



## LEGAL ALERT

March 18, 2020

### Shareholders' Meetings in Today's Extraordinary Environment

On March 13, 2020, the United States Securities and Exchange Commission (the "SEC") issued staff guidance regarding annual meetings in light of coronavirus concerns (a copy of which is attached). This guidance provides for changing the date and time of shareholder meetings as well as for conducting "virtual" shareholder meetings. The guidance approaches this issue from an SEC perspective which is driven by a company's disclosure obligations under the Securities Exchange Act of 1934, as amended. However, companies are reminded that they have legal obligations under state law and under their respective articles of incorporation and bylaws in connection with all aspects of the shareholder meeting. These state law and company specific obligations (the company's articles and bylaws) must be complied with in order to permit the company to legally postpone or adjourn a shareholder meeting. In addition, state law and company specific obligations (the company's articles and bylaws) must also be consulted regarding the validity of any "business only," "virtual," "skinny" or "non shareholder" shareholder meetings. Many companies are currently considering these options. In regard to nontraditional shareholder meetings, under Pennsylvania law, "typical" articles of incorporation and bylaws of many Pennsylvania companies, it is required that the Chairman or the President (the Chair of the Meeting as specified in the bylaws), the corporate secretary, proxy holders and judge(s) of election be in attendance in order for the meeting to be validly convened and held in accordance with law.

The decision to postpone or adjourn an annual meeting is a decision of the board of directors and requires valid board action under state law and a company's articles and bylaws. Regardless of what action is taken, care must be exercised to ensure validity of corporate actions. We strongly recommend that you discuss this matter with your corporate/SEC legal counsel as soon as possible. Our office has prepared the required disclosures, shareholder letters and board documents necessary to effect various nontraditional meeting options. In addition, the following members of our office are available to discuss these matters with you at your earliest convenience:

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## Announcement

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# Staff Guidance for Conducting Annual Meetings in Light of COVID-19 Concerns

The staff of the Division of Corporation Finance and the Division of Investment Management has received inquiries from issuers and shareholders regarding compliance with the federal proxy rules for upcoming annual meetings in light of health, transportation, and other logistical issues raised by the spread of coronavirus disease 2019 (COVID-19). Given the public health and safety concerns related to COVID-19, the staff is providing the following guidance to assist issuers, shareholders, and other market participants affected by COVID-19 with meeting their obligations under the federal proxy rules.<sup>[1]</sup> We remind all parties to consider their own specific facts and circumstances in determining the need for any additional measures beyond the actions discussed below. We strongly encourage 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. We expect all market participants to cooperate with one another to facilitate issuers' obligations to hold annual meetings and disseminate timely, accurate, and clear proxy disclosures under the federal securities laws as well as to allow shareholders to exercise their voting rights under state law.

Any issuer or other person in need of additional assistance related to deadlines, delivery obligations, or their public filings should contact the Division of Corporation Finance at

(202) 551-3500 or at [https://www.sec.gov/forms/corp\\_fin\\_interpretive](https://www.sec.gov/forms/corp_fin_interpretive).<sup>[2]</sup> Investment companies registered under the Investment Company Act of 1940 and business development companies, or their shareholders, in need of additional assistance should contact the staff of the Division of Investment Management at [IMOCC@sec.gov](mailto:IMOCC@sec.gov), or (202) 551-6825.

## Background

Issuers are generally required to hold annual meetings of security holders under state law. When issuers with securities registered under Exchange Act Section 12 solicit proxy authority from their shareholders in connection with an annual meeting, they are required to comply with the federal proxy rules, which require, among other things, the delivery of proxy materials (such as definitive proxy statements and proxy cards).

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

The staff understands that some issuers are contemplating possible changes in the date, time, or location of their annual meetings due to the difficulties arising from COVID-19. In light of these difficulties, the staff will take the position that an issuer that has already mailed and filed its definitive 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 it:

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

We expect issuers to take these actions promptly after making a decision to change the date, time, or location of the meeting and sufficiently in advance of the meeting so the market is alerted to the change in a timely manner. To the extent that issuers have not yet mailed and filed their definitive proxy materials, they should consider whether to include disclosures regarding the possibility that the date, time, or location of the annual meeting will change due to COVID-19. Such determination should be made based on each issuer's particular facts and circumstances and the reasonable likelihood of such a change.

## "Virtual" Shareholder Meetings

The staff understands that some issuers are contemplating the possibility of conducting a "virtual" shareholder meeting through the internet or other electronic means in lieu of an in-person meeting. The ability to conduct a "virtual" meeting is governed by state law, where permitted, and the issuer's governing documents. Robust disclosures that facilitate informed shareholder voting are just as important for a "virtual" meeting or "hybrid" meeting (*i.e.*, an in-person meeting that also permits shareholder participation through electronic means) as they are for an in-person meeting.

To the extent an issuer plans to conduct a "virtual" or "hybrid" meeting, the staff expects the issuer to notify its shareholders, intermediaries in the proxy process, and other market participants of such plans in a timely manner and disclose clear directions as to the logistical details of the "virtual" or "hybrid" meeting, including how shareholders can remotely access, participate in, and vote at such meeting. For issuers that have not yet filed and delivered their definitive proxy materials, such disclosures should be in the definitive proxy statement and other soliciting materials. Issuers that have already filed and mailed their definitive proxy materials would not need to mail additional soliciting materials (including new proxy cards) solely for the purpose of switching to a "virtual" or "hybrid" meeting if they follow 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 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 staff encourages 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.

Furthermore, 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 to be "good cause" under Rule 14a-8(h) should issuers assert Rule 14a-8(h)(3) as a basis to exclude a proposal submitted by the shareholder proponent for any meetings held in the following two calendar years.

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[1] The guidance represents only the views of the staff of the Division of Corporation Finance and the Division of Investment Management and has no legal force or effect. These views do not alter or amend applicable law and create no new or additional obligations for any person. This guidance is not a rule, regulation, or statement of the Securities and Exchange Commission and the Commission has neither approved nor disapproved its contents. This guidance also does not address any procedural, notice, or other requirements with respect to annual meetings under applicable state law, issuer governing documents, or exchange listing standards.

[2] See also the Commission order providing conditional regulatory relief and assistance for issuers affected by COVID-19, Release No. 34-88318 (March 4, 2020), available at <https://www.sec.gov/rules/other/2020/34-88318.pdf>.

*Modified: March 13, 2020*