

# CORONAVIRUS INFORMATION & UPDATES

April 13, 2020

## Annual Meetings, Compensation and COVID-19: Where Things Stand

The COVID-19 pandemic continues to pose unprecedented challenges. Public health and safety concerns have prompted many companies to change the format of their upcoming annual shareholder meetings from a traditional, in-person meeting to an entirely “virtual” one. The SEC and certain state governors have provided relief to companies affected by COVID-19 to facilitate their ability to hold shareholder meetings. Institutional Shareholder Services (“ISS”) has also recently provided guidance on virtual meetings and certain executive compensation-related matters in response to the COVID-19 pandemic. Here’s a brief look at where things stand.

### SEC Staff Guidance

The SEC’s Divisions of Corporation Finance and Investment Management have provided [guidance](#) on shareholder meetings, published initially on March 13, 2020 and updated on April 7, 2020.

#### *Changing the Date, Time, or Location of a Shareholder Meeting*

The staff will take the position that an issuer that (i) has decided to change the date, time, or location of its annual or special shareholder meeting due to difficulties arising from COVID-19, and (ii) has already mailed and filed its definitive proxy materials can notify shareholders of the change without mailing additional soliciting materials or amending its proxy materials if it:

- issues a press release announcing the change in the date, time, or location;
- files the announcement as definitive additional soliciting material on EDGAR; and
- takes all reasonable steps necessary to inform other intermediaries in the proxy process and other relevant market participants (such as any proxy service provider and the appropriate national securities exchanges) of the change.

The SEC staff expects an issuer to take the above actions promptly after making a decision to change the date, time, or location of its meeting and sufficiently in advance of the meeting so as to timely alert the market. If an issuer has not yet mailed and filed its definitive proxy materials, the guidance states that the issuer should consider, based on its particular facts and circumstances and the reasonable likelihood of any change in meeting date, time, or location, whether to include disclosures in its proxy materials regarding the possibility of such changes due to COVID-19. Issuers that have not yet filed a definitive proxy statement should take advantage of the opportunity to include the suggested disclosure of the possibility that the shareholder meeting may need to be changed to a virtual-only meeting.

#### *“Virtual” Shareholder Meetings*

The guidance acknowledges that an issuer’s ability to conduct a “virtual” shareholder meeting is governed by the law of an issuer’s state of incorporation and the issuer’s governing documents.

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If an issuer plans to conduct a “virtual” or “hybrid” (i.e., an in-person meeting that also permits shareholder participation through electronic means) meeting, the SEC staff expects the issuer will notify its shareholders, intermediaries in the proxy process, and other market participants of such plans in a timely manner and disclose clear directions on the logistical details of the “virtual” or “hybrid” meeting, including how shareholders can remotely access, participate in, and vote at such meeting.

If an issuer has not yet filed and delivered its definitive proxy materials, the guidance indicates that these disclosures should be included in the issuer’s definitive proxy statement and other soliciting materials. If the issuer has already filed and mailed its definitive proxy materials, however, then the issuer could file additional soliciting material with the SEC but would not need to mail the additional soliciting materials (and in most cases would not need to mail new proxy cards) solely for the purpose of switching to a “virtual” or “hybrid” meeting if the issuer follows the steps described above for announcing a change in the meeting date, time, or location.

## *Presentation of Shareholder Proposals*

Exchange Act Rule 14a-8(h) requires shareholder proponents, or their representatives, to appear and present their shareholder proposals at the annual meeting. In light of the possible difficulties for shareholder proponents to attend annual meetings in person to present their proposals, the SEC staff is encouraging issuers, to the extent feasible under state law, to provide shareholder proponents or their representatives with the ability to present their proposals through alternative means, such as by phone, during the 2020 proxy season.

In addition, the guidance clarifies that, if a shareholder proponent or representative is not able to attend the annual meeting and present the proposal due to the inability to travel or other hardships related to COVID-19, then the staff would consider this to be “good cause” under Rule 14a-8(h), which would prevent an issuer from asserting Rule 14a-8(h)(3) as a basis to exclude a proposal submitted by the shareholder proponent for the next two annual meetings.

## *Delays in Printing and Mailing of Full Set of Proxy Materials*

The guidance also provides some relief to companies experiencing delays in printing and mailing of “full sets” of proxy materials to shareholders due to COVID-19.<sup>1</sup>

The staff encourages issuers affected by printing and mailing delays caused by COVID-19 to use all reasonable efforts to provide timely notice to shareholders and respond to a shareholder’s request for paper copies of proxy materials in a timely manner without putting anyone’s health or safety at risk. The guidance suggests that reasonable efforts could include delaying a meeting in order to provide materials on a timely basis. In circumstances where COVID-19-related difficulties make delays in printing and mailing unavoidable, however, the staff would not object to issuers relying on the “notice-only” delivery option even when they may not meet all of the requirements of Rule 14a-16,<sup>2</sup> so long as they

<sup>1</sup> This section on printing and mailing delays was added to the guidance on April 7.

<sup>2</sup> These requirements include: the Rule 14a-16(a) requirement to send a notice of electronic availability of proxy materials and annual reports no later than 40 calendar days before the meeting; the Rule 14a-16(j)(1) requirement to send paper copies of proxy materials and annual reports within three business days after receiving a request; and the Rule 14a-16(j)(4) requirement to continue to send paper copies of proxy materials and annual reports to requesting shareholders until such requests are revoked. The staff is leaving to issuers the task of determining how many days fewer than 40 before the meeting will be sufficient.

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provide shareholders with proxy materials sufficiently in advance of the meeting to review these materials and exercise their voting rights. In addition, the issuer must announce the change in delivery method by following the steps outlined above regarding announcing a change in the meeting date, time, or location. This requirement to notify shareholders only applies when the issuer is not able to comply fully with Rule 14a-16. A company that has historically printed and mailed full sets of proxy materials to its shareholders but decides to rely on the notice-only delivery option this year in compliance with all of the requirements of Rule 14a-16 may wish, but is not required, to take the above steps to notify its shareholders of such a change. In contrast, a company that intends to rely on the notice-only delivery option, but expects to be unable to comply with all of the requirements of Rule 14a-16 due to COVID-19-related difficulties, is required to take the above steps to notify its shareholders about the change in delivery method.

The guidance further advises that affected issuers and intermediaries should continue to use their best efforts to send paper copies of proxy materials and annual reports to requesting shareholders, even if such deliveries would be delayed.

## State Executive Orders

### *Delaware*

Delaware's Governor, John Carney, issued an [executive order](#) on April 6, 2020 that provides two limited forms of relief for publicly traded companies incorporated in Delaware that as of that date had already sent stockholders a notice of a stockholder meeting.

First, the order provides that if the board decides to change to a virtual meeting due to COVID-19, the company can notify stockholders of the change solely by a document filed with the SEC and a press release, which must be promptly posted on the company's website. Notably, the order does not relieve companies from the timing requirement in Section 222 of the Delaware General Corporation Law, which generally requires notice of a meeting be given to stockholders not less than 10 nor more than 60 days before the meeting date.

Second, the order provides relief to a company that is unable to convene a meeting of stockholders at a physical location due to COVID-19. The order provides that the company may adjourn the meeting to another date or time, to be held by remote communication, and may provide notice of the meeting (including the new date and time and the means of attending by remote communication) in a document filed with the SEC and a press release, which must be promptly posted on the company's website.

### *Massachusetts*

Massachusetts's Governor, Charles Baker, issued an [executive order](#) on March 30, 2020, that permits public companies incorporated in Massachusetts to hold virtual-only shareholder meetings from March 30, 2020 until 60 days after the end of the current state of emergency due to COVID-19. The order suspends the provision in Section 7.08 of the Massachusetts Business Corporation Act that normally prohibits public companies incorporated in Massachusetts from holding annual or special shareholder meetings solely by means of remote communication. Section 7.08 requires that companies holding virtual shareholder meetings allow shareholders a reasonable opportunity to participate, including being able to vote remotely and read or hear the proceedings of the meeting substantially concurrently with such

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proceedings, and that companies take reasonable measures to verify that each person deemed present and permitted to vote at the meeting is a shareholder and maintain a record of any shareholder voting or other action at the meeting.

The order provides that Massachusetts public companies that have sent written notice to shareholders of the location of an in-person annual meeting before April 10, 2020 will not be required to mail an additional written notice regarding a change to a virtual format if they (i) issue a press release announcing the change; (ii) provide email notices to those shareholders who have provided their email addresses; and (iii) take all reasonable steps to notify shareholders of the change. Companies that provide notice of their annual meeting after April 9 specifying a physical location for their annual meeting will not be able to take advantage of the order's relief if they later decide to switch to a virtual meeting due to COVID-19.

## *New York*

New York's Governor, Andrew Cuomo, issued an [executive order](#) on March 20, 2020, that temporarily suspends subsection (a) of Section 602 and subsections (a) and (b) of Section 605 of the New York Business Corporation Law "to the extent they require meetings of shareholders to be noticed and held at a physical location." Thus, New York corporations can choose to hold a virtual-only shareholder meeting. Currently, the order is effective through April 19, 2020.

## **Views of ISS, Glass Lewis and CII**

### **ISS**

On April 8, 2020, ISS issued [new guidance](#) clarifying how it will apply its benchmark voting policies during the coming months of the 2020 proxy season in the wake of the COVID-19 public health crisis (the "ISS COVID-19 Guidance").

Among the issues the ISS COVID-19 Guidance addresses are virtual-only meetings and several compensation-related topics, including changes in metrics or goals or targets with respect to short- and long-term incentive awards as well as option repricings.

### **Virtual Meetings**

With respect to virtual-only meetings, ISS acknowledges that they may be both necessary and desirable in the current situation. In the United States, ISS does not have a policy to recommend votes against companies who hold virtual-only meetings and has no plans to change that approach. In other markets around the world, ISS will not be making adverse vote recommendations related to companies holding virtual-only meetings until such time that it is safe to hold in-person meetings again. ISS is encouraging companies that decide to hold virtual-only meetings to disclose clearly the reason for their decision (i.e., that it is related to the COVID-19 pandemic) and provide shareholders with a meaningful opportunity to participate as fully as possible, including being able to ask questions of, and engage in a dialogue with, directors and senior management. ISS is also urging companies to commit to returning to in-person or hybrid meetings (or to put that matter to shareholders to decide) as soon as practicable.

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## Executive Compensation

For companies that are or will be materially changing the executive compensation performance metrics, goals or targets used in their short-term compensation plans in response to the COVID-19 pandemic, the ISS COVID-19 Guidance encourages boards to provide contemporaneous disclosure to shareholders of their rationales for such changes. For outstanding long-term awards, given that the ISS benchmark voting policies generally do not support changes to mid-cycle awards, ISS will look at any changes made to long-term awards on a case-by-case basis to determine whether directors exercised appropriate discretion and provided an adequate explanation of their rationale for changes to shareholders. Any future structural changes to long-term plans will be assessed under ISS's existing policy framework.

With respect to the repricing of stock option awards, ISS will apply its existing case-by-case policy approach if a company seeks shareholder approval of an option repricing at its 2020 annual meeting. Under its existing policy, ISS will generally recommend opposing any repricing that occurs within one year of a precipitous drop in a company's stock price. For those plans that permit repricings without shareholder approval, if a board approves a repricing without seeking shareholder approval, the directors' actions will remain subject to scrutiny under ISS's benchmark policy board accountability provisions, which provide that ISS will recommend a vote against or withhold from members of the compensation committee who approved the repricing.

## *Glass Lewis*

On March 19, 2020, Glass Lewis [updated its policy guidelines](#) on virtual-only meetings due to COVID-19. Pursuant to the update, Glass Lewis will, for the duration of the 2020 proxy season (March 1, 2020 through June 30, 2020), take into account the extenuating circumstance of the COVID-19 pandemic when applying its policy on virtual-only shareholder meetings. Glass Lewis will review these on a case-by-case basis and note whether companies state their intention to resume holding in-person or hybrid meetings under normal circumstances. For companies opting to hold a virtual-only meeting due to COVID-19 between March 1, 2020 and June 30, 2020, Glass Lewis will generally refrain from recommending to vote against members of the governance committee on such basis, provided that the company discloses, at a minimum, its rationale for doing so, including citing COVID-19. For annual shareholder meetings occurring after June 30, 2020, Glass Lewis's standard policy on virtual-only meetings will apply because Glass Lewis believes that, even if the COVID-19 pandemic were to continue beyond such date, companies will have been afforded sufficient time to address shareholder concerns as outlined in its standard policy.

## *Council of Institutional Investors*

In a [statement](#) issued on March 16, 2020, the Council of Institutional Investors ("CII") indicated support for companies deciding to switch to virtual-only shareholder meetings due to COVID-19. CII urged companies to make clear that any such change is a "one-off" decision that is "tailored for current circumstances" and to follow "best practices" that would "replicat[e] as much as possible the experience of an in-person meeting."

If you have any questions about this Alert, please contact your usual legal advisor at Ropes & Gray.