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ADVISORY PRACTICE

Special Meeting Reminders

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With annual meeting season having concluded for calendar year-end companies, some companies are contemplating holding special meetings for various proposals that cannot wait until next year's annual meeting. Set forth below are five key reminders regarding the proxy rules and process relating to special meetings.

1. A special meeting requires the filing of a preliminary proxy statement. The exemption in Rule 14a-6(a) from the requirement to file a preliminary proxy statement applies only to annual meetings and special meetings held in lieu of an annual meeting. As a result, regardless of the proposal that is being voted on at the special meeting, a preliminary proxy statement is required.

Key take-away: timelines for special meetings must include at least 10 calendar days between the filing of the preliminary and definitive proxy statement. It may also be prudent to include additional time in the planning process to address SEC staff comments, if any. The time required to respond to SEC staff comments could potentially affect the scheduled timeline for use of the notice and access rules for a proxy solicitation, which could in turn require the company either to move the date of the special meeting or to conduct the proxy solicitation under the full-set delivery rules, and could result in a shorter proxy solicitation period that could adversely affect shareholder voting.

2. Notice and access may be used unless the special meeting relates to a business combination or cash-out merger. A company can use the notice and access rules for most special meeting proxy solicitations, provided it complies with the requirements of Rule 14a-16. However, if the special meeting relates to a business combination transaction (as defined in Rule 165 of the Securities Act) or certain cash-out mergers, Rule 14a-16(m) prohibits use of the notice and access rules.

Key take-away: the notice and access rules permit use of a notice and access solicitation for special meetings unless prohibited by SEC rules, but Rule 14a-16 contains several timing requirements that cannot be waived. These include sending a notice of internet availability of proxy materials that complies with SEC rules to securityholders at least 40 calendar days before the date of the special meeting and providing intermediaries with the information required to prepare and send a similar notice to beneficial holders at least 40 calendar days before the date of the special meeting, among other requirements. Planning for special meetings should include coordination with Broadridge and any other intermediaries early in the process to ensure that the timetable is legally compliant and will facilitate an effective solicitation.

3. There is an exception to the 20 business day broker search requirement of Rule 14a-13. Rule 14a-13(a)(3)(i) provides that if it is impracticable to conduct the broker search 20

business days prior to the record date of a special meeting, it may be conducted as many days before the record date of such meeting as is practicable. While it is advisable to comply with the 20 business day requirement, there is flexibility to conduct the broker search less than 20 business days prior to the record date.

Key take-away: unlike annual meetings, the broker search process may not require 20 business days. Planning for a special meeting should include confirmation of the period that will be required for the broker search for the special meeting.

4. Review disclosure about the required vote, the applicable voting standard, and the method for counting votes very carefully, and obtain confirmation from the NYSE to determine whether matters being voted on are routine or non-routine. It is essential to provide correct disclosure about the vote required to approve a matter, the applicable voting standard, and the method for counting votes. Item 21(b) of Schedule 14A requires companies to “[d]isclose the method by which votes will be counted, including the treatment and effect under applicable state law and registrant charter and bylaw provisions of abstentions, broker non-votes, and, to the extent applicable, a security holder’s withholding of authority to vote for a nominee in an election of directors.” With respect to broker discretionary voting, unless Rule 452 is absolutely clear, it is imperative to obtain confirmation from the NYSE – prior to filing the preliminary proxy statement – whether a matter is a routine matter, for which a broker “may vote” without receiving voting instructions from the beneficial holder, or a broker “may not vote” matter. In our experience, proposals to increase the number of authorized shares of common stock and reverse stock split proposals are typically coded as routine by the NYSE. Furthermore, in our experience, whether an adjournment proposal is routine typically is determined by reference to whether the underlying proposal for which adjournment may be sought is routine. Even in cases such as these, however, it is imperative to obtain NYSE confirmation with respect to how a proposal will be coded, especially because NYSE Rule 452 is silent on the treatment of several proposals that are regularly the subject of special meetings.

Key take-away: disclosure about the required vote, the applicable voting standard and method of counting votes must be accurate. For matters submitted for approval at special meetings it will often not be clear under NYSE Rule 452 whether a matter is routine or non-routine. As a result, it will be necessary to obtain confirmation from the NYSE concerning whether each matter is routine or non-routine. Obtaining this confirmation can involve unpredictable timing, so timelines should provide for seeking this confirmation as early as possible and allow for some uncertainty about how long this confirmation may take.

5. Companies can begin a proxy solicitation after a preliminary proxy statement has been filed, although proxy cards cannot be sent until the company has filed the definitive proxy materials and unless shareholders receive the definitive proxy statement with or before receiving a proxy card. Once a preliminary proxy statement has been filed, a company can begin soliciting activities, so long as a proxy card is not provided until dissemination of the definitive proxy statement pursuant to Rule 14a-3(a). Rule 14a-3(a) permits a company to circulate its preliminary proxy statement to shareholders, such as selected large holders, in advance of the filing and dissemination of the definitive proxy statement and proxy card.

Key take-away: SEC rules permit companies to begin solicitation activities, such as communicating with selected large holders, after the company has filed the preliminary proxy statement. Timelines can include soliciting activities following this filing, which may increase the success of the proxy solicitation. Company personnel and others who will engage in these activities should be carefully coached on permissible communications and activities, and any applicable SEC filing requirements must be observed. SEC rules prohibit sending proxy cards unless the proxy card is accompanied or preceded by the definitive proxy statement.