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Preparing for the Annual Shareholders Meeting: Five Practical Matters US Public Companies Should Consider Now

By now, public companies should be actively engaged in preparing for their upcoming annual meeting of shareholders. Significant corporate resources are typically devoted to the preparation of the proxy statement and the solicitation and tabulation of votes, matters which are key to the annual meeting process. However, while considerations regarding the conduct of the meeting itself are equally as important, they frequently are not given as much attention. We discuss below five areas in which advance planning can facilitate a smooth meeting process.

Meeting Attendance

Companies should establish who is allowed to attend the shareholders meeting and what documentation they must provide. Some companies require admission tickets and/or pre-registration for shareholders to attend the meeting. Companies should also decide what documentation beneficial owners must provide in order to attend the meeting. At a minimum, companies typically require that beneficial owners provide either a proxy from the record owner or a copy of their latest brokerage account statement showing their beneficial ownership position in order to vote at the meeting; many companies require the same documentation in order for beneficial owners to attend the meeting. If a company permits a shareholder to bring guests to the meeting, the company should determine whether or not it wants to limit the number of guests. Requirements for shareholder attendance should be decided well in advance of the meeting and should be disclosed in the proxy statement to avoid any issues on the day of the meeting.

If media or analysts are permitted to attend the annual meeting, the company should consider whether to provide them with a separate seating section at the meeting or a satellite room with video feed. Companies may want to limit such attendance to observation only, allowing only shareholders to ask questions and make statements. Companies should also decide in advance whether to let employees or other members of the community attend the annual meeting and, if they will, under what conditions.

Security

Companies should consider what security measures they want to have in place for their annual meetings. Security personnel can be useful in providing an orderly meeting if admission rules are being applied, if a large crowd is expected or if a controversial topic is either on the agenda or expected to be raised. Security personnel can also be helpful in dealing with an unruly shareholder or a protest that is disrupting the meeting. Discussions with the security team in advance of the meeting help to assure that the appropriate staffing is in place and that the company's officers, investor relations department and security detail are in

agreement on how various scenarios should be addressed.

In the current climate, companies may want to limit what people attending the meeting may bring in with them. This can involve restrictions on the size or number of items. Some companies may want to reserve the right to inspect bags manually or through a screening device. Some may employ the use of x-ray devices similar to those used at airports. It is a good idea to describe such measures in the proxy materials or admission card so that shareholders will know what to expect and can plan accordingly.

Shareholder Proposals

If any shareholder proposals are included in the proxy statement, applicable rules of the Securities and Exchange Commission require the proponent, or a representative of the proponent, to present the proposal at the meeting. Otherwise, a company may choose not to have the proposal voted on by shareholders. Companies may want to touch base with each proponent to determine who will present the proposal. For convenience, the company may want to provide a special seating area for the proponents. Some companies choose to have an investor relations person sit with the proponents to coordinate the shareholder proposal presentation portion of the meeting.

Companies should have a procedure to confirm that an appropriate person is presenting the proposal. If the person at the meeting is not the proponent, either because the proponent is an organization rather than an individual or because the proponent has asked a representative to present the proposal, the company may want to confirm authority. The company should decide in advance whether it will require a written proxy or other authorization to verify the representative's authority to present the proposal on behalf of the proponent or if it will rely on something more informal, such as a telephone call or email from the proponent. In this regard, the company should be aware of any applicable bylaw or governing law provision regarding presenting proposals.

Companies should also decide in advance how they will proceed if neither the proponent nor the proponent's representative attends the meeting. Some companies may choose to present the proposal as a courtesy, since it appeared in the proxy statement, especially if the proxies in hand indicate that the proposal will fail. Rule 14a-8(i)(12) under the Securities Exchange Act of 1934 permits shareholder proposals dealing with *substantially the same matter* to be excluded from proxy statements within three calendar years from the last time such a proposal was included if the proposal when voted on failed to achieve certain thresholds (between 3 and 10 percent, depending on how many times the proposal was made within the preceding five calendar years). A company may consider it advantageous to allow a matter to be voted upon even if the proponent is not present, if that action would enable the company to exclude a similar proposal, even if from a different proponent, at a subsequent meeting.

If, without good cause, the proponent or the proponent's representative fails to appear at the meeting and present the proposal, Rule 14a-8(h)(3) permits the company to exclude from its proxy materials for the following two calendar years any proposals *submitted by that proponent*. While there is precedent permitting a company to exclude shareholder proposals on this basis even if the company submits an absentee proponent's proposal to a vote for the convenience of its shareholders,[1] companies should be careful not take actions that may waive this right, for example, by asking another shareholder in attendance at the meeting to present the proposal.[2]

Companies are required to file a Form 8-K with the Securities and Exchange Commission following submission of matters to a vote of

shareholders to report the outcome of each such shareholder vote. If a company permits the vote to proceed even though the proposal was not presented by the proponent or the proponent's representative, or if the company otherwise wants to make public that the proposal was not voted upon because of the proponent's failure to appear at the meeting, the company may document in its voting results Form 8-K that the proponent failed to appear or send a representative to present the proposal.

If a shareholder seeks to present a proposal at the meeting that was not included in the company's proxy statement, the company should determine whether its bylaws and applicable law permit such action. Company counsel should plan these in advance to develop an appropriate response should such situation arise.

Technology and the Annual Meeting

Companies should determine whether they want to take advantage of evolving technology in the annual meeting context. "Virtual" meetings are becoming part of the annual meeting landscape, although, currently, annual meetings are generally not exclusively electronic. However, a growing number of companies are supplementing their annual meetings with a web-based component. In some cases, this is audio only, while other companies provide video, letting shareholders see as well as hear the meeting. Some companies offer an interactive virtual meeting experience, permitting shareholders to ask questions online. Companies may post electronic records, or transcripts, of their meetings on their web sites for a period of time so shareholders or others can listen or view them at their convenience. These various electronic options are growing in popularity as methods of opening the meeting to shareholders who are not able to attend the meeting in person.

Some companies choose to use various forms of social media for shareholder communications as part of the annual meeting process. For example, investor relations personnel may find it useful to tweet key points made by the chief executive officer during the meeting (which they may want to prepare and discuss internally before the meeting). Companies may also want to blog about events at the meeting. Because tweets and blogs may not provide widespread dissemination of information, companies using social media in conjunction with the annual meeting should be sure that their representatives understand the selective disclosure implications of Regulation FD (discussed further in "Question and Answer Sessions" below).

Question and Answer Sessions

Many shareholders expect to be able to ask questions of management at the annual meeting, so the Q&A session of the meeting is very important. However, the Q&A session will likely be the most challenging time of the meeting because it is the most unpredictable. Management is often expected to promptly provide answers to unexpected questions. Therefore, it is helpful to inject as much control as possible into the process by establishing and publicizing ahead of time the procedures that shareholders must follow to participate in the Q&A session. Companies may also want to develop contingency plans should anyone attending the meeting ignore the rules or otherwise cause a disruption (see "Security" above).

Companies should specify in advance when shareholders will be able to ask questions or make statements at the meeting; companies also may want to specify time limits for individual questions and statements to avoid shareholders making long speeches. Generally, the Q&A session of the annual meeting will follow the business portion of the meeting. Some companies may prefer that shareholders submit questions in writing during the meeting. This process can have the advantage of eliminating repetition while making sure that questions of

concern to multiple shareholders get answered. It also can provide officers with some extra time to prepare a response. However, it is possible that some shareholders may complain that such a process is too controlled and less candid.

The company should decide in advance who will be its representatives in the Q&A session. Will it just be certain management representatives, or will board members also participate? Also, the company should decide if it will let shareholders direct questions to particular officers or directors, or if management will decide among themselves who will answer. If there are some topics that a company will not discuss during the Q&A session (such as personal grievances or current litigation), the company should consider whether it wants to announce that in its introduction to this portion of the meeting.

It is not possible to predict everything that shareholders may ask during the annual meeting, but certain topics can be anticipated. Areas that shareholders may focus on include company performance and strategy, global economic conditions, corporate governance, executive compensation, political contributions, cybersecurity and social and environmental issues, including climate change. Investor relations may want to prepare a script with sample questions and answers, and company officers may want to rehearse a practice Q&A session. If directors might answer questions, or otherwise speak, at the meeting, they also should prepare in advance.

Shareholder meetings are subject to Regulation FD, and any material, nonpublic information disclosed by the company or its representatives during the course of the meeting, including during a Q&A session, must be publicly disseminated in compliance with Regulation FD. This is true even if the meeting is public and/or the press is present. A live webcast or other electronic broadcast of the meeting can constitute public disclosure for Regulation FD purposes if the notice provisions of Regulation FD are followed.[3] In any event, companies should plan in advance how to avoid or limit the disclosure of material nonpublic information during the meeting and how to react if inadvertent disclosure occurs.

For more information about the topics raised in this Legal Update, please contact the author of this Legal Update, Laura D. Richman, at +1 312 701 7304, or any of the following lawyers:

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Endnotes

1 See, for example, *McDonald's Corporation* (March 3, 2015).

2 See, for example, *Sprint Nextel Corporation* (March 18, 2013).

3 See Regulation FD CD&I 102.05, CD&I 102.06 and CD&I 102.01, available at https://www.sec.gov/divisions/corpfin/guidance/regfd-interp.htm.

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