

COVID-19: SEC PROVIDES GUIDANCE TO FUNDS CONDUCTING SHAREHOLDER MEETINGS

Date: 23 March 2020

Investment Management Alert

By: C. Todd Gibson, Jon-Luc Dupuy, Shane C. Shannon

On March 13, 2020, the staff of the Division of Corporation Finance and the Division of Investment Management of the U.S. Securities and Exchange Commission ("SEC") issued guidance to provide flexibility and assist issuers (including registered investment companies ("funds")), shareholders, and other market participants impacted by coronavirus ("COVID-19") ("Guidance") with respect to their annual shareholder meetings.[1] From the perspective of fund managers, the Guidance is particularly relevant to closed-end funds and business development companies, as open-ended and exchange-traded funds are generally not required to conduct annual meetings. Although the Guidance only expressly addresses the conduct of annual meetings, our understanding is that the SEC staff has communicated to industry trade groups that the Guidance also applies to special meetings (e.g., a meeting to approve a fund merger).

According to the Guidance: (1) a fund that has already mailed and filed its definitive proxy materials can, subject to certain conditions, 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; (2) a fund may conduct a "virtual" (i.e., through internet or other electronic means in lieu of an in-person meeting) or "hybrid" shareholder meeting (i.e., an in-person meeting that also permits shareholder participation through electronic means) if permitted by state law and the registered investment company's governing documents; and (3) funds should provide shareholders with the ability to present proposals through alternative means, such as by phone, if permitted by state law.[2]

CHANGING THE DATE, TIME, OR LOCATION OF AN ANNUAL MEETING

The Guidance permits a fund that has already mailed and filed its definitive proxy materials to 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 the 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 the change.

Funds are expected to take these actions promptly after making a decision to change the logistics of the meeting and sufficiently in advance of the meeting to alert the market to the change in a timely manner. To the extent that funds have not yet mailed and filed their definitive proxy materials, the Guidance provides that funds should consider whether to include disclosures regarding the possibility that the date, time, or location of the annual

meeting may change due to COVID-19. The Guidance highlights that this determination should be made based on each fund's particular facts and circumstances and the reasonable likelihood of such a change.

"VIRTUAL" OR "HYBRID" SHAREHOLDER MEETINGS

The Guidance also addresses the convening of a "virtual" or "hybrid" shareholder meeting by means of the internet or other electronic means. To the extent a fund plans to conduct a "virtual" or "hybrid" meeting, the SEC staff expects the fund to notify its shareholders, intermediaries in the proxy process, and other market participants of its plans in a timely manner and disclose clear directions as to the logistical details of the meeting, including how shareholders can remotely access, participate in, and vote at the meeting. Funds should also confirm that virtual meetings are permitted under state law and under the fund's governing documents. To the extent funds have not yet filed and delivered their definitive proxy materials, the Guidance provides that such disclosures should be in the definitive proxy statement and other soliciting materials. The Guidance also notes that funds that have already filed and mailed their definitive proxy materials would not need to mail additional soliciting materials 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

Rule 14a-8(h) under the Securities Exchange Act of 1934, as amended, 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, the Guidance encourages funds to provide shareholder proponents or their representatives with the ability to present their proposals through alternative means, such as by phone, if permitted under state law. Notably, to the extent a shareholder proponent or representative is not able to attend the annual meeting and present the proposal due to hardships, travel restrictions, or other obstacles related to COVID-19, the Guidance provides that the SEC staff would consider such scenario to be "good cause" under Rule 14a-8(h) in the event a fund asserts Rule 14a-8(h)(3) in an effort to exclude a proposal submitted by the shareholder proponent for any meetings held in the following two calendar years.[3]

STATE LAW CONSIDERATIONS

With respect to registered funds, the Investment Company Act of 1940, as amended ("1940 Act"), outlines certain requirements for matters requiring the convening of a shareholder meeting, but state law establishes the basic framework for the logistics and conduct of the meeting. Importantly, state law is not displaced by the 1940 Act unless it is inconsistent with the 1940 Act, so it is important that funds refer to their relevant state-specific laws as well as their governing documents.[4] Funds are most commonly organized under the laws of either Massachusetts (business trusts), Delaware (statutory trusts, LLCs, limited partnerships, or corporations), or Maryland (corporations). The laws of each of these states generally provide for (or do not otherwise prohibit) conducting shareholder meetings virtually, subject to certain conditions that vary by state. For more information regarding the implications of the Guidance relating to certain state laws, please see the K&L Gates LLP's client alert entitled "[COVID-19: Taking Another Look at Virtual Stockholder Meetings as the COVID-19 Outbreak Spreads.](#)"

The Guidance states that the SEC staff expects all market participants "to cooperate with one another to facilitate funds' 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."

Notes:

[1] Available here: <https://www.sec.gov/ocr/staff-guidance-conducting-annual-meetings-light-covid-19-concerns>.

[2] It should be noted that although the Guidance applies in the context of registered investment companies (referred to as "funds" in this alert), private funds that are exempt from SEC registration will need to be cognizant of state law requirements in the same manner as registered funds with respect to any matters requiring a meeting and/or vote of investors (e.g., LLC members or limited partners).

[3] Rule 14a-8(h)(3) provides that a fund may exclude a proponent's proposals for two calendar years if (i) the fund included one of the proponent's proposals in its proxy materials for a shareholders' meeting, (ii) neither the proponent nor the proponent's qualified representative appeared and presented the proposal, and (iii) the proponent did not demonstrate "good cause" for failing to attend the meeting or present the proposal. If a proponent voluntarily provides a written statement evidencing an intention to act contrary to Rule 14a-8(h)(1) and not attend the meeting, Rule 14a-8(i)(3) may serve as a basis for the company to exclude the proposal because the proponent's actions are contrary to the proxy rules. Rule 14a-8(i)(3) provides that a proposal is excludable when the proposal or supporting statement is contrary to any of the SEC's proxy rules, including Rule 14a-9, which prohibits materially false or misleading statements in proxy soliciting materials.

[4] See *Burks v. Lasker*, 441 U.S. 471 (1975).

KEY CONTACTS



C. TODD GIBSON
PARTNER

BOSTON, PITTSBURGH
+1.617.261.3140
TODD.GIBSON@KLGATES.COM



JON-LUC DUPUY
PARTNER

BOSTON
+1.617.261.3146
JON-LUC.DUPUY@KLGATES.COM

This publication/newsletter is for informational purposes and does not contain or convey legal advice. The information herein should not be used or relied upon in regard to any particular facts or circumstances without first consulting a lawyer. Any views expressed herein are those of the author(s) and not necessarily those of the law firm's clients.