Planning Ahead: Virtual Shareholder Meetings in the 2021 Proxy Season

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The COVID-19 pandemic has impacted U.S. public companies in myriad ways. The fact that the traditional proxy season — the period from April through June when a substantial number of public companies hold their annual meetings — took place at all is a credit to the collaborative efforts and flexibility of many different participants in the proxy ecosystem, including companies, boards of directors, corporate secretaries, state governments, the Securities and Exchange Commission (SEC), various service providers, proxy advisory firms and investors. The outcome was a monumental shift from a proxy season of traditional in-person annual meetings of shareholders to one largely of virtual shareholder meetings.

Considering the lack of planning time and the haste with which this systemic pivot occurred, the virtual meeting proxy season should be considered a resounding success. Companies were able to conduct their annual meetings mostly on schedule while observing the necessary restrictions and guidelines on public gatherings, thereby protecting the health of shareholders, employees, directors and other annual meeting participants. Investors were able to attend and participate in annual meetings without traveling or gathering in large groups and could even attend multiple meetings in a single day, resulting in greater shareholder attendance. That said, at least some investors remain concerned about a lack of transparency surrounding virtual shareholder meetings — particularly due to the fact that only the company was able to see the questions shareholders asked during Q&A sessions — and have called virtual meetings a "poor substitute" for in-person meetings.

Looking ahead, uncertainty relating to COVID-19 remains; however, companies have more time to consider and plan for the possibility — or even the likelihood — of virtual shareholder meetings for the 2021 proxy season. As part of this planning process, companies may want to engage with their shareholders now, during the "off season" shareholder engagement period that runs from September through December or early January, to obtain investor feedback on the virtual shareholder meeting process. Doing so may inform company decision-making, proxy disclosures and perhaps implementation of "virtual proxy season 2.0."

As was the case for 2020, 2021 annual meeting planning and decisions around holding an in-person or a virtual annual meeting will require companies to consider — in addition to public health and employee safety concerns, and government recommendations and restrictions on public gatherings — state corporate law, corporate governance documents, SEC rules and guidance, and proxy advisory firm and investor viewpoints and policies. Also, companies should engage early with virtual meeting service providers to understand how virtual meeting platforms may be evolving in response to both company and investor feedback.

State Corporate Law and Corporate Governance Documents

The starting point for a company considering conducting a virtual shareholder meeting is to take into account the laws of the state in which it is incorporated. The majority of states, including Delaware, permit companies to hold virtual-only shareholder meetings.

Many of the states that otherwise would have required an in-person meeting, or at least an in-person component (*i.e.*, a hybrid meeting that allows for both in-person and virtual attendance), provided relief in 2020 through a combination of executive orders and/or amendments to the governing statutes. However, the status of this relief for 2021 annual meetings is uncertain. For example, for New York corporations, virtual-only shareholder meetings are allowed only for as long as the current state of emergency remains in place. Similarly, New Jersey corporations are permitted to hold virtual-only shareholder meetings only when the governor has declared a state of emergency. Companies incorporated in states such as these will have to engage in additional contingency planning to account for the risk that a virtual-only meeting permitted when the company files its proxy statement may no longer be permitted by the date of the 2021 annual meeting.

Most companies holding virtual-only shareholder meetings in 2020 reviewed their corporate governance documents and made any changes necessary to utilize emergency or similar relief provided from state restrictions on virtual-only shareholder meetings. Companies should continue to monitor developments in their state of incorporation and review their corporate governance documents in light of any potentially relevant statutory changes or new executive orders.

SEC Staff Guidance

Although the ability to hold a shareholder meeting virtually and questions on the conduct of the meeting itself are governed by state corporate law, the federal securities laws and SEC rules govern proxy disclosure as well as the inclusion of certain shareholder proposals in a company's proxy materials. The staff of the SEC's Division of Corporation Finance (Staff) issued helpful guidance early in the 2020 proxy season reminding companies contemplating virtual shareholder meetings to "disclose clear directions as to the logistical details of the [meeting], including how shareholders can remotely access, participate in, and vote at such meeting." The guidance also addressed how companies should disclose changes to the date, time or location of a meeting (including switching from an in-person to a virtual meeting) and encouraged companies to provide proponents of shareholder proposals or their representatives "with the ability to present their proposals through alternative means, such as by phone, during the 2020 proxy season."

Certain investor groups have written to the Staff to express their concerns regarding virtual shareholder meetings. These concerns relate to disclosure about how shareholders can access virtual meetings, the presentation of shareholder proposals, and the transparency and conduct of Q&A sessions. It is possible that the Staff could issue further guidance for companies planning to hold virtual shareholder meetings calling for additional or expanded proxy disclosure in these areas.

Proxy Advisory Firms and Investors

Institutional Shareholder Services (ISS) does not have a policy of voting against companies holding virtual shareholder meetings. In April 2020, ISS issued guidance that was supportive of virtual meetings during the pandemic and encouraged companies to commit to returning to in-person (or hybrid) meetings as soon as practicable. As part of its recently completed annual survey, which often informs its views of potential benchmark voting policy changes for the upcoming proxy season, ISS sought feedback on whether to maintain the guidance for 2021 and on the topic of virtual shareholder meetings more generally. Updated ISS policies for the 2021 proxy season likely will be published in November or December 2020, and companies should review them for any updates relating to virtual shareholder meetings.

Glass Lewis' current policy, which precedes the COVID-19 pandemic, recommends voting against director nominees who serve on the governance committee of a company that holds virtual-only meetings without sufficient disclosure about shareholder participation rights. Glass Lewis effectively suspended this policy through June 30, 2020. How the firm will apply this policy going forward remains to be seen, as does the question of whether it will expand the policy to seek additional meeting procedures or disclosures for virtual shareholder meetings heading into 2021. Updates to Glass Lewis policies also are likely to be published in November or December 2020.

Early in the 2020 proxy season, a number of investors and investor groups, including some that were previously opposed to virtual shareholder meetings, voiced support for them in light of the pandemic. How they approach this topic in 2021, informed by their own experiences and those of other investors during the 2020 proxy season, is to be determined. Accordingly, companies may want to solicit feedback from their investors in order to incorporate that feedback into the decision-making for the 2021 annual meeting format. Some investor concerns may be addressed easily by enhancing proxy disclosure, while others may impact how companies conduct the meeting. At a minimum, the ability to include proxy disclosure relating to shareholder engagement on this topic and describing steps taken to be responsive to the feedback has the potential to mitigate negative reactions from proxy advisory firms or investors that are less accepting of virtual shareholder meetings in 2021.

Virtual Meeting Service Providers

Finally, companies should speak with virtual meeting service providers to understand how the platforms may be evolving, as well as to express company preferences for enhancements the company might wish to include. For the 2020 proxy season, the vast majority of virtual meetings were audio rather than video, and shareholders generally typed their questions into the virtual meeting portal, meaning only the company saw them. Some shareholders expressed dissatisfaction with being unable to see management and the board members during the meeting, and with the inability to see or hear questions from other shareholders. Given greater time to think through and plan for a virtual shareholder meeting, some companies may implement additional preferences that were not feasible in the hectic pivot to virtual meetings in 2020.

Conclusion

Although the future of the COVID-19 pandemic and the prospects for in-person shareholder meetings are unclear, companies have the ability to plan for virtual shareholder meetings in a more orderly and methodical fashion than they did for 2020 meetings. A company's own preferences, investor feedback, proxy advisory firm policies, state corporate law matters, SEC guidance and platform offerings by virtual meeting service providers may inform a company's decision-making and proxy disclosure going forward. As a result, it is possible that virtual shareholder meetings could look different in 2021 than they did in 2020.