

# Considerations for Annual Shareholder Meetings in the Time of COVID-19

*April 8, 2020*

As the COVID-19 pandemic continues to evolve, many public companies have made or are considering changes to their upcoming annual shareholder meetings. Several high-profile companies, including Berkshire Hathaway and Starbucks, switched to virtual-only annual meetings this year, while other companies are considering adding a virtual participation option to an in-person meeting (a “hybrid”). Other companies may consider delaying the annual meeting. As a follow-up to our previous Sidley Update on this topic, this Sidley Update reflects recent developments that impact annual shareholder meetings during the 2020 proxy season.

Public companies considering changing the date and/or location of an annual meeting, including a switch from an in-person meeting to a virtual or hybrid meeting, will need to review applicable requirements under federal securities laws, state law, stock exchange rules and the company’s charter and bylaws and should also bear in mind proxy advisory firm and investor viewpoints. These considerations are discussed below.<sup>1</sup>

As a practical matter, companies may be forced to change the date and/or location of their annual meetings in light of stay-at-home orders and other restrictions on social interaction that several states have imposed to try to slow the spread of COVID-19.<sup>2</sup> Also, companies should be mindful of the White House directive to avoid social gatherings in groups of more than 10 people as well as the Centers for Disease Control and Prevention guidance to cancel large, in-person events and certain gatherings of more than 10 people.

Companies that change the date and/or location of an annual meeting should comply with the March 13, 2020 [guidance](#) (updated as of April 7, 2020) for conducting shareholder meetings in light of COVID-19 concerns issued by the Staff of the Division of Corporation Finance and the Division of Investment Management of the Securities and Exchange Commission (SEC) as follows:

- A company that has ***already mailed and filed its definitive proxy materials*** can notify shareholders of any such change without mailing additional soliciting materials or amending its proxy materials if the company:
  - Announces the change in a press release;
  - Files the announcement as definitive additional soliciting material on EDGAR and

includes, if the meeting will be virtual or a hybrid, how shareholders can remotely access, participate in and vote at such meeting; 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 such change.<sup>3</sup>

The SEC Staff expects companies to take these actions promptly after making a decision to change the date or location of the meeting and sufficiently in advance of the meeting so the market is alerted to the change in a timely manner.

- A company that has ***yet to mail and file its definitive proxy materials*** should consider including disclosures regarding the possibility that the date, time or location of the annual meeting will change due to COVID-19, including any possible switch to a virtual or hybrid meeting to the extent that such switch has not been decided, or that the company may adopt additional screening procedures for admission to an in-person meeting. Such determination should be made based on each company's particular facts and circumstances and the reasonable likelihood of such a change. If a company plans to conduct a virtual or hybrid meeting, the SEC Staff expects the company to notify its shareholders and intermediaries in the proxy process of such plans in a timely manner and disclose in the proxy statement the logistical details of the meeting, including information about how shareholders can remotely access, participate in and vote at such meeting.

Companies that are reviewing their annual meeting date, location and procedures should consider the matters set forth below as they decide what to do next, under the following scenarios.

### **Scenario 1: Switch to a Virtual Annual Meeting**

For companies that are considering switching to a virtual annual meeting:

- Review the company's charter and bylaws and state law requirements as to whether virtual-only and/or hybrid annual meetings are permitted. For example, under the Delaware General Corporation Law (DGCL), if the charter or bylaw authorizes the board to determine the place of a shareholder meeting, the board may determine that the meeting be held solely by means of remote communication (Section 211(a)). Several states have recently passed emergency legislation or executive orders in light of the COVID-19 pandemic to permit or facilitate virtual-only and hybrid annual meetings as summarized below.
  - **California.** On March 30, the Governor of California issued an [executive order](#) declaring that a California corporation may hold a virtual shareholder meeting if the meeting has already been scheduled or must occur before June 30. The order suspends the California statutes that currently require corporations to (1) obtain shareholder consent to hold a shareholder meeting by electronic transmission or by electronic video screen communication and (2) provide written notice of such meetings, to the extent that a corporation has provided notice to its shareholders that a meeting will occur at a physical location and subsequently provides notice by a press release, website posting and other means reasonably designed to inform shareholders that the meeting will occur by electronic transmission or by electronic video screen

communication.

- **Connecticut**. On March 21, the Governor of Connecticut issued an [executive order](#) that permits virtual-only shareholder meetings during a state of emergency declared by the Governor, which will be in effect until the Governor determines that the emergency no longer exists. Virtual-only meetings are permitted if the board of directors makes the list of shareholders entitled to vote available for inspection as set forth in the order.
  - **Georgia**. On March 20, the Governor of Georgia issued an [executive order](#) that permits virtual-only shareholder meetings during a state of emergency declared by the Governor, which currently ends on April 13. Virtual-only meetings are permitted if the board establishes procedures to enable shareholder participation and voting on matters submitted at the meeting.
  - **Massachusetts**. On March 30, the Governor of Massachusetts issued an [order](#) that suspends the operation of a law currently prohibiting virtual-only meetings for a period ending 60 days after Massachusetts is no longer under a state of emergency. The order permits Massachusetts corporations that previously sent notice of annual meetings to be held at a physical location to notify shareholders of a change to a virtual-only meeting by (1) issuing a press release announcing the change, (2) emailing notice to shareholders who have provided an email address and (3) taking all other reasonable steps to notify shareholders of the change.
  - **New Jersey**. In March a bill unanimously passed both houses of the New Jersey legislature that would permit New Jersey corporations to hold shareholder meetings in part or solely by means of remote communication during a state of emergency declared by the Governor, which will be [in effect](#) until the Governor determines that the emergency no longer exists. The legislation is subject to certain conditions including (1) board approval of the meeting guidelines and procedures and (2) implementation of reasonable measures to assure shareholder participation in the meeting (e.g., an opportunity to vote and hear the proceedings).
  - **New York**. On March 20, the Governor of New York issued an [executive order](#) that permits virtual-only shareholder meetings until April 19 by suspending the provision of the New York Business Corporation Law that requires meetings of shareholders to be noticed and held at a physical location.
  - **North Carolina**. On April 1, the Governor of North Carolina issued an executive order that permits virtual-only shareholder meetings during a state of emergency declared by the Governor, provided that shareholders have the opportunity to participate in and vote at such meeting.
- If the company has already mailed and filed its definitive proxy materials, promptly after the company has decided to switch to a virtual annual meeting, announce the change in the manner set forth in the SEC Staff guidance discussed above with respect to announcing a change in the meeting date or location without the need to mail additional soliciting materials (including new proxy cards). Delaware corporations should also note that on April 6, the Governor of Delaware issued a [modification](#) of Delaware's declaration of a state of emergency to provide flexibility to SEC-registered Delaware corporations that previously sent notice of annual meetings to be held

at a physical location and now wish to switch to a virtual meeting. Under the modification:

- If a corporation's board wishes to change a previously noticed meeting with a physical meeting location to a meeting conducted solely by remote communication, it may notify shareholders of the change solely by a document publicly filed by the corporation with the SEC and a press release promptly posted on the corporation's website; and
- If it is impracticable to convene a previously noticed meeting of shareholders at its physical location due to the COVID-19 pandemic, the corporation may adjourn the meeting to another date or time, to be held by remote communication, by providing notice of the date and time and the means of remote communication in a document filed by the corporation with the SEC and a press release promptly posted on the corporation's website.
- Determine logistical matters regarding the virtual meeting, including engaging a service provider to host the meeting, clarifying the procedures for registered and beneficial shareholders to access the meeting, whether to use live video as well as audio, how votes will be collected before and during the meeting, how the board and management will participate, whether a shareholder list will be made available on the website, what website updates are needed and how questions will be addressed. Typically companies close out the formal portion of the annual meeting before opening up the Q&A session. Check with the service provider how much notice it needs to action a switch to a virtual-only meeting.
- If a shareholder proposal is on the ballot, determine how the proponent or representative can present the proposal. SEC guidance has encouraged, to the extent feasible under state law, that proponents are given the ability to present their proposals through alternative means, such as by phone. We believe that most companies are providing the proponents the ability to present proposals live over the phone, but some may use a pre-recording of the proponents' presentation of their proposals and play it at the meeting or present the proposals on behalf of the proponents.
  - The SEC Staff has announced in the new guidance that failure to present a proposal due to the inability to travel or other hardships related to COVID-19 will be considered a "good cause" under Exchange Act Rule 14a-8(h), should companies assert Rule 14a-8(h)(3) as a basis to exclude a proposal submitted by the shareholder proponent for any meetings held in the following two calendar years.
- Disclose in the proxy statement information regarding the manner in which the virtual meeting may be held, including information regarding how shareholders may participate in the annual meeting, the manner in which questions may be submitted, how questions will be addressed and how shareholders can receive technical assistance before and during the meeting.
- Consider proxy advisory firm policies on virtual meetings that may drive voting recommendations.
  - Institutional Shareholder Services (ISS) does not have a formal policy to recommend votes against companies that hold virtual-only annual meetings. ISS issued new policy guidance on April 8 confirming there will be no change to that approach this proxy season. ISS encourages companies holding virtual-only meetings to provide shareholders with a meaningful opportunity to participate fully in the meeting, including the ability to engage in dialogue with and ask questions of directors and senior

management.

- Under its standard policy, Glass Lewis generally recommends voting against governance committee members at companies that opt to hold virtual-only shareholder meetings without providing specified robust proxy statement disclosures. On March 19, Glass Lewis [announced](#) an immediately effective policy update in recognition of the fact that many public companies have resorted to virtual-only meetings in light of the COVID-19 pandemic. Under its [updated guidelines](#), for companies opting to hold a virtual-only meeting during the 2020 proxy season (March 1 through June 30), Glass Lewis will generally refrain from recommending voting against governance committee members provided that a company discloses its rationale for holding a virtual-only meeting and specifically references COVID-19.<sup>4</sup> Glass Lewis will review these situations on a case-by-case basis and note whether companies disclose their intention to resume holding in-person or hybrid meetings under normal circumstances.
- Consider viewpoints of institutional investors with regard to virtual meetings.
  - On March 16, the Council of Institutional Investors (CII), which has generally opposed virtual-only shareholder meetings, issued a [statement](#) acknowledging that many public companies will reasonably move to a virtual-only format this year. CII hopes that companies will make clear that this is a one-time decision in light of the current situation and urges companies to follow best practices for shareholder participation.
  - On March 31, the President and CEO of State Street Global Advisors (SSGA) published a [letter](#) urging companies to either postpone their annual meetings or shift to virtual meetings. If shifting to a virtual format, SSGA expects shareholders to have the same rights and opportunities as at a physical meeting including the ability “to have active and robust interactions with management and the board at appropriate times.”
- Conduct a “dry run” prior to the meeting date to identify and resolve any technical issues and ensure that key people are familiar with the technology they will use during the meeting.

## **Scenario 2: Hold an In-Person or Hybrid Annual Meeting**

For companies that are considering holding an in-person annual meeting (with or without a virtual participation option, as discussed under Scenario 1):

- Consider whether any company representatives should refrain from attending the annual meeting in person because they are at high risk of contracting COVID-19.
- For hybrid meetings, consider adding disclosure in the proxy statement encouraging shareholders to participate virtually in light of concerns surrounding the COVID-19 pandemic.
- For both in-person and hybrid meetings, consider adding disclosure in the proxy statement encouraging shareholders not to attend in person if they are experiencing any flu-like symptoms or have recently been exposed to a person diagnosed with COVID-19.
- Consider adding additional named proxies and ensure the proxy card permits full power of substitution of the named proxies, to protect against the risk that one or more of the named proxies are not available (e.g., because of falling ill, quarantine requirements or travel

restrictions).

- Review the company's bylaws and corporate governance guidelines to determine who will chair the meeting if the chair becomes unavailable.
- For companies that have stated in the proxy statement that a representative from the independent auditing firm will be present at the meeting and available to answer questions, confirm who is expected to attend the meeting, including a back-up option(s) prepared to answer appropriate questions (e.g., a partner from that firm's local office who could step in if non-local key audit partners are not available).
- Confirm who will act as the inspector of election and agree on a back-up plan if the individual inspector is no longer available.
- Review the company's bylaws and applicable law to determine whether the chair has authority to exclude a shareholder or proxy from the meeting, for example, to maintain the safety of those present; if not, considering amending the bylaws to specifically authorize this where permitted.
- Review the company's process for screening persons for admission to the meeting and consider including additional security personnel and a health expert to monitor attendees for apparent flu like symptoms.
- Ensure that sufficient proxy cards, ballot papers, hand sanitizer and masks (if needed) are available at the meeting.
- Review the script before the meeting to announce the health and safety measures in place and request that anyone who is experiencing flu-like symptoms leave the room and submit a ballot.

### **Scenario 3: Delay the Annual Meeting**

For companies that are considering delaying the annual meeting:

- Review the company's bylaws to determine whether they require annual meetings to be held on a specific day or during a particular month; if so, consider amending the bylaws to permit the board to determine the date, time and place (if any, as discussed under Scenario 1) of the annual meeting.
- Evaluate whether delaying the meeting by postponing the meeting to a different date or by convening and immediately adjourning the meeting to a different date. Review the impact of either method of delaying the annual meeting on the applicable deadlines for shareholder proposals under Exchange Act Rule 14a-8, shareholder proposals and director nominations under the company's advance notice provisions, and director nominations under the company's proxy access provision.
- Review state law, New York Stock Exchange (NYSE) and NASDAQ requirements as to annual meeting requirements when determining what the new date will be. For example, the DGCL provides that the Court of Chancery, upon application of a shareholder or director, can summarily order a company to hold an annual meeting for the election of directors if more than 13 months has elapsed since the most recent meeting (Section 211(c)). The NYSE requires listed companies to hold an annual meeting during each fiscal year (NYSE Listed Company Manual Section 302.00) and NASDAQ requires companies to hold an annual meeting no later than one year after the end of the company's fiscal year-end (NASDAQ Stock Market Rule 5620).

- If necessary, schedule a board meeting to set the new annual meeting date and record date, in line with state law requirements and the company's bylaws. For example, Delaware requires the record date for voting and the meeting notice to be between 10 and 60 days before the meeting and that any determination of stockholders of record entitled to notice or to vote shall apply to any adjournment of the meeting (DGCL Sections 213(a) and 222(b)).
- If a new date is required, update the annual meeting checklist and ensure that the company has adequate time to meet various deadlines (e.g., the broker search required by Rule 14a-13, which is required at least 20 business days prior to the record date or otherwise as practicable).
- Issue a press release announcing and providing notice to shareholders of the new annual meeting date and new shareholder proposal deadline, file with the SEC as additional definitive soliciting materials pursuant to the new SEC Staff guidance discussed above and on Form 8-K (Item 8.01) and notify the relevant stock exchange as appropriate. For example, the NYSE requires immediate notification of dates set in connection with the calling of any shareholder meeting and notice of at least 10 days prior to the record date, with some exceptions where a full 10 days' notice is not possible (NYSE Listed Company Manual Sections 204.21 and 401.02).
- File an amendment to Form 10-K to include the Part III information if the proxy statement will be filed more than 120 days after fiscal year-end, or, alternatively, file a Form 8-K to extend the 120-day deadline by up to 45 days. Ensure that the board has had an opportunity to review the information before filing, which may require scheduling one or more additional board and/or committee meetings.
  - A company does not need to provide information responsive to Part III of Form 10-K if it discloses that information in a proxy statement filed within 120 days of the company's fiscal year-end. For calendar year companies, the 120-day deadline this year falls on April 29. On April 6, the SEC issued a new [Compliance and Disclosure Interpretation](#) (C&DI) confirming that the conditional filing relief provided by the [SEC Order](#) discussed in a previous [Sidley Update](#) can be used to extend by up to 45 days the 120-day deadline for filing Part III information as long as (1) the 120-day deadline falls within the relief period specified in the SEC Order (currently March 1 to July 1) and (2) the company meets the conditions of the SEC Order (e.g., filing a Form 8-K). The C&DI outlines the procedures to follow under various scenarios. Specifically:
    - A company that timely filed its Form 10-K without relying on the SEC Order should furnish a Form 8-K with the disclosures required in the Order by the 120-day deadline. The company would then need to provide the Part III information within 45 days of the 120-day deadline by including it in a Form 10-K/A or proxy statement.
    - A company may invoke the SEC Order with respect to both the Form 10-K and the Part III information by furnishing a single Form 8-K by the original Form 10-K deadline that (1) provides the disclosures required by the Order, (2) indicates that the company will incorporate the Part III information by reference and (3) provides the estimated date by which the Part III information will be filed. The company must then file the Part III information no later than 45 days following the 120-day deadline (June 13 for calendar



year companies).

- A company that properly invoked the SEC Order with respect to its Form 10-K by furnishing a Form 8-K but was silent on its ability to timely file Part III information may (1) include the Part III information in its Form 10-K filed within 45 days of the original Form 10-K deadline or (2) furnish a second Form 8-K with the disclosures required in the Order by the original 120-day deadline and then file the Part III information no later than 45 days following the 120-day deadline by including it in a Form 10-K/A or proxy statement.
- In its new policy guidance, ISS indicated that it will be “positively noted” when companies and boards that have necessarily had to postpone their annual shareholder meetings use webcasts, conference calls and other forms of electronic communication to stay engaged with investors.
- Note that Glass Lewis will apply its standard policy on virtual-only meetings to shareholder meetings held after June 30, 2020. Glass Lewis has stated that this will be the case even if the pandemic continues beyond this date because Glass Lewis has given companies sufficient time to address shareholder concerns as described in its policy. To avoid a vote recommendation against governance committee members in the future, Glass Lewis expects robust proxy statement disclosure assuring shareholders that they will have the same participation rights they would have at an in-person meeting as described under Glass Lewis’ guidelines.

### **New SEC Guidance For Companies Experiencing Delays in Printing and Mailing Proxy Materials**

The April 7 update to the SEC [guidance](#) on shareholder meetings includes a new section providing flexibility to companies experiencing delays in printing and physically mailing the “full set” of their proxy materials for their upcoming annual meetings.<sup>5</sup> Where delays are unavoidable due to COVID-19 related difficulties, the SEC Staff would not object to a company using the “notice-only” delivery option in a manner that, while not technically complying with all of the notice and timing requirements of Exchange Act Rule 14a-16 (e.g., sending the notice of electronic availability of the proxy materials at least 40 calendar days before the meeting), will provide shareholders with proxy materials sufficiently in advance of the meeting to review them and vote on an informed basis. This will be the case if the company announces the change in the delivery method by following the steps described above for announcing a change in the meeting date or location. Affected companies and intermediaries should continue to use their best efforts to send paper copies of proxy materials and annual reports to shareholders upon request, even if such deliveries would be delayed.

Our [COVID-19 landing page](#) will continue to be updated as these matters develop.

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<sup>1</sup>For companies who expect a shareholder activist to file opposing proxy materials, there are additional considerations due to the increased complexity of the annual meeting and the potential impact on the activist campaign. For example, most service providers for virtual and hybrid-virtual annual meetings do not have the capability to support a contested annual meeting.

<sup>2</sup>A Sidley resource tracking state-issued stay-at-home orders is available [here](#).

<sup>3</sup>The April 7 update to the SEC’s guidance clarifies that it applies to both annual and special shareholder meetings.



<sup>4</sup>Glass Lewis referred to [Starbucks Corporation's 2020 proxy statement](#) as an example of effective disclosure on this point.

<sup>5</sup>A “full set” of proxy materials would contain (1) a proxy statement or information statement, (2) an annual report if required by Exchange Rule 14a-3(b) or 14c-3(a) and (3) a proxy card or, in the case of a “street name” holder, a request for voting instructions, if proxies are being solicited.

## CONTACTS

If you have any questions regarding this Sidley Update, please contact the Sidley lawyer with whom you usually work, or

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