

"The Coronavirus: What Should Your Company Do Now?"

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Concerns about the magnitude of the coronavirus outbreak and its potential impact on business raise a wide array of securities law compliance and corporate governance issues for public companies and the lawyers who advise them. Join these experts:

- **Ning Chiu**, Counsel, Davis Polk & Wardwell LLP
- **Meredith Cross**, Partner, WilmerHale
- **Keir Gumbs**, Associate General Counsel & Deputy Corporate Secretary, Uber
- **Dave Lynn**, Partner, Morrison & Foerster LLP and Editor of TheCorporateCounsel.net

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David Lynn, *Senior Editor*, TheCorporateCounsel.net: Hello, everyone. Welcome to today's webcast, "The Coronavirus - What Should Your Company Do Now?" I am Dave Lynn, Senior Editor of TheCorporateCounsel.net and a partner at Morrison & Foerster.

First and foremost, I hope everybody listening is staying safe and following the guidelines in their areas, so we can all work together to stop the spread of this virus. Obviously, the health and safety of our family and friends and colleagues is a top priority in this crisis, but we do also need to consider the health of our financial markets and our public companies as they confront this unprecedented situation. That's really what we are going to talk about here today.

I'm going to introduce the great panel that we have assembled here today. I am really pleased that they were able to take time out of their very busy schedules to address the membership here because this is such an important topic. We really wanted to identify the experts in the field.

I am pleased to be joined by Ning Chiu, Counsel at David Polk & Wardwell; Meredith Cross, Partner at WilmerHale; and Keir Gumbs, Associate General Counsel and Deputy Corporate Secretary at Uber. We are going to run through for you a variety of topics about the impact of COVID-19 on public companies and what their considerations should be for filings, disclosure, financial information and upcoming annual meetings.

SEC's Efforts to Address COVID-19 Issues

I am going to start off by talking about the SEC's efforts to address some of these issues. The first thing I wanted to touch on was the SEC's operating status. First off, the headline here is that the SEC is fully up and running and open for business. What transpired really over the last couple of weeks is that a majority of the SEC Staff began teleworking. That was as of last Tuesday, and now, the agency has announced that they have transitioned to full telework posture with some limited exceptions.

In these sorts of times when there is market panic and concern about these issues, job one for the SEC is to maintain continuity of the operations of the Commission. This isn't like a snowstorm or last year when we had the government shut down. It's not like the agency is operating with a skeleton crew. The Staff is teleworking, just like the rest of us. They are doing their best to address this crisis that we are now facing.

So, I beg of you, please keep your delaying amendments on your registration statements and don't start freaking out about when you are going to hear from the Staff on the review of a filing or whether it will be declared effective, because it really should be business as usual.

I would note that the Staff has been teleworking for something like 18 years now. Because I can remember when it was first memorialized in the collective bargaining agreement that the agency signed back in 2002. So, they are probably much better at teleworking than you are or than I am.

They really are up and running and trying to respond to your needs. You may not be able to reach the Staff at their D.C. office number on the first try, but they are going to call you back. If you have the Staff's email address, send them an email, and they will respond.

One thing to preface the discussion about some of the releases that the SEC and the Staff has put out. I can remember being at the SEC when Hurricane Katrina happened and sitting there with my colleagues trying to come up with all the different ways we could assist the people impacted by the hurricane. I know that's what the Staff is doing now.

They are really looking for ways that they can be accommodating to issuers on something that's even a much larger scale than that disaster. I think that is really reflected in the types of exemptive relief and guidance that they have been able to provide to date and I am sure will continue to provide.

I would note that the Staff, the Chairman and the Commission have been on top of this topic for some time now. If you go back to the end of January when the Commission was considering some MD&A proposals from the bully pulpit there, Chairman Clayton was able to address the issue and basically said that the Commission would be monitoring the situation and providing guidance along the way and assistance to make sure market participants have what they need and that disclosures would be made when necessary, and offered some guidance about the things that issuers should think about from a disclosure perspective, which we will talk about in more detail.

In mid-February, there was a Joint Statement that Chairman Clayton joined with members of the Staff and the Chairman of the PCAOB and talking about audit issues. Among the things they talked about were the need for potential subsequent event footnotes, particularly at that time when a lot of large accelerated filers were filing 10-Ks, as well as circumstances around whether relief might be necessary from filing deadlines and the like because of concerns with, in that case, getting the audit done essentially.

Understanding the SEC's COVID-19 Exemptive Order

Lynn: At the beginning of this month, on March 4, the SEC adopted an Exemptive Order that basically extended the deadlines for a vast majority of SEC reports and also served as a reminder that companies needed to consider their overall disclosure obligations in the context of this crisis.

The things that the Commission talked about in announcing this order was that they have reminded companies about their need to disclose material information about the coronavirus and avoid selective disclosure and disseminate information broadly. And then also consider whether it was necessary to revisit, refresh or update previous disclosure to the extent that the information becomes materially inaccurate.

They also reminded people to take advantage, when appropriate, of the safe harbor for forward looking statements. So, that's sort of some of the guidance that was provided in and around the time of the Exemptive Order.

The Exemptive Order itself covers the time period from March 1 to April 30 of this year. [NOTE: On March 25, the SEC extended the relief to July 1, 2020.] It's clear from the order itself and the communications around the order that the Staff and the Commission were going to be monitoring the situation and considering whether alterations would be necessary.

The order basically applies to any company that has reporting requirements under Section 13 and 15(d) of the Exchange Act or any person who is required to make filings for such a company and the exemption applies to the requirements to file or furnish materials under a broad range of applicable provisions.

You can look at the order to see them all, but it was 13(a), 13(f), 13(g), 14(a), 14(c), 14(f), 15(d), Regulation 13A, Regulation 13D-G except for the provisions that mandate filing of Schedule 13D or amendments to Schedule 13D, Regulations 14A, 14C and 15D, as well as Exchange Act Rules 13(f)(1) and 14(f)(1).

The exemption provided an extended filing deadline that is available when a number of conditions are satisfied. First, if the company or the person that's required to make any filings with respect to the company is unable to meet the filing deadline due to the circumstances arising from COVID-19.

Then, the company has to furnish to the Commission a Form 8-K - or, if they are an FPI, a Form 6-K - by the later of March 16 or the original filing deadline of the report. That 8-K would set forth that the company is relying on the order, a brief description of the reasons why it couldn't file the applicable reports, schedule or form on a timely basis, the estimated date by which the report, schedule or form is expected to be filed.

If appropriate, the company is supposed to provide a risk factor explaining, if material, the impact of COVID-19 on the company's business. If the reason relates to somebody's required opinion or report or certification, then the issuer has to attach as an exhibit, the statement filed by that person, stating the specific reasons why they couldn't furnish that opinion, report or certification before the date it was required to be filed.

Then, the company or the person that's making a filing with respect to a company has to file the report, schedule or form no later than 45 days after the original due date. When it's filed, then they have to disclose in that filing that the company has relied on the Exemptive Order, and explain why it hadn't filed the report, schedule or form on a timely basis.

Important to keep in mind here in terms of applying this thing - you don't have to file a Form 12b-25, because the Exemptive Order and the 8-K that has to be filed is basically doing the job of Form 12b-25.

However, the SEC did clarify that, as a result of the Exemptive Order, the 45-day extended deadline is your new deadline. So, you could, in fact, file Form 12b-25 at that time your report is due under the Exemptive Order to extend your deadline further, under the applicable extensions that are provided in Rule 12b-25. So, no Form 12b-25 at the front end but the potential to rely on 12b-25 at the back end.

The other thing I would note about the coverage of the order - noticeably absent were Schedule 13D and amendments to Schedule 13D. Those were specifically carved out. Also, the order didn't reference Section 16(a) reports. Obviously, the SEC made a determination there that Section 16(a) reports and Schedule 13Ds were still important to disseminate that information in the marketplace, so they didn't apply the same principles of the Exemptive Order to those reports.

In terms of how the extended filing deadline sort of feeds through to other things - basically, in the press release accompanying the Exemptive Order, the SEC said that you would effectively be current and timely for S-3 eligibility and the definition of WKSI as long as you were current and timely as of the first day of the relief period, and then you filed any report that was due during the 45-day filing extension time.

Similarly, for S-8 eligibility purposes and for the current public information requirement of Rule 144, you would be current under basically that same framework. That was all in the press release, not the Exemptive Order itself, but just to give you an idea of how the Staff would be applying that going forward.

Also note, too, that the Exemptive Order did provide some relief from the requirements under the proxy rules to furnish proxy materials or, if applicable to your situation, information statement materials, to security holders when mail delivery is not possible. This is not a situation I have run into yet. It seems like it would be a pretty extreme outcome that mail delivery would be suspended.

But, as we all recognize, anything is possible at this point. So, there, a couple of conditions must be satisfied. First, the security holder has to be in a mailing address where common carrier services have been suspended, then the company that is making the solicitation or sending out the information materials has to make a good faith effort to furnish to the security holder.

It's unclear exactly what would satisfy that, but I think just basically trying to get it to them in any means possible that would be appropriate in those circumstances. That's something that may come into play down the road. I haven't seen it yet, but it's certainly another aspect of the Exemptive Order.

Like I said at the outset, this is probably not the last actual Commission action we will see on this topic. We'll discuss later in the webcast about Staff action that has happened and Staff guidance. [NOTE: On March 24, 2020, the Staff published *Staff Statement Regarding Rule 302(b) of Regulation S-T in Light of COVID-19 Concerns* to address questions it has received regarding the authentication and document retention requirements of Rule 302(b) of Regulation S-T in light of various logistical issues raised by the COVID-19 pandemic. On March 25, 2020, the Division of Corporation Finance published *CF Disclosure Guidance: Topic No. 9 - Coronavirus (COVID-19)*, in which the Staff provides its views regarding the disclosure obligations that public companies should consider in light of the circumstances presented by the COVID-19 pandemic.]

The SEC has set up a portion of its website that's dedicated to updates about the COVID-19 pandemic, and that's something you should definitely monitor as they continue to consider the ways in which they can help issuers and people affected while trying to preserve disclosure to the marketplace.

With that, I will turn it over to Meredith to run us through our disclosure obligations.

Identifying and addressing disclosure and SEC reporting issues

Meredith Cross, Partner, *WilmerHale*: Thank you, Dave. I echo your remarks about hoping everyone is safe and that we all help each other during this very hard time.

This is an unprecedented time in the 38 years I have been doing this, in trying to provide good advice to companies about how they should be addressing disclosure matters. I have the same experiences as Dave and I'm sure others on this call, that the Staff has absolutely been available and helpful. Even on just regular carrying on with what you do day-to-day, they are doing their jobs and they do want to be helpful. They are there to help if you do need to talk to them about COVID-19 or regular work.

As a starting point, the COVID-19 matter became acute after most companies had already filed their annual reports - at least large-cap companies - and done earnings and done their guidance. The baseline of information that is out there on how the coronavirus will impact companies or is impacting them is pretty sparse. There is just not a lot of information because of where it came up on the calendar.

Some companies included something in their risk factors, depending on when they filed, but there is just not a lot of information and it had not sort of taken over our lives at that point. That's where we start, which is not the easiest place to be starting with.

To level set, going back to basics, there is not a general obligation to make disclosures, updating the market, etc., about what's happening at your company absent a mandatory 8-K or a periodic filing or if you are generally doing something such as an offering or the like.

The same analysis applies to coronavirus matters. With the calendar as it has been, most have not had to deal with a new periodic report and people are hard-pressed to find an 8-K item that's getting triggered other than a number of companies have filed under Item 2.03 of 8-K in connection with drawing their credit facilities or getting new credit facilities.

It's not all companies because you do look for materiality,- I don't know if others on the call feel differently - but that's the main 8-K item that we have seen that might trigger a disclosure. That said, there's a number of other factors that can result in companies deciding that they want to do a disclosure.

Another thing that makes this especially challenging is the very public nature of things that are happening at companies and the public interest in those things and, as I mentioned, where it is on the calendar. We don't have 10-Qs for calendar companies until I guess the beginning of May.

At the same time, plants are getting closed, cities are telling people they can't have people at the office. There are news reports about supplies not coming in. I, like many others, are getting questions about "Do I need to talk about that? Can I answer questions about that if somebody calls up?"

The answer that I have been giving in general is that you have to think about Reg FD. If something would be material and non-public, then you probably don't want to be answering those questions in a one-on-one setting. You can talk to the press about these things.

A number of companies have addressed these challenges through press statements. If part of their business has to be closed, they will put something out in a way of a press statement so that the information is out there. They don't need to have a press release that tries to update the world on everything happening at the company, but they are dealing with it through press statements. That has been pretty common.

If you do talk - again, in an FD-compliant manner - you then need to be materially complete and not mislead. That leads to challenges about how much or how little you say if you are doing an update. I think that one of the most important things that is often very difficult to take on, but is the case now, is that you need to not be afraid to say you do not know what this means for you and you can't predict.

Often, companies struggle with that answer, but I have to say that most at this point, they don't know, and they can't predict. That's something that more and more companies are getting comfortable saying.

Another issue that is complicated here is the listing standards and requirements to put on material move. I think you need to consider those. We need to be pragmatic about making sure your disclosures provide useful information and not be putting out constant notices about each thing that

happens that somebody might think is material. I don't think that's a good approach to this. I don't know if anybody else wants to talk about those issues before I keep going.

Lynn: Yes. It strikes me that a good primer to try to figure out what to say here is, you can go back to the SEC cybersecurity guidance from 2018. It's similar to guidance the SEC made on other issues of this nature, but you have a situation where there is a great deal of uncertainty.

It could have an extraordinarily outsized material effect on the company but at this point, you may not know what that effect is and you sort of have to look at all that in the context of your company's circumstances at this moment in time. In a lot of ways, that guidance kind of walks through the types of things that you might be concerned about and wanted to address in the course of dealing with this. That's probably how the SEC looks at it as well.

Cross: That's a helpful place to look. That also has the benefit of reminding people about, if you are updating risk factors, being very careful not to provide hypothetical risk factors about things that may happen to you if they are already happening to you.

I'll talk in a minute about updating risk factors - for various reasons, but when you do update, you need to not say that your business supplies may not come in if, in fact, your supplies are not coming in. That would be in the nature of the SEC's enforcement cases in the cybersecurity area where if someone says "We may be hacked" when, in fact, they are in the middle of being hacked.

As you write these disclosures, you need to be very careful not to put something that isn't materially complete or accurate. That is challenging in this area. That's why you get back to you don't know. You do know some facts and you can include facts you do know, but you need to be careful not to go out too far and get yourself in trouble for actually trying to do a good thing through disclosure, and then actually potentially have something that is misleading.

Keir Gumbs, Associate General Counsel and Deputy Corporate Secretary, Uber: I want to add one thing on that, which is to me - and I don't know how others feel about this - but the environment from a disclosure perspective and markets perspective feels very similar to how things felt in the 2007-2008 timeframe. Hopefully, it's not the same underlying economic issues that we had then.

The point you just made, Meredith, really reminds me of how at that time when people were thinking about mortgage-backed securities and similar kinds of instruments, when people were speaking - and I can think of a specific example of an SEC case on this basis where people would say, "Well, we are not experiencing anything impacting our portfolio or these types of instruments" when, in fact, there may have already been some red flags that they did. All of these things are judged in hindsight.

For me, at least, in thinking about the advice that I am giving or even just talking with peers, that's the thing that I always keep in mind, to your last point, which is if you are experiencing something, if you are seeing a flag and you are making disclosure about the business performance, you are going to be hung out to dry if your statements about the performance aren't complete with respect to whatever that flag might be as it relates to COVID.

Cross: That goes into the next point of whether you are ready to say anything. I don't think people need to race out and say something just because people have questions. You need to very carefully consider when is the right time to speak.

A couple of times that may require you to speak would be if you are going to access the capital markets or, if you left your trading door open and you have people that are transacting. Both of those would be areas where you'd have to look at your disclosure practices as it exists and decide whether or not an additional disclosure would be needed in order for those things to go on.

I've seen a lot of companies close trading windows - not all. There are some companies where it's quite clear what would be going on whether or not they are speaking, and maybe that works all right. In the capital markets area, there may be some that don't feel the need to say anything to go to market but certainly seeing more and more disclosures in connection with that.

There is also the question that we are getting a lot - "should we be withdrawing our guidance?" We are seeing more and more companies are going out there and either in connection with saying, for example, that they are drawing down their facilities to increase liquidity or for whatever other reasons they are speaking, though they will include that they are withdrawing their guidance, that they don't know, particularly in the hospitality area, they don't know what is going to be happening. So, they are doing that.

There is not an affirmative obligation to go withdraw your guidance. It goes, again, to the timing when you want to speak. You may want to wait until you have more to say, and it's really a judgment call for the company to make. I don't think that people should feel compelled to race out and withdraw their guidance once they have a sense that they are not going to be able to make it.

I think the markets understand that all companies are facing huge challenges right now. I'd say probably confirming guidance would be more surprising in some instances than withdrawing. Does anybody want to talk about that? I think that one is a tough call.

Lynn: Yes. I think that's a good point you just made, Meredith. For the calendar year-end company right now, would be kind of the traditional pre-release timeframe - a couple of weeks before the end of the quarter and into the first week after the quarter where if the market doesn't hear from you, then they assume you are going to be good on your guidance.

That traditional convention may not apply in this current situation just because people realize that things are completely haywire. That may drive a lot of people to feel compelled to say something, but they need to think about what is absolutely necessary at this time.

Cross: Whether the timing is right, yes. A lot of this is about providing disclosures that are useful to investors, that are materially complete and not misleading. You've got to figure out a way to do that when you are going to speak, and that is one of the challenges on this one.

I mentioned before the Item 2.03 8-Ks. There's a lot of those getting filed. We had statistics. We have been following them as a firm, and I think yesterday there were 13 of them or something like that. They have been ticking up over time as companies enter into new credit facilities or draw their facilities. Some of them are doing Item 2.03. Some are doing them as just FD disclosures. For some companies, it's not material, so they are not doing anything under that particular 8-K item.

Once we get through this period of uncertainty about what one should be disclosing, keeping in mind the overall framework that I described, we are then going to be moving into getting ready for the upcoming 10-Qs for calendar year companies and earnings materials and the like. This is where the SEC's guidance that they just put out is worth remembering, and then, just in general, the usual analysis will apply.

This may be a time when we see more companies updating risk factors in 10-Qs than is usually the case. In a lot of large-cap companies, you will see no updates throughout the year. I wouldn't be surprised to see more updates to risk factors in the upcoming 10-Qs.

For those companies that don't repeat their risk factors in the 10-Qs, there is a requirement, of course, to update them if you have material changes to them. When you are doing that, you are going to need to see where you are at that time and, again, focus on not having hypothetical risks.

The other thing that is different here compared to other things that have happened in most crises is that this is also going to likely have an impact for MD&A.

You will have the things that you talk about as risks for the company, and then you are going to need to talk about how it has impacted results and known trends, events or uncertainties, very recently like future results. This is certainly going to be in that category. I would expect to see more MD&A disclosures on this topic than you have seen around some of the other challenges that we faced recently.

When you get to earnings, certainly to the extent that companies haven't withdrawn before then, I could see companies deciding that they can't provide guidance over the course of the rest of the year and withdraw at that time. That wouldn't surprise me. Those were the things that I planned to cover.

Ning Chiu, Counsel, *Davis Polk & Wardwell*: I wanted to raise two considerations for people. One is an easy one, and the other is much more unpleasant and harder. One, if you haven't filed your proxy statement, a lot of people's proxy statements have a CEO letter or a board letter or something like that and those were written a long time ago or maybe your annual report has a CEO letter that was usually prepared and they might sound at this point kind of odd if they don't mention what's happening in the world today or what's happening in the environment.

You might want to take a look at that if they really just cover 2019 and is very optimistic and positive. Take a look at that. At the same time, don't go overboard and try to make a lot of assurances about what's happening to the business even though it's in the proxy statement and it's just the letter for that because, as Meredith pointed out, you're still trying to figure out what's happening and your risk factors, when you come to it for your 10-Q, may actually be very different. Be mindful of not being overly optimistic in the assuring CEO letter.

The other thing to think about, which is incredibly unpleasant - but, people should just consider if your CEO gets sick or has tested positive, would you say something, would you not say something. This isn't necessarily a technical legal question because there is no 8-K trigger for something like that and there's a lot of factors to consider, including whether it might leak and whether you want to control the story, but it is something that, at this point, companies should at least have considered and have a plan for. With that, I am turning it over to Keir.

Financial reporting and internal control implications

Gumbs: There are probably six or seven things that we could talk about in the context of financial reporting and internal controls, but I am going to just focus on three and then turn it over back to Ning.

The first one - it relates to impairment, which is one of the things that companies will have to start thinking about in light of the COVID outbreak, meaning, whether or not any of the assets in their balance sheet, including things like investments in other companies or goodwill, might be impaired as a result of the outbreak.

An example might be if you have a business that is in China where the performance of that business over the course of the last three months is substantially below where it was before and especially if it's a business that you may need to go out and do some fundraising, bringing additional capital and the like, where that may be an external event that would cause you to look at it and evaluate whether or not that asset has been impaired.

The key thing is - from an auditing standard - that you are supposed to think about that. Any time that there is an indication that the cash-generating unit might be impaired. For many companies, particularly companies that are particularly exposed to this virus, companies that are either operating

in China, companies that have supply chain or other aspects of their business that might be impacted, it's something that they are going to have to think about.

Even though for many companies that are calendar year and companies that are not yet at the point where they are worrying about their annual report, it's something you have to think about every single period. We are coming up on the end of Q1 for this year - you should plan to have that conversation with your auditor and really be thoughtful about whether or not there are any steps you need to take directly for potential impairment for businesses or assets on your balance sheet.

The second one that's a little bit more imminent relates to liquidity. One of the things and certainly a lesson from the financial crisis is that liquidity really is critical for companies in business periods like this because to the extent that you have liquidity, it can really help your company survive what would otherwise be a very challenging economic environment for the company to continue operating in.

With that in mind, companies should look at, if they haven't already, the terms in their debt agreements. In many companies, that agreement - particularly companies that aren't necessarily AAA credit, so to speak, - there are liquidity triggers that could be implicated by a business downturn.

An example might be a financial ratio that's tied to the performance of the business in cash on hand versus your outstanding business. There are notice periods that could be triggered under some of those covenants. Companies really should think about that because to the extent that you are close to crossing one of those ratios or to the extent that you have an obligation to notify the lender about your financial performance or the fact that you just violated this covenant, that could really impact your ability to continue relying on that debt.

In extreme cases, you could be in a position where the lender has the ability to accelerate the debt which, in a time where cash is king, it's really not a position that companies want in the end. So, just a callout for companies to think about if they are looking at the COVID crisis and how it might impact their ability to continue operating.

I'll tie really two different concepts together while we are talking about financial reporting. One is internal controls and the second is the financial reporting process. Where those come together, in my mind at least, is to the extent that while we sustain the social distancing practices that are being observed now, you really have to plan in advance for how that is going to impact the audit process for your company.

It probably makes sense for companies regardless of when their fiscal year end is to start thinking about and planning and engaging with their outside auditor about how they are going to manage some of the processes associated with the internal control assessment as well as the audit of their financial statements.

Some easy examples might be to the extent that the auditors need to do in-person assessments of assets - inventory assessments, for example - or if they need certain people to do interviews and the like with members of financial reporting and parts of the business, how do you do that in a world where you are not supposed to be in close contact? To the extent that you need to do everything over the phone or video, it's really important to start thinking about that and planning for that now, so that's one additional area.

Just a couple of other things. One is think about the impact of this crisis on your ability to forecast the business projections, tying back to Meredith's point about giving guidance, and continuing to have support for the guidance.

Think about asset write-downs in the context of your balance sheet beyond just general impairment. The last one that I will mention is the subsequent event note, which is that companies have a

requirement to disclose any information that lets the user of their financial statements evaluate even if that happens after the end of the reporting period.

As this COVID crisis continues to roll through in different parts of the world and different parts of the city, presumably that might impact different parts of your business at different periods of time. It's just something you have to continually evaluate as part of the financial reporting process. Ning, I'll just stop there and turn it over to you.

Dealing with the potential impact on your annual meeting

Chiu: Annual meetings is a topic that I think I have been talking about every single day for weeks on end, or maybe it just feels like that - multiple times a day. The concern here is that a company would not be able to hold its annual meeting at the date, time and place that you are planning for when you put out your proxy statement.

Most meetings are between late April and June, so we really cannot tell at this point - if I could tell, it could essentially save the world, but I can't tell. Nobody can tell right now whether that could happen.

Just to frame this for people - consider for a minute what a meeting is for this purpose, which is under state law requirement. You have to allow shareholders to somehow attend the meeting, ask questions, present any proposals that they may have that's properly presented in accordance with by-laws of 14a-8, and you have to allow shareholders to vote. Those are all key. The voting part is the reason that you can't just have something like an earnings call.

Keep in mind also, though, what is not required. What is not required but are commonly part of the meeting - the CEO presentation is not required. Board and management attendance is not required. A formal Q&A session is not required. Those are all common elements that people have kind of grown up with, and sometimes people kind of get mixed up about what you have to have and what you are doing because maybe you have a few people attend and maybe it's kind of nice to do those things for shareholders.

I would advocate for everyone to focus on the essentials. I think right now, it's really important to do what we can and just focus on - in some ways, minimalist approaches might be the time to do for this year. That might make sense for focusing on the essentials about what you have to have for a meeting.

In terms of the factors that you want to consider about the risks associated with whether or not you can hold that meeting at the date, time and place that you are planning for, consider whether virtual-only meetings are permitted by state law and your by-laws.

Now, you are dividing into two sets of companies where it is or it isn't, and what kind of attendance do you normally get at the meeting? A lot of people, when you talk to them, they have gone through these routines where they have the presentation, they have board and management attend and they have all this, and it turns out that maybe 2 to 20 people normally attend. Consider whether that makes sense for - at this point, maybe zero to five people might be attending. Then, to divide the world, as I said before, into the companies that can do virtual-only and the companies that cannot.

A lot of memos and other things I've seen, it starts off with all the stuff about virtual-only meetings. I feel like that companies that can't do it are being the forgotten, less-favored child. So, I am going to start with those companies.

Let's say virtual-only is either not a possibility because it's not permitted under your state law or the company decides that it is not something that they want to do and they want to roll the dice even if it is permitted. In any case, you are preparing for a physical meeting.

These are things to kind of prepare for. Scouting alternative locations in advance. It may be the case, unfortunately, that it's just that place that's not available in that particular date and time. Check your by-laws to see who can be designated as chair of the meeting and the secretary of the meeting, and consider whether you want to have an enabling resolution delegating to a board committee when you set that date and time and place to make a very quick change.

Remember that a board committee under some states could be one person, so you can maybe designate that to the chair to make that decision to appoint someone else as chair and secretary of the meeting, in which case you could have a very minimal meeting with just two people.

Understand the difference under your state law between what it means to adjourn a meeting and what it means to postpone a meeting. An adjournment of a meeting under a lot of state laws is, including Delaware, would allow you to not resend the notice or reset the record date. If you could open the meeting and then adjourn until further notice, that might be helpful to you.

Postponing a meeting if your meeting date ends up being more than 60 days after that record date, you may need to send out a new notice. There are differences, so make sure you understand those.

Then, think about some out-of-the-box approaches which might be necessary. Consider those, for example, if you have the addresses of the shareholders who tend to show up at your meetings, maybe you could reach out to them and say, "Look, we are going to do a very barebones meeting for the health and safety of everyone this year. If you have any questions, feel free to ask them now. We kind of prefer that we have very low attendance because of those reasons."

Offer up, for example, that you might want to consider something as radical as doing a CEO teleconference in the future for shareholders or something else because most people who come to a meeting are coming for that portion. They are not coming for the reading of the proposals and the voting. They are coming to see the CEO or board members, and maybe you can offer up something as an alternative to that format to discourage attendance.

Also, keep in mind that your meeting is at a place, it's at an address, and it's not a particular room. That address may include a parking lot, outside - something like that. Those are things to keep in mind for a physical meeting.

Now, a virtual-only is an option. People who have virtual-only as an option have probably already considered whether or not to do that, have already reached out to vendors. A lot of people have to kind of see that's possible. If you have a meeting during some of the busy times, I understand that capacity is getting quite filled. If you haven't done that, you might want to.

Those companies have a couple of different paths. One is to decide whether or not to switch to virtual-only now if your proxy hasn't been filed yet. Then, your proxy statement would account for a virtual-only meeting, how you enter the meeting, using your control number, how you participate, how you vote. Remember, you have to update your notice and access card, if you are notice and access, and you update your proxy card as well. Remember those as well if you are not used to doing it.

CII issued a statement that said that for companies who are doing virtual meetings this year because of the coronavirus, they would like companies to make it clear that that is the case, that it would be a one-off situation. I'm not sure, unfortunately, whether or not people can say it's a one-off situation. You may want to make clear that you are doing it for concerns about the coronavirus and to appease any investors who are concerned about that.

I'm a little bit disappointed that there hasn't been as much empathy towards why companies may need to switch from some of the investor groups and there hasn't been as much support for - "We understand the situation you are going through, so just get your meeting done and hope everybody stays healthy and safe." There seems to be still a little bit of a lack of empathy.

Cross: I couldn't agree with you more. I am hopeful that what seems to be an oddly tone-deaf response to this will change as we get closer because none of them should want gatherings of multiple people in contravention of everything being said about this. I've got to think maybe they spoke too soon. I'll say it this way. I don't think companies should worry about the reaction of the institutional investor groups or proxy advisory firms or anyone else about having a virtual meeting if that is the way to avoid bringing people together and keeping people safe. I just think that should not be the focus right now.

Chiu: I totally agree. I really want companies to try to focus on the essentials and try to avoid some of the stress that I am hearing about this particular topic. There is so much going on. The last thing you need to do is stress about this.

I think that everyone's decisions are being made with good intentions. Everyone I'm talking to is trying to figure out what they can do, so I do hope that there is empathy around that whether or not people do a virtual-only meeting, whether or not people try to restrict or limit attendance because of all the discouragement around group gatherings. I think that as time goes on, some of the investors will hopefully understand why that is being done.

If you are not switching to virtual now but that is a possibility or if you have already filed your proxy and you are still considering it, thankfully, the SEC provided some really helpful guidance about how you can do that, which includes filing additional soliciting material, which is a DEF A14A, with a press release - so first issue a press release - and then file that and make note that you are switching to virtual-only or you might be switching to a different place or you might be postponing a meeting. That guidance came out on March 13, and it has a lot of really helpful information about that.

There's a couple of examples. Starbucks switched to virtual-only. They actually held their meeting I think yesterday. They are obviously in Washington, they made the change to virtual-only about two weeks before the meeting. There's another company called F5 Networks that's also in Washington that actually I think added a virtual component to their meeting as opposed to just switching to virtual-only.

That is a possibility, but as I said, we are trying to do a minimalist approach and focus on essentials. I'm not sure why people want to add on if you have to have a physical meeting anyway. Those are all really helpful guidance that the SEC put out.

There have been some questions about state law issues regarding notices. Notices of this time, date and place are supposed to be sent out 10 days in advance of the meeting at the latest. There have been some questions about whether you need to re-mail notices. There has been some differing opinions about that and differing advice.

I think that there is some settling of this where the press release, if it's done 10 days in advance, may be sufficient. If you haven't filed your proxy, you might want to account for the possibility of a switch in the notice section of your proxy statement and maybe other sections and just say, "We are intending to hold the meeting physically. We might switch to virtual depending on the situation. If we do that, we are going to issue a press release. We are going to file." That will also help give sufficient notice if and when you switch your meeting. I'll stop there in case anybody has any other thoughts about annual meetings during this time.

Cross: One thing on this whole question about what kind of notice is required. I think it can be a good idea to check with state law counsel to get good advice for the company on what needs to be done. I am hopeful people would be pragmatic, but at least to the extent that you don't know what you are supposed to do, this is an area where experts can be really helpful.

Chiu: Yes. I think that's right.

Gumbs: The only thing I would add is setting aside some of the view that the CII has articulated about (VSM)s in the context of this COVID crisis. There is some really useful guidance out there that a working group that included CII and CalSTRs and a bunch of other investors put together a couple of years ago on - I worked on it - just full disclaimer or full disclosure.

There's some good stuff in there about just governance for putting together your virtual stockholder meeting, whether it'd be a fully virtual one or a hybrid. It's something worth talking about. One of the things, for example, that comes up in there is just a lot of investor distrust around why companies are organizing VSMS setting aside kind of the current crisis.

There are some suggestions like making commitments about questions, posting questions before and/or afterwards, providing more visibility about the rules for the meeting and how it's going to be operated, all of which that could mitigate, to some extent, some of the skepticism that investors have about virtual stockholder meetings. So, just something for people to look at if they haven't already seen it.

Chiu: Yes, and I would say that for companies that are thinking about switching, there are some basic information you can try to figure about how questions are submitted at the meeting, about technical assistance, about perhaps prerecording the CEO portion if that's what you want to do.

There's a couple of things - usually you get to plan for these things long in advance. Now, you are scrambling a bit, but there are some good resources out there. There's actually an old transcript on corporate counsel guidance - it's from like 2016 that talks about how to run a virtual meeting. That's actually very helpful as well.

You may not have a ton of time, but there are some good resources like the one Keir mentioned on other places about a few basic things you would decide at that time you set up your virtual meeting. I am re-emphasizing that this is the year to just focus on basics, essentials, get your meeting done. This is probably the least of your worries. You can then go and think about MD&A and risk factors, which I believe is going to be a much bigger and more important component to your financial reporting and to your SEC requirements.

Lynn: Yes. I think that's really good advice. The one challenge I have run into with advising about the annual meeting is that it is so company-specific in many situations because for a huge swath of companies, annual meetings are just such sleepy affairs where no shareholders has shown up for the last 20 years or maybe one or two shareholders routinely shows up. That is even among big S&P 500 companies. That happens quite frequently. They are not in a huge sort of stadium-filling events like the Berkshire Hathaway meeting, necessarily.

People really have to think about what has been their experience and what is their expectation regarding attendance and if it really is the fact that people have never come to the annual meeting before, this is not the time they are ever going to come to the annual meeting now. That's something to take into account.

Then, there are also the travel issues. If you are having the annual meeting somewhere that's hard for people to get to, I think that's definitely something people are challenged with just in terms of the management and the directors, the inspector of elections, the auditor, all those people that make an appearance at the annual meeting. They really need to think about that.

Cross: One thing there is a lot of confusion about is, why can't you just have a webcast because nobody comes anyway. The answer to that is, that's a nice supplement but that's not a meeting.

Chiu: Right. That's not a meeting that you have to let people vote.

Cross: Yes, and because of the way stock is held, you can't know that the people who are dialing in are people who can vote. I have been telling people you need to at least be able to have a meeting. You don't have to plan. I like your parking lot idea, David. You don't have to plan for a football field full of people, but if you are going to stick with a meeting that is in person, then you have to be able to let people in if they show up.

There has been a lot of talk about can you take people's temperature? What are you going to do make it safe? There's lots of good advice to be given on that beyond the scope of this call, but you do have to be able to have people at a meeting. If you've got it set up for a building that's not going to let people in without screening, you've got to think about whether that's going to satisfy your requirements.

Chiu: That's why you have to take everybody outside, but you do have to take your ballots outside, too. There are actually more requirements to remote meetings for the state laws that have remote-only meetings than people think. They think that it's just permissive. There's actually a set of requirements, too, and - for example, the CGCO about a remote meeting has to be. You need to let people vote, and you need to let people attend, and you need to let people present proposals.

Gumbs: Well, I don't know that that's right. I mean the case law on that topic just suggests that if you create reasonable rules regarding the meeting that aren't intended to suppress the shareholder franchise, that those rules would generally be restricted unless you are trying to get away with something.

I actually don't think that the restrictions are that hard. The key thing is making sure that you could do the key things you just said, Ning, which are can people see and hear the meeting contemporaneously and can they vote during the meeting.

When you look at the numbers - I mean most people - basically, it's like an earnings call. How you vote; there's tons of options on how you can do it. You can

The key thing is, though - to your very good point, people just can't do it. You need to make sure that you look at your by-laws, make sure your by-laws allow you to have it and, then, set it up in such a way that you can be comfortable that you are satisfying the requirements of Delaware law.

Cross: This is the time, too, if you need to think outside the box, about how you could. There are people who like to go to meetings and vote personally. That is just in their nature. If that is the case that you've seen at your meeting, if you have those people's contact information, maybe you'd want to reach out to them in advance and say, "Look, this might not be the year for you to come. We would like to accommodate you in other ways."

That is the time to kind of think outside the box for some of those issues. Everybody knows what their attendance track record is, what kind of people who come to their meetings. That's something everybody should consider as well.

Gumbs: I think that people feel naturally defensive if they decide to do them, and I've always been the advocate for doing virtual meetings because I actually think genuinely that it's an opportunity to bring more people into the annual meeting than is the case before.

If folks are thinking about this, particularly in light of coronavirus, I would take that tact, which is to think about the positives. Think about people, the cost of getting to the meeting, people who are physically challenged who may find it difficult to travel, people who are in remote places. I mean this, in some ways, is making it a more democratic process. I think that that's how folks should plan, particularly if they are engaging with investors about this decision.

Cross: Right. We will see if this is the year when maybe investors will see that people can host virtual-only meetings and it does work out and it might be allowing more people to attend rather than not as we are all remote working anyway so we could remote into a meeting. We will see if this is the year we convince people that there is nothing wrong or bad about a virtual-only meeting. We will find out.

Lynn: Great. Thank you to the panel, to Keir and Meredith and Ning, for providing us with all these insights and for taking the time to prepare for this in the midst of answering a lot of questions from clients. I do want to say to everyone out there that's listening, please stay safe and follow the guidelines that are applied, and we can all get through this together. I hope you all have a nice afternoon.

