SMITH ANDERSON
expectexcellence®

ANNUAL MEETINGS IN A WORLD WITHOUT MEETINGS: THE IMPACT OF COVID-19 ON PUBLIC COMPANIES

03.17.2020
By Heyward Armstrong, Amy Batten and Davis Fussell

Update: On April 1, 2020, Governor Roy Cooper issued Executive Order No. 125 Authorizing and Encouraging Remote Shareholder Meetings During the COVID-19 State of Emergency, which updates some of the North Carolina-specific guidance in this alert. Please find our alert analyzing the ***Order here****.*

Update: On April 7, 2020, the SEC Staff issued an announcement updating its March 13, 2020, guidance by providing limited relief to public companies related to printing and mailing proxy materials. Please find our alert analyzing the ***announcement here****.*

Coronavirus (COVID-19) is having an unprecedented impact on the world's economy, including historic stock market declines, a virtual standstill in business and leisure travel, closures of schools and businesses and a focus on "social distancing" through remote working (or not working at all). These shocks are being felt acutely by public company boards of directors and management as they carefully consider how to navigate a business and risk environment of first impression while continuing to comply with their obligations to their shareholders under federal securities laws and regulations and state corporate law. This client alert highlights some of the key issues that public companies should be considering during these challenging times.

Annual Meetings in a World Without Meetings

The COVID-19 pandemic is occurring in the middle of proxy season, when many public companies have already mailed or will shortly be mailing proxy statements to their shareholders for their upcoming annual meetings. However, particularly with multiple states having already banned large group meetings and the White House issuing guidelines recommending Americans avoid gathering in groups of more than 10 people, many public companies are appropriately concerned regarding their ability to hold in-person annual meetings and public perception if online options are not made available.

Options for Public Companies

Public companies have a number of options if they determine that holding an in-person-only meeting in the near term is not an appropriate approach. All of these approaches will require review of applicable state corporate law (we have highlighted Delaware and North Carolina implications below) and the company's organizational documents.

- **Webcast the Meeting**: Public companies can provide shareholders the ability to participate in the meeting (in listen-only mode, with presentation materials made available, or in full participatory mode) by webcast or dial-in.
    - Advantages: Nearly all companies are accustomed to webcasting earnings calls and similar corporate updates, including the ability to answer participant questions, and many companies are already webcasting annual meetings. This option is the least expensive and disruptive to implement, especially if definitive proxy materials have already been mailed. Information can be disseminated by press release and additional solicitation material can be filed with the SEC. Most public companies will likely already have a quorum and sufficient proxies to approve the matters to be voted on in advance of the meeting and additional participation is not necessary from a corporate law standpoint.
    - Disadvantages: The company is still required to actually hold the meeting in person, and webcast participants are not deemed to be present in person for purposes of establishing a quorum and voting. This may present logistical challenges for the company (including venue and security availability) as well as for company officers and directors and shareholders actually attending the meeting. But for smaller public companies that historically have limited turnout at their annual meetings and hold them in their own offices or those of their law firms, this option may be sufficient. On the other hand, for larger companies, there may be reputational considerations to not allowing shareholders to truly participate remotely.
- **Convert to a Hybrid Meeting**: Most state corporate laws (including North Carolina and Delaware) permit companies to hold a hybrid meeting (meaning an in-person meeting that can also be attended remotely).
    - Advantages: This option gives shareholders more flexibility than going all virtual or staying entirely in-person and allows public companies to encourage (without requiring) remote participation. It also complies with state laws (like North Carolina) that do not currently permit virtual-only annual meetings. Much of the technology needed to implement this option can be accessed by using an experienced provider of virtual annual meeting services.
    - Disadvantages: This option has many of the same logistical challenges as the webcasting option and also requires companies to satisfy applicable state law procedural requirements. For example, Delaware has specific requirements regarding confirming that shareholders are entitled to vote, ensuring they are able to participate in the meeting, that records of actions are maintained and that shareholders have access to shareholder lists, making the use of (and incurring the cost for) an experienced provider of virtual annual meeting services advisable.
- **Convert to a Virtual-Only Meeting**: A number of state corporate laws (including Delaware but not including North Carolina) permit companies to hold virtual-only meetings with no in-person component:
    - Advantages: This option provides the physically safest approach to lessening the impact of the spread of COVID-19. It also eliminates the physical logistical challenges associated with holding an in-person meeting.
    - Disadvantages: A number of states (including North Carolina) do not permit this option. Companies also lose the in-person ability to connect directly with shareholders, although given the current environment this is unlikely to create any practical risk for most companies. For smaller companies, the added complexity and cost may not be worthwhile, and holding the annual meeting in their own or their law firms' offices with a webcast may be a better solution.

- **Postpone or Adjourn the Meeting**: Companies that have already scheduled their annual meetings may determine to postpone or adjourn them (with different implications for each under state law), and those that have not already notified shareholders of their annual meeting date and time may determine to hold their annual meetings later in the year (companies that move their annual meetings by more than 30 day after the anniversary of the previous year's annual meeting should also consider the requirements of Exchange Act Rule 14a-5(f)).
    - Advantages: Particularly for smaller public companies that do not have shareholder proposals that they need to have approved (e.g., increases in share availability under equity incentive plans), holding the meeting later in the year may be an attractive option. Companies that take this approach should include the information required by Part III of Form 10-K in their initial Form 10-K filings or by amending their Form 10-Ks to include this information (no later than April 29, 2020).
    - Disadvantages: Companies that have significant shareholder proposals may not be able to adjourn or postpone their meetings (at least not for extended periods). In addition, depending on state law requirements, adjournments and postponements may result in the need to establish new record dates and send out updated materials.

SEC Staff Guidance

The Staff of the SEC's Division of Corporation Finance issued guidance on March 13, 2020, reminding companies of their disclosure obligations with respect to the holding of annual meetings and to assist public companies (particularly those that have already filed their definitive proxy materials) in complying with the federal securities laws. The Staff acknowledged that many companies that have already filed their definitive proxy materials may now wish to change the date, time or location of their meetings. The March 13, 2020, guidance permits companies to do so without mailing additional soliciting materials to shareholders so long as they (i) issue a press release announcing such change, (ii) file the announcement as definitive additional soliciting material on EDGAR and (iii) take all reasonable steps necessary to inform intermediaries in the proxy process and other relevant market participants (including the appropriate national securities exchanges) of the change. Compliance with these requirements will likely be sufficient from a state law notice standpoint unless there is a particularly controversial measure on the agenda (although this should be examined carefully). If possible, though, companies should consider sending an updated notice to shareholders notifying them of the change.

If You Have Not Already Filed Your Proxy Materials

For public companies that have not already filed their proxy materials, we recommend that boards and senior management:

- **Be Thoughtful**: Carefully consider the date, time and place of your annual meeting, including whether the annual meeting can be held later in the year than usual. Assume that the disruption from COVID-19 will last well into the summer.
- **Be Prepared**: Comply with any state law requirements for virtual-only meetings even if a virtual-only meeting is not planned so that the meeting can be switched to a virtual-only or hybrid meeting in the future. If renting venue space, carefully review contractual provisions permitting the company to cancel the space if the annual meeting is moved.
- **Be Flexible**: Disclose in the proxy statement that management and the board of directors are monitoring COVID-19 developments; that the company may determine that it is in the best interests of all

stakeholders to change the date, time or location of the meeting; and how the company will notify shareholders of the change.

Ongoing Disclosure Considerations

Many calendar year-end public companies have already filed their annual reports on Form 10-K for 2019, with the deadlines for accelerated and large accelerated filers having already passed. However, a number of companies have yet to file their Form 10-Ks and need to consider the impact of the pandemic on their disclosures. Given the dynamic situation with this pandemic, we expect that all issuers will need to continuously revisit their disclosures for each Form 10-Q filing during 2020 and in many cases more frequently. Key disclosure considerations include the following:

- **Risk Factors**: As previously discussed, the Securities and Exchange Commission (SEC) has brought a number of enforcement actions against public companies that did not properly update their risk factors when hypothetical risks materialized into actual problems. Many public companies already had risk factors related to the effect of natural disasters and similar events; those risks are now reality, and the actual and expected impacts of COVID-19 should be disclosed. These may include, among others, supply chain disruptions, loss of revenues, failures to meet contractual obligations and the inability to enroll participants in clinical trials. Particularly given the ever-involving situation and the impossibility of predicting the full impact of this global crisis, we recommend that public companies clearly state in their risk factor disclosures that the full impact of COVID-19 is unknown at this time and proactively update these risk factors each quarter for material developments.
- **Legal Proceedings**: Considering recent and expected future stock price volatility and the significant risk of disclosure staleness, especially when viewed in hindsight, we anticipate that many companies will face shareholder class action lawsuits regarding their disclosures. In addition, breaches of contractual obligations will also likely give risk to litigation. Public companies should carefully monitor pending, threatened and likely litigation for appropriate disclosure in their annual and quarterly reports (and more frequently if they are accessing the capital markets).
- **Management's Discussion and Analysis of Financial Condition and Results of Operations**: Regulation S-K Item 303 requires public companies to discuss known trends and uncertainties impacting their liquidity, capital resources and results of operations. Companies should be proactive in disclosing the actual and potential impact of COVID-19 on top- and bottom-line results and ability to raise capital, should ensure this disclosure is consistent with their updated risk factors and should invoke the safe harbor in Section 21E of the Securities Exchange Act with respect to all forward-looking statements. For example, companies should clearly describe (to the extent possible with the then-available information) the potential impact of COVID-19 on customer demand for their products and services, their near-term and long-term capital needs and ability to meet those needs, their ability to source raw materials in light of supply chain disruptions and that all of these statements are forward-looking statements subject to the risks included in the report.
- **Non-GAAP Financial Measures**: Some public companies may be tempted to create financial measures that exclude the impact of COVID-19 on their financial results and liquidity measures. Any such measures will need to be carefully examined in light of existing SEC staff guidance on non-GAAP measures to ensure that such measures comply with such guidance and are not misleading.
- **Internal Controls**: Public companies should evaluate the effectiveness of their internal control over financial reporting and disclosure controls and procedures in light of the impact of COVID-19, including

the ability of the company to accurately and timely record, process and present financial results and make required disclosures, especially in an environment characterized by rapid change and employee absences. Material changes in internal controls should be reported in the company's periodic filings.

- **Material Nonpublic Information**: In guidance the SEC issued on March 4, 2020, the SEC reminded issuers of their obligations under Regulation FD to avoid selective disclosure of material nonpublic information regarding the impact of COVID-19. The SEC also reminded companies that they and their corporate insiders should not offer, sell or purchase securities while in possession of material nonpublic information. Companies should consider suspending stock repurchase programs and imposing or extending blackout periods on applicable corporate insiders in light of the rapidly evolving COVID-19 environment.
- **SEC Accommodations**: As part of its March 4, 2020, guidance, the SEC issued an Order providing that public companies that cannot meet a filing deadline due to circumstances related to COVID-19 may generally obtain a 45-day extension of such deadline by filing a Form 8-K no later than the due date of the applicable report that discloses (i) that the company is relying on the Order, (ii) a brief description regarding why the company cannot timely file the report (including a statement from a third party if such third party is the reason for the delay), (iii) the estimated filing date and (iv) a risk factor (if appropriate) explaining the impact of COVID-19 on the company's business (if material).

Risk Management

The impact of the COVID-19 pandemic on businesses and the economy is of a nature and magnitude not seen at least since the 2008 recession and that will continue to test the ability of boards and management to identify, respond to and overcome numerous business, operational and disclosure challenges. Directors should especially remain mindful of their obligation to set the tone at the top with respect to risk management, work closely with senior executives to identify all material risks arising from COVID-19 and develop a game plan to seek to preserve and hopefully enhance shareholder value during this difficult time while remaining a good corporate citizen. Companies should especially consider not only the financial and operational risks of COVID-19, but also the reputational risks of a misstep in how the company is perceived to be responding to these risks. As always, companies should fall back on their corporate disclosure policies, carefully vetting all messages related to COVID-19, ensuring only designated company personnel speak for the company and providing consistent, compassionate and achievable messages to all stakeholders and regulators.

If you have any questions related to this alert, please do not hesitate to contact any member of the Public Companies group or your regular Smith Anderson lawyer.

PROFESSIONALS

Heyward D. Armstrong

Amy Meyers Batten

Davis J. Fussell

PRACTICE AREAS

Public Companies