COVID-19 Update: Considerations for Corporations Regarding Board and Shareholder Meetings, SEC Reporting, and Mitigation of Potential Shareholder Disputes

NOTE: This article was posted on March 27, 2020 at 2 pm PDT. Because the COVID-19 situation is rapidly changing as the federal government and State of California continues to fight the pandemic, individuals and businesses should consult with counsel for the latest developments and updated guidance on this topic.

In just a few short weeks, the global COVID-19 pandemic has dramatically altered the landscape of corporate operations in California, and in the country as a whole. In light of ongoing state, county, and city 'stay at home' orders and restrictions on non-essential businesses, many businesses have been forced to scale back, or even cease operations entirely. In the face of such measures, business owners and corporate boards must be vigilant in upholding their corporate duties, guarding against potential future liability, and protecting the interests of partners, shareholders, and investors.

Shareholder Meetings

Health concerns, restrictions on gathering and travel, and government 'stay at home' or 'shelter in place' orders are obvious impediments to the annual shareholder meetings required for publicly traded companies. The United States Securities and Exchange Commission (the "SEC") recognizes that COVID-19 concerns will force companies to change the date, time, and/or location of their annual shareholder meetings. The SEC issued guidance for meeting obligations under federal proxy rules on March 13, 2020[i], and provided further guidance in an order issued March 25, 2020. The guidance provides that a publicly traded company that has not yet mailed and filed its definitive proxy materials with the SEC should consider including disclosures regarding any potential change to the date, time, or location of its annual meeting.

Additionally, on March 4, 2020, the SEC issued an order[ii] addressing pre-meeting communications with shareholders, modified by the further order of March 25, 2020[iii]. These orders temporarily exempt companies from furnishing proxy statements, annual reports, information statements, and other soliciting materials to shareholders who have a mailing address located in an area where the common carrier has, as a result of COVID-19, suspended delivery service of the type used by the registrant. However, the company must make a good faith effort to supply the solicitation or information materials to the shareholder, as required by the rules applicable to the method of delivering such materials.

In the event the company has already mailed and filed its definitive proxy materials, that company *does not* need to amend its proxy materials or mail additional soliciting materials (as is generally required under Rule 14a-6(h) of the Securities Exchange Act of 1934) *if* it: (1) notifies shareholders by issuing a press release announcing such change; (2) files the press release as additional soliciting material with the SEC; and (3) informs other intermediaries in the proxy process (i.e., proxy service providers) and market participants (e.g., the securities exchange) of the changes.

Some companies may be permitted to conduct virtual or hybrid shareholder meetings instead of an in-person meeting. Virtual meetings are held electronically; hybrid meetings are in-person meetings that allow participation by virtual means. The ability to hold virtual or hybrid meetings is dependent on the law of the state of incorporation, as well as the company's governing documents.

A public company that plans to conduct a virtual or hybrid meeting in lieu of an in-person meeting is expected to notify its shareholders, intermediaries in the proxy process, and other market participants of such plans in a timely manner, as addressed above. Specifically, the SEC's guidance provides that companies that have not yet filed their definitive proxy materials should include disclosures regarding the virtual or hybrid meeting in their definitive proxy statement and other soliciting materials, including clear directions as to the logistical details of the meeting (e.g., how shareholders can remotely access, participate in, and vote at such meeting). Those companies that have already filed their definitive proxy materials do not need to amend such materials if they satisfy the same conditions for announcing a change in the meeting date, time, or location, as discussed above.

Bear in mind that in the event of a contested shareholder meeting, additional issues must be addressed to ensure proper compliance in a virtual or hybrid meeting. The process by which participating shareholders may make proposals, raise issues, issue challenges, and vote must be carefully considered. To this end, the SEC has encouraged companies to provide alternate means for shareholders to present Rule 14a-8 proposals, such as telephonically. This guidance contravenes Exchange Act Rule 14a-8(h), which requires such shareholder proposals to be presented in person, and corporations are advised to consult applicable state law in considering alternate shareholder proposal procedure.

Board Meetings

Given COVID-19 considerations and applicable government orders, boards of directors must also be prepared to consider alternatives to in-person meetings and anticipate disruptions to the timing of scheduled meetings. Generally, transitioning from in-person board meetings to virtual or hybrid meetings is a simpler proposition than changing shareholder meetings. Many boards have already embraced the practice and technology of virtual meetings, and formal notice requirements are less burdensome for board meetings than shareholder meetings. Moreover, boards may choose to act by written consent rather than formal meeting. However, prior to instituting virtual meetings, re-scheduling board meetings, or acting by written consent, the board must review state law and corporate governance documents to ensure such actions are permissible and for additional requirements applicable to non-traditional meetings.

As with shareholder meetings, consideration must be given to practical concerns which may arise from virtual meetings. Companies should take appropriate steps to ensure participants are provided access to copies of all documents and materials up for discussion or consideration at the meeting, while recognizing potential concerns relating to the fiduciary responsibilities of confidentiality. To the same end, the board should confirm that the technology used sufficiently ensures the security of virtual meetings and allows for efficient and effective communication, deliberation, and exercise of votes.

Filing Deadlines

The same COVID-19 related health concerns and logistics challenges may also impact a company's ability to timely comply with SEC filing obligations. The SEC has addressed this issue in its order dated March 4, 2020. Under that order, subject to certain conditions, publicly traded companies are entitled to an additional 45 days to file reports required by Securities Exchange Act 13(a) and 15(d) normally due between March 1 and April 30, 2020. On March 25, 2020, the SEC extended the order to include such reports due between March 1 and July 1, 2020. The SEC has reserved the right to further extend these deadlines as the situation progresses, and has stated that those affected "may include U.S. companies with significant operations in the affected areas, as well as companies located in those regions."

The deadline extension does not apply automatically. A company seeking to utilize the extended deadlines must satisfy the conditions set forth in the March 4 SEC order, as modified March 25:

> (a) The registrant or any person required to make any filings with respect to such a registrant is unable to meet a filing deadline due to circumstances related to COVID-19;
> (b) Any registrant relying on this Order furnishes to the Commission a Form 8-K or, if eligible, a Form 6-K by the later of March 16 or the original filing deadline of the report stating:
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> > (1) that it is relying on this Order;
> > (2) a brief description of the reasons why it could not file such report, schedule or form on a timely basis;
> > (3) the estimated date by which the report, schedule, or form is expected to be filed;
> > (4) a company specific risk factor or factors explaining the impact, if material, of COVID-19 on its business; and
> > (5) if the reason the subject report cannot be filed timely relates to the inability of any person, other than the registrant, to furnish any required opinion, report or certification, the Form 8-K or Form 6-K shall have attached as an exhibit a statement signed by such person stating the specific reasons why such person is unable to furnish the required opinion, report or certification on or before the date such report must be filed.
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> (c) The registrant or any person required to make any filings with respect to such a registrant files with the Commission any report, schedule, or form required to be filed no later than 45 days after the original due date; and
> (d) In any report, schedule or form filed by the applicable deadline pursuant to paragraph (c) above, the registrant or any person required to make any filings with respect to such a registrant must disclose that it is relying on this Order and state the reasons why it could not file such report, schedule or form on a timely basis.

Mitigation of Shareholder Disputes

The COVID-19 pandemic has already had a severe impact on the economy, and containment efforts such as 'shelter in place' orders are slowing many California business sectors to a halt. Companies and their boards are facing unprecedented operational and legal issues. While it is impossible to anticipate the full scope of the current crisis and ultimate effect on a corporation, recent history shows that such events can lead to litigation, government investigations, and shareholder derivative actions regarding board oversight. One need only look at the lawsuits aimed at corporate officers and directors arising from the economic impact of recent SARS and Ebola outbreaks to recognize the importance to directors, officers, and senior management of considering how to manage the risks associated with such potential litigation.

As addressed above, restrictions on travel and gatherings have presented hurdles to providing disclosures to shareholders and the SEC. While the SEC has provided a framework to relax deadlines applicable to certain reporting obligations, the commission nonetheless encourages open communication with investors. It is critically important during this time that companies work closely with their audit committees and auditors to ensure their financial reporting is as open and accurate as possible. In connection with the March 4 SEC order, committee Chairman Jay Clayton urged companies to "provide investors with insight regarding their assessment of, and plans for addressing, material risks to their business and operations resulting from the coronavirus to the fullest extent practicable to keep investors and markets informed of material developments." The SEC further reminded companies disclosing material information related to the coronavirus to "take the necessary steps to avoid selective disclosures by disseminating such information broadly to the public."

The SEC further recommends that companies consider whether they may need to revisit, refresh, or update previous disclosures to the extent that the information has become materially inaccurate, and advises that "companies providing forward-looking information in an effort to keep investors informed about material developments, including known trends or uncertainties regarding the coronavirus, can take steps to avail themselves of the safe harbor in Section 21E of the Exchange Act for this information."

Section 21E of the Exchange Act provides a safe harbor for certain forward-looking statements, so long as such statements are "accompanied by meaningful cautionary statements identifying important factors that could cause actual results to differ materially from those in the forward-looking statement." In times of financial uncertainty, such cautionary statements may be crucial in protecting a company against future shareholder litigation.

Relatedly, in preparing Regulation S-K disclosures, impacted companies should pay close attention to Item 105, which requires disclosure of the "most significant factors that make an investment in the registrant or offering speculative or risky," and to Item 303, which requires disclosure of "known trends or uncertainties" that have had or are expected to have a material impact on "net sales or revenues or income." Accusations of failures to make appropriate disclosures in these items were common factors in much of the shareholder litigation that followed the SARS and Ebola outbreaks.

In light of the ongoing COVID-19 pandemic and the evolving economic impacts, companies must evaluate whether public filings appropriately disclose associated financial risks. Taking the time now to

carefully draft disclosures related to financial performance will be critical to mitigating the risk of future litigation. Particular caution must be exercised in the drafting and dissemination of public documents referring to areas of the business potentially impacted by COVID-19 concerns, and companies should review recent filings for appropriate cautionary statements and evaluate stated risk factors for potential updates.

In summary, board members and corporate officers should take precautionary steps now to mitigate potential litigation related to COVID-19.

If you have questions regarding this article, contact The Maloney Firm at 310.540.1505.

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[i] https://www.sec.gov/ocr/staff-guidance-conducting-annual-meetings-light-covid-19-concerns
[ii] https://www.sec.gov/rules/other/2020/34-88318.pdf
[iii] https://www.sec.gov/rules/exorders/2020/34-88465.pdf