

## A Board's Guide To Conducting Virtual Shareholder Meetings

By **Carol Sherman and Norly Jean-Charles** (April 14, 2020, 5:52 PM EDT)

The staff of the Division of Corporation Finance and the Division of Investment Management of the U.S. Securities and Exchange Commission has provided guidance to issuers and shareholders regarding compliance with the federal proxy rules for upcoming annual meetings in light of health and other logistical issues raised by the spread of coronavirus disease 2019, or COVID-19.

On March 13, the SEC provided guidance<sup>[1]</sup> to assist public companies, public investment companies and shareholders with their upcoming annual meetings.

Public companies that have already filed their proxy materials seeking to change the date and location of their annual meetings in connection with adjournments, postponements and switching to virtual shareholder meetings, can announce these changes via press release and in their SEC filings, by filing the announcement as definitive additional soliciting material, but need not mail such announcements or revised proxy materials to shareholders.

These companies may also provide their shareholders with alternative means, such as telephone, to present their proposals at annual meetings.

### Virtual Shareholder Meetings Governed by State Law and Issuers' Governing Documents

Whether a company can hold a virtual shareholder meeting depends on the laws of its state of formation and its organizational documents. For example, the Delaware General Corporation Law permits virtual meetings, but the New York Business Corporation Law is less clear on the subject.

However, on March 20, New York Gov. Andrew Cuomo signed Executive Order No. 202.8,<sup>[2]</sup> temporarily permitting New York corporations to hold virtual annual meetings. The executive order temporarily suspends Section 602(a) and Sections 605(a) and (b) of New York's Business Corporation Law to the extent these sections require notice of shareholder meetings and shareholder meetings' physical locations. Executive Order No. 202.14<sup>[3]</sup> further extends the Executive Order through April 29, 2020, unless later extended by a future executive order.

The executive order allays the concerns of many New York public companies that have been attempting



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to set up their annual meetings for the 2020 proxy season in a manner that complies with New York law and also protects the health and safety of their directors, executives, employees, shareholders and other constituencies that would typically attend annual meetings.

Without the executive order, the New York Business Corporation Law requires New York corporations to hold annual meetings at a physical location, although they may provide their shareholders with the option to attend via remote communication.

Also on March 20, New Jersey Gov. Phil Murphy signed legislation[4] permitting New Jersey companies to hold hybrid or virtual-only annual shareholder meetings during a state of emergency, as long as the board of directors authorizes 202.8 and adopts guidelines and procedures governing such a meeting.

Similarly, on March 21, Connecticut Gov. Ned Lamont issued executive order 7I[5] amending the statutory requirement under the Connecticut Business Corporation Act for in-person shareholders' meetings for Connecticut business corporations, which allows for virtual or hybrid — in person with remote access — meetings.

The executive order does not affect requirements of the state law and a corporation's bylaws with respect to notice of postponement or adjournment of a meeting or for a change in the date, time or place of the meeting and such requirements, such as notice provisions, must be satisfied in connection with a meeting change.

The executive order took effect immediately and will remain in effect for the duration of the public health and civil preparedness emergency, unless earlier modified or terminated by the governor.

The two most prominent proxy advisory services, Institutional Shareholder Services Inc. and Glass Lewis & Co. LLC, have both issued guidelines on policies regarding virtual shareholder meetings.

In a policy statement[6] on April 8, ISS recognized that meetings may have to be postponed or delayed in jurisdictions where in-person meetings are required, and that such companies, as well as companies who use or switch to virtual-only meetings, are encouraged "to disclose clearly the reason for their decision (i.e. that it is related to the COVID-19 pandemic) and to strive to provide shareholders with a meaningful opportunity (subject to local laws) to participate as fully as possible." [7]

ISS does not currently have a policy to recommend votes against companies that hold virtual-only meetings. Glass Lewis provided an update[8] on March 19 regarding its policy on virtual shareholder meetings:

For companies opting to hold a virtual-only shareholder meeting due to COVID-19 between March 1, 2020 and June 30, 2020, we will generally refrain from recommending to vote against members of the governance committee on this basis, provided that the company discloses, at a minimum, its rationale for doing so, including citing COVID-19.[9]

### **Some Benefits and Risks Associated With Virtual Annual Meetings**

Virtual annual meetings allow shareholders to attend and participate in a meeting where they might otherwise have been unable to do so. A virtual annual meeting could also result in reduced costs for both the company and shareholders. On the other hand, a virtual meeting might diminish companies' ability to resolve hostile questions as effectively as in physical meetings.

## **Some Practical Considerations for Boards**

### ***Ongoing Risk Assessment***

As risk management oversight is the board's responsibility, we suggest board members work closely with company managements to understand critical risks emanating from COVID-19, and develop strategies that would mitigate these risks. This is particularly true if some companies decide to move forward with an in-person or hybrid meeting.

### ***Ongoing Engagement With Shareholders***

Although outreach to shareholders is recommended in order to ensure that shareholders have had the opportunity to express any concerns, in-person gatherings are discouraged, and in most cases prohibited, in the era of COVID-19. Virtual annual meetings solve this problem, but might impact the extent to which management and the board are able to engage meaningfully with shareholders.

### ***Prioritizing Health and Safety***

Board members should work with company management to prioritize the health and safety of all stakeholders, including shareholders, employees, business partners, and their families. Should in-person annual meetings be deemed necessary or preferable by companies, they should consider whether the meeting could be postponed or adjourned.

### ***Logistics***

Companies and boards need to determine whether they have the critical infrastructure or technologies needed to host a virtual annual meeting.

*How will shareholders be allowed to participate in the meeting? Will they be able to ask questions and make comments?*

Companies should provide different media through which shareholders will be able to participate in their annual meetings. Shareholders should be able to participate via telephone line or online video presentation.

Companies should test telephone, video and web lines before the annual meeting, so that they will be able to ascertain the best medium by which shareholders will be able ask questions and make comments. Companies may wish to accept questions from shareholders by email or similar means in advance of the meeting.

*Will a virtual forum allow shareholders to exercise all of the rights guaranteed to them under both federal and state securities laws?*

While it may be difficult to provide a direct answer to this question, there are some steps companies should take to ensure that virtual meetings are shareholder friendly:

- Ensure equal access by offering different technological media (phone, prerecorded video, web) to shareholders.

- Create a code of conduct for shareholder participation.
- Institute reasonable time guidelines for shareholder questions.
- Institute a procedure to manage shareholder questions that are out of order.
- Post all appropriate shareholder questions received online during the annual meeting.
- Create a technical support hotline to aid shareholders who are experiencing issues with accessing the annual meeting.

### **Disclosures for Virtual Meetings**

It is important to keep in mind that disclosures that facilitate informed shareholder voting are just as important for a virtual meeting or hybrid meeting (i.e., an in-person meeting that also permits shareholder participation through electronic means) as they are for an in-person meeting.

***Clarification: This article has been updated to clarify that the April 7 Executive Order 202.14 extended Executive Order 202.8 through April 29. A separate period ending May 7 appears to apply to Executive Order 202.14 as a whole.***

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[1] SEC Press Release 2020-62, SEC Staff Provides Guidance to Promote Continued Shareholder Engagement, Including at Virtual Annual Meetings, for Companies and Funds Affected by the Coronavirus Disease 2019 (COVID-19) (March 13, 2020), press release available at <https://www.sec.gov/news/press-release/2020-62> and guidance available at <https://www.sec.gov/ocr/staff-guidance-conducting-annual-meetings-light-covid-19-concerns?auHash=zrsDVFen7QmUL6Xou7EIHYov4Y6lfrRTjW3KPSVukQs>.

[2] NY. Exec. Order No. 202.8 (Mar. 20, 2020), <https://www.governor.ny.gov/news/no-2028-continuing-temporary-suspension-and-modification-laws-relating-disaster-emergency>.

[3] NY Exec. Order No. 202.14 (Apr. 7, 2020), <https://www.governor.ny.gov/news/no-20214-continuing-temporary-suspension-and-modification-laws-relating-disaster-emergency>.

[4] S. 2290 (2020) available at <https://legiscan.com/NJ/text/S2290/2020>.

[5] Conn. Exec. Order No. 7I (Mar. 21, 2020), <https://portal.ct.gov/-/media/Office-of-the-Governor/Executive-Orders/Lamont-Executive-Orders/Executive-Order-No-7I.pdf?la=en>.

[6] ISS, Impact of the COVID-19 Pandemic (April 8, 2020), available at <https://www.issgovernance.com/file/policy/active/americas/ISS-Policy-Guidance-for-Impacts-of-the-Coronavirus-Pandemic.pdf>.

[7] Id.

[8] Aaron Bertinetti, Immediate Glass Lewis Guidelines Update on Virtual-Only Meetings due to COVID-19 (Coronavirus), GLASS LEWIS BLOG (Mar. 19, 2020), <https://www.glasslewis.com/immediate-glass-lewis-guidelines-update-on-virtual-only-meetings-due-to-covid-19-coronavirus/>.

[9] Id.