state of their incorporation allow shareholder meetings by virtual means and, if so, the parameters for such meetings. For example, under Section 211 of Delaware's General Corporation Law ("DGCL"), if a board of directors is authorized to determine the place of a meeting of shareholders, the board of directors may, in its sole discretion, determine that the meeting "shall not be held at any place, but may instead be held solely by means of remote communication." The DGCL also provides that, if authorized by the board of directors, subject to any guidelines and procedures the board may adopt, shareholders may participate and vote remotely; provided that (1) reasonable measures are implemented to verify that each person permitted to vote remotely is a shareholder or proxyholder; (2) reasonable measures are implemented to provide remote shareholders and proxyholders an opportunity to vote and participate in the meeting, "including an opportunity to read or hear the proceedings of the meeting substantially concurrently with such proceedings"; and (3) that a record is maintained of any remote votes or other actions at the meeting. Maryland, where most real estate investment trusts are incorporated, has a similar provision governing virtual-only meetings. By contrast, New York's Business Corporation Law ("NYBCL") does not expressly provide that a meeting of shareholders may take place solely by remote communication, although Section 602 of the NYBCL allows a board of directors, where authorized, to implement reasonable measures to allow participation and voting at shareholder meetings by electronic communication. (A bill seeking to amend Section 602 of the NYBCL to expressly permit virtual-only meetings is currently pending.) The NYBCL also specifies that a company holding a shareholder meeting by virtual means must provide between 10–60 days' advance notice, and such notice must include logistical details of how shareholders can participate in the meeting. In addition, some states that allow for virtual-only meetings impose procedural requirements that make having a virtual meeting impracticable: for example, California currently requires a company to receive unrevoked shareholder consent before holding a virtual-only or hybrid meeting.

It is also important for companies to review their charters, bylaws and other applicable governing documents and internal policies to determine if they allow for a switch to a virtual-only or hybrid meeting. If so, companies should understand any advance notice or other requirements that might apply under applicable state law and their documents and policies if the company does decide to move to a virtual-only or hybrid meeting, including after filing proxy materials with the SEC. For example, if a company has filed a proxy statement that preserves the option to switch to a virtual-only or hybrid meeting, it may be necessary for

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the board of directors to take action (either by vote or written consent) before a switch can be made. On the other hand, if a company has filed a proxy statement that does not preserve the option, a new meeting notice under state law may be required.

If a company decides to proceed with a physical or hybrid meeting, it should ensure that the in-person component of the meeting is in compliance with applicable law and consider applicable guidance, including from the Centers for Disease Control and Prevention, the World Health Organization and other sources of recommendations about social gatherings. Companies should also consider whether their full board and management team should and could participate from different locations for safety and business continuity planning reasons.

PROXY ADVISOR AND INSTITUTIONAL INVESTOR POLICIES ON VIRTUAL-ONLY MEETINGS

Virtual-only meetings have, in the past, been subject to criticism by proxy advisors and institutional investors. Proxy advisors have expressed concerns that, though the number of shareholders attending a shareholder meeting may increase when the meeting is held virtually, the depth of shareholder engagement at such meetings may not be sufficient to hold the board accountable. While Institutional Shareholder Services (“ISS”) has not yet adopted a formal voting policy on virtual-only meetings in the United States, Glass Lewis & Co.’s (“Glass Lewis”) 2020 proxy voting guidelines recommend voting against members of the governance committee if a company is planning to hold a virtual-only shareholder meeting, unless there is sufficiently robust disclosure in the proxy statement to assure shareholders that they will have the same participation rights as they would have had at an in-person meeting. In explaining its position, Glass Lewis has stated that virtual-only meetings hinder shareholders’ ability to “meaningfully communicate” with the company management.

Vanguard’s 2020 proxy voting policy similarly provides that it will vote against proposals to conduct virtual-only meetings. (BlackRock, Fidelity and State Street have not adopted formal voting policies on virtual-only meetings.)

It is important to note that both Glass Lewis’s and Vanguard’s 2020 voting policies were published in 2019, and may be updated following the date of this publication. Both ISS and Glass Lewis have recently signaled that in response to Coronavirus they may change their policies with regard to virtual-only meetings for 2020, provided that shareholders are provided sufficient disclosure on how to access the meetings and are not limited in their participation rights.

ISSUER APPROACHES

For an issuer that is considering switching to a virtual meeting or preserving the option to do so at a later date, deciding on the right approach and accompanying disclosure requires a company-specific analysis

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that should be undertaken together with the company's internal and external advisors, taking into account such things as the company's historical shareholder meeting and disclosure practices, as well as feedback from shareholders and the investor relations team. While companies may take different approaches to disclosure, there are certain noteworthy common themes that have emerged from recently filed proxy statements.

For example, for issuers that have recently disclosed the decision to move to a virtual meeting in their proxy statements, it is typical for the proxy statement to emphasize the issuer's intention of ensuring meaningful shareholder participation and the implementation of procedural safeguards to that end, including:

- technical support available prior to and during the meeting;
- formal rules of conduct at the meeting, including Q&A procedures and how shareholders may see/hear management and board members; and
- where questions and answers will be posted after the meeting (typically on the company's website).

For issuers that have disclosed plans for a physical meeting but have preserved the option to switch to a virtual meeting in their proxy statement, it is typical for the proxy statement to specify, among other things, the amount of advance notice the issuer intends to provide to shareholders if it decides to make the switch.

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CONTACTS

New York

Werner F. Ahlers	+1-212-558-1623	ahlersw@sullcrom.com
Francis J. Aquila	+1-212-558-4048	aquilaf@sullcrom.com
Nicolas Bourtin	+1-212-558-3920	bourtinn@sullcrom.com
Catherine M. Clarkin	+1-212-558-4175	clarkinc@sullcrom.com
Audra D. Cohen	+1-212-558-3275	cohen@sullcrom.com
H. Rodgin Cohen	+1-212-558-3534	cohenhr@sullcrom.com
Scott B. Crofton	+1-212-558-4682	croftons@sullcrom.com
Robert W. Downes	+1-212-558-4312	downesr@sullcrom.com
Mitchell S. Eitel	+1-212-558-4960	eitel@sullcrom.com
John Evangelakos	+1-212-558-4260	evangelakosj@sullcrom.com
Jared M. Fishman	+1-212-558-1689	fishmanj@sullcrom.com
Sergio J. Galvis	+1-212-558-4740	galviss@sullcrom.com
C. Andrew Gerlach	+1-212-558-4789	gerlacha@sullcrom.com
Matthew B. Goodman	+1-212-558-4995	goodmanm@sullcrom.com
Brian E. Hamilton	+1-212-558-4801	hamiltonb@sullcrom.com
Matthew G. Hurd	+1-212-558-3122	hurdm@sullcrom.com
Stephen M. Kotran	+1-212-558-4963	kotrans@sullcrom.com
Mark J. Menting	+1-212-558-4859	mentingm@sullcrom.com
Scott D. Miller	+1-212-558-3109	miller@sullcrom.com
Keith A. Pagnani	+1-212-558-4397	pagnanik@sullcrom.com
George J. Sampas	+1-212-558-4945	sampasg@sullcrom.com
Melissa Sawyer	+1-212-558-4243	sawyer@sullcrom.com

SULLIVAN & CROMWELL LLP

Alan J. Sinsheimer	+1-212-558-3738	sinsheimer@sullcrom.com
Marc Trevino	+1-212-558-4239	trevinom@sullcrom.com
Krishna Veeraraghavan	+1-212-558-7931	veeraraghavank@sullcrom.com
Benjamin H. Weiner	+1-212-558-7861	weinerb@sullcrom.com
<hr/> Washington, D.C.		
Julia M. Jordan	+1-202-956-7535	jordanjm@sullcrom.com
Robert S. Risoleo	+1-202-956-7510	risoleor@sullcrom.com
<hr/> Los Angeles		
Eric M. Krautheimer	+1-310-712-6678	krautheimere@sullcrom.com
Rita-Anne O'Neill	+1-310-712-6698	oneillr@sullcrom.com
Alison S. Ressler	+1-310-712-6630	resslera@sullcrom.com
<hr/> Palo Alto		
Scott D. Miller	+1-650-461-5620	millersc@sullcrom.com
Sarah P. Payne	+1-650-461-5669	paynesa@sullcrom.com
<hr/> London		
John Horsfield-Bradbury	+44-20-7959-8491	horsfieldbradburyj@sullcrom.com
Jeremy B. Kutner	+44-20-7959-8484	kutnerj@sullcrom.com
Ben Perry	+44-20-7959-8477	perryb@sullcrom.com
Richard A. Pollack	+44-20-7959-8404	pollackr@sullcrom.com
Evan S. Simpson	+44-20-7959-8426	simpsons@sullcrom.com
<hr/> Paris		
Olivier de Vilmorin	+33-1-7304-5895	devilmorino@sullcrom.com
<hr/> Frankfurt		
Carsten Berrar	+49-69-4272-5506	berrarc@sullcrom.com
York Schnorbus	+49-69-4272-5517	schnorbusy@sullcrom.com
<hr/> Brussels		
Michael Rosenthal	+32-2896-8001	rosenthalm@sullcrom.com
<hr/> Melbourne		
Waldo D. Jones Jr.	+61-3-9535-1508	jonesw@sullcrom.com
<hr/> Sydney		
Waldo D. Jones Jr.	+61-2-8227-6702	jonesw@sullcrom.com
<hr/> Tokyo		
Keiji Hatano	+81-3-3213-6171	hatanok@sullcrom.com

SULLIVAN & CROMWELL LLP

Hong Kong

Garth W. Bray

+852-2826-8691

brayg@sullcrom.com

Kay Ian Ng

+852-2826-8601

ngki@sullcrom.com

Beijing

Gwen Wong

+86-10-5923-5967

wonggw@sullcrom.com
