

Public Company Stockholder Meeting Adjournment Proposals

Recently, we have been seeing an increase in situations where clients are having difficulty reaching a quorum for an annual or special meeting or in securing enough votes to pass a proposal. Some of this difficulty can be traced to the decision by Schwab and TD Ameritrade (now one company) and other firms to refrain from exercising discretionary voting on routine matters. In other instances, it results from companies, particularly small caps, having a diffuse retail shareholder base.

To address the need to solicit additional votes, companies may seek to adjourn the annual or special meeting. There are several issues to consider in connection with an adjournment: (1) compliance with the company's bylaws; (2) compliance with state or other local corporation law requirements; and (3) the Securities and Exchange Commission's positions that an adjournment of a stockholder meeting to solicit additional votes requires (x) disclosure in the proxy statement of the company's intent to seek an adjournment if needed to solicit additional proxies and (y) a specific adjournment proposal on the proxy card.

The bylaws of most companies and state law typically provide broad adjournment authority. For example, under Goodwin's model form of Delaware public company [bylaws](#), the presiding officer at the meeting has the authority to adjourn a meeting for any reason, regardless of whether a quorum is present, and to establish the time and place at which the meeting will be reconvened. No vote of the stockholders is required. Under Delaware law, if a stockholder meeting is adjourned, and if the time and location of the reconvened meeting are announced at the time of adjournment, no additional notice to stockholders need be given unless (a) the adjournment is for greater than 30 days or (b) a new record date is fixed subsequent to adjournment (see Delaware General Corporation Law sections 222(c) and 213(a)).

The SEC aspect of the adjournment scenario can be more challenging if companies are not prepared. As a general matter, the SEC has taken the position that only the stockholders may authorize an adjournment and such authorization must occur through a separate adjournment proposal. This requires a separate proposal to be included in the notice to stockholders and in the proxy statement and on the proxy card. More specifically, the SEC has taken the position in [comment letters](#) that postponement or adjournment of a meeting to solicit additional proxies is a substantive proposal for which proxies must be independently solicited notwithstanding the provisions of the company's by-laws or state law, citing [Rule 14a-4\(d\)\(4\)](#) under the Securities Exchange Act of 1934. Rule 14a-4(d)(4) states that no proxy shall confer authority to consent to or authorize any action other than the action proposed to be taken in the proxy statement or matters referred to in paragraph (c) of that section and although Rule 14a-4(c)(7) allows for discretionary actions regarding "matters incident to the conduct of the meeting," the SEC has taken the position that postponement or adjournment to solicit additional proxies is not a matter incident to the conduct of the meeting. Some proxy statements take a shorthand approach to this issue by stating in the proxy statement that granting proxy authority with respect to "transacting such other business as may be properly brought before the Annual Meeting or any adjournment or postponement thereof" includes adjourning or postponing to solicit additional proxies. However, we do not believe such approach would withstand SEC scrutiny and could be subject to challenge in private litigation.

Even with a separate adjournment proposal, companies need to be mindful of [Rule 452 of the New York Stock Exchange](#), which governs when a broker may vote on a beneficial owner's behalf in the ACTIVE/124174395.3

absence of specific instructions. The SEC has articulated a view that brokers do not have discretionary authority to vote for adjournment under Rule 452. In practice, we have seen the NYSE take the position that an adjournment proposal is routine where the underlying proposal for which adjournment may be sought is routine. Given the uncertainty, it is imperative to obtain NYSE confirmation with respect to how an adjournment proposal will be coded. Under state law, an adjournment proposal generally requires a majority of the votes cast on the proposal to pass such that, if the proposal is non-routine and if there are other proposals that are routine, there will be broker non-votes (BNVs). BNVs will not affect the outcome of the vote on the adjournment proposal, but brokers will not be able to assist the company in achieving a majority of the votes cast.

Thus, companies that have any concerns about satisfying the quorum requirements for an annual or special meeting or obtaining the vote on a proposal presented at the meeting should include a proxy adjournment proposal in their proxy statement and on the proxy card. It is worth noting that specific adjournment proposals are relatively common for mergers and other business combination transactions and proposals to amend a company's charter.

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Below is an example of an adjournment proposal:

We are asking our stockholders to vote on a proposal to approve any adjournments of the [Annual/Special] Meeting for the purpose of soliciting additional proxies if there are not sufficient votes at the [Annual/Special] Meeting to approve _____ or establish a quorum.

PROPOSAL 3: Approval of an Adjournment of the Annual Meeting

To consider and vote on a proposal to approve any adjournment of the [Annual/Special] Meeting from time to time, if necessary or appropriate, including to solicit additional votes in favor of the proposal to _____ if there are not sufficient votes at the time of the [Annual/Special] Meeting to adopt the _____ Proposal or to establish a quorum, which proposal we refer to as the "Adjournment Proposal."

VOTE REQUIRED

Approval of the Adjournment Proposal requires the affirmative vote of the holders of a majority of the votes cast affirmatively or negatively at the [Annual/Special] Meeting; provided, that in the absence of a quorum, the affirmative vote of the holders of a majority of the shares represented thereat is required for the Adjournment Proposal. Approval of this Adjournment Proposal is not a condition to the completion of _____. If you properly authorize your proxy by mail, by telephone or through the Internet, but do not indicate instructions to vote your shares "FOR," "AGAINST" or "ABSTAIN" on the Adjournment Proposal, your shares will be voted in accordance with the recommendation of our Board, which is "FOR" the Adjournment Proposal. Abstentions will have no effect with respect to the vote on the Adjournment Proposal (assuming the presence of a quorum), or, in the absence of a quorum, will have the same effect as a vote "AGAINST" the Adjournment Proposal.

RECOMMENDATION OF THE BOARD

Our Board, by unanimous vote, recommends that our stockholders vote "FOR" the Adjournment Proposal.

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