

Via Email

May 3, 2020

Anne Sheehan  
Chair  
Investor Advisory Committee  
Securities and Exchange Commission  
100 F Street NE  
Washington, DC 20549-1090

*Re: Comments on Public Company Disclosure Considerations and Shareholder Engagement/Virtual Shareholder Meetings in the Covid-19 Pandemic Context*

Dear Chair Sheehan and Members of the Investor Advisory Committee:

We are writing on behalf of the Council of Institutional Investors (CII), a nonprofit, nonpartisan association of U.S. public, corporate and union employee benefit funds, other employee benefit plans, state and local entities charged with investing public assets, and foundations and endowments with combined assets under management of approximately \$4 trillion. Our member funds include major long-term shareowners with a duty to protect the retirement savings of millions of workers and their families, including public pension funds with more than 15 million participants – true “Main Street” investors through their pension funds. Our associate members include non-U.S. asset owners with about \$4 trillion in assets, and a range of asset managers with more than \$35 trillion in assets under management.<sup>1</sup>

The purpose of this letter is to provide perspectives on topics to be discussed at the May 4, 2020, Investor Advisory Committee (IAC) meeting concerning public company disclosure and shareholder engagement and virtual shareholder meetings in the context of the Covid-19 Pandemic.

**Public Company Disclosure**

We appreciate the work of the Securities and Exchange Commission (SEC) and its Division of Corporation Finance (Division) on corporate reporting during this crisis. The SEC issued orders on March 4, 2020, and March 25, 2020, providing for regulatory relief for registrants on certain SEC filings due on or before July 1, 2020.<sup>2</sup>

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<sup>1</sup> For more information about the Council of Institutional Investors (“CII”), including its board and members, please visit CII’s website at <http://www.cii.org>.

<sup>2</sup> SEC, Order Under Section 36 of the Securities Exchange Act of 1934 Granting Exemptions from Specified Provisions of the Exchange Act and Certain Rules Thereunder, Release No. 34-88318, March 4, 2020, at <https://www.sec.gov/rules/other/2020/34-88318.pdf>; and Order Under Section 36 of the Securities Exchange Act of 1934 Modifying Exemptions from the Reporting and Proxy Delivery Requirements for Public Companies, Release No. 34-88365, March 25, 2020, at <https://www.sec.gov/rules/exorders/2020/34-88465.pdf>.

In our view, timely corporate reporting is, if anything, even more critical for investors during a time of crisis and market volatility. However, we understand challenges resulting from the pandemic for the range of SEC filers. In our view, the SEC and the Division appear to have implemented the regulatory relief appropriately. Moreover, they have provided effective guidance on timely, robust and complete information that is essential for market function, including on effects and risks of Covid-19, which have dramatically affected near-term (and perhaps long-term) results and entity value in virtually all sectors of the economy.<sup>3</sup>

Narrative guidance on specific questions related to operations appears to us to be particularly useful right now – we think as a general matter more important than specific earnings guidance (and we have expressed skepticism in the past about routine provision of quarterly earnings guidance<sup>4</sup>). In this regard, we believe it would be useful for the Division to revisit its disclosure guidance (Topic No. 9), published more than a month ago. The Covid-19 crisis has been fast-moving, and conditions and understanding have evolved considerably since March 25.

For many businesses that have continued to operate without pause – in some cases actually stepping up operations due to demand – a critical set of issues for successful operation now is safety of employees and customers. In many cases, it appears to us highly relevant to investors how companies are assuring safety, including policies on leave and sick pay, as well as safety equipment and protocols at workplaces. And for companies with operations in hiatus due to government orders and/or temporary absence of demand, the ability to gear back up will depend in part on credibility of safety steps that are taken. A question within this topic is whether and how companies are testing (or plan to test) workers for Covid-19 and for antibodies, which will be important for confidence to move forward, particularly to the extent there is not a broad and effective government-sponsored testing regime. We believe it could sharpen the March 25 guidance for the Division to consider further relevant questions on these matters.

We believe that some companies have been very forthcoming on these issues, and it may be early to render negative judgments on companies that have largely shut operations as we arguably are (at most) in the beginning stages of re-opening sectors of the economy. But it would be useful for the Division to consider whether it can prod useful Covid-19 related disclosure on matters of human capital management and customer safety, as it has in other areas.

A related question we have heard, on which disclosure so far seems to be limited, is whether the crisis will compel companies to further automate processes.

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<sup>3</sup> Division of Corporation Finance CF Disclosure Guidance: Topic No. 9, March 25, 2020, at <https://www.sec.gov/corpfin/coronavirus-covid-19>, which poses highly useful and specific questions for issuers to consider on disclosure about risks and effects of Covid-19; and a public statement by SEC Chairman Jay Clayton and Division of Corporation Finance Director William Hinman, “The Importance of Disclosure – For Investors, Markets and Our Fight Against Covid-19,” April 8, 2020, at <https://www.sec.gov/news/public-statement/statement-clayton-hinman>.

<sup>4</sup> See, e.g., Letter from Jeffrey P. Mahoney, General Counsel, CII to Brent J. Fields, Secretary, Securities and Exchange Commission 3-6 (Mar. 21, 2019), [https://www.cii.org/files/issues\\_and\\_advocacy/correspondence/2019/March%2021,%202019%20letter%20to%20SEC%20on%20RFC%20\(final\).pdf](https://www.cii.org/files/issues_and_advocacy/correspondence/2019/March%2021,%202019%20letter%20to%20SEC%20on%20RFC%20(final).pdf).

We also believe it would be useful for the Division to consider whether in the future it should provide some further guidance on longer-term issues that have been dramatized by the Covid-19 crisis. For example, the Division's March 25 guidance includes appropriate and useful questions on business continuity plans.<sup>5</sup> Given the speed with which the world was upended by this pandemic, the importance of business continuity policies has become more clear than ever. It may make sense for the Division to provide additional guidance for company disclosures on business continuity planning more generally and going forward. This could include, for example, proxy statement disclosure about the board role in approving business continuity plans; and narrative discussion on whether business continuity plans are stress-tested, and if so, general description of the approaches used.

### **Shareholder Engagement and Virtual Shareholder Meetings**

Historically, CII has been skeptical about replacement of in-person shareholder meetings with purely virtual meetings. CII's member-approved Corporate Governance Policies state the following:

4.7 Electronic Meetings: Companies should hold shareowner meetings by remote communication (so-called "virtual" meetings) only as a supplement to traditional in-person shareowner meetings, not as a substitute.

Companies incorporating virtual technology into their shareowner meeting should use it as a tool for broadening, not limiting, shareowner meeting participation. With this objective in mind, a virtual option, if used, should facilitate the opportunity for remote attendees to participate in the meeting to the same degree as in-person attendees.

Virtual-only shareholder meetings do not exist in a virtual vacuum. Any bona fide shareholder who desires to be in the physical room from which the chair conducts a virtual-only meeting should have the choice to do so, provided the shareholder complies with reasonable admission requirements.<sup>6</sup>

CII also articulated our views on best annual meeting practices in a 2017 publication, "Building a Better Meeting."<sup>7</sup>

Clearly, virtual shareholder meetings have become imperative this spring in light of communicability of Covid-19 and the various governmental orders limiting meetings and travel. The ability of U.S. companies to hold meetings virtually under the law of Delaware and other states has been a good thing at this moment of crisis. In a March 16, 2020, statement, CII recognized that

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<sup>5</sup> CF Disclosure Guidance, op. cit. ("Have you experienced challenges in implementing your business continuity plans or do you foresee requiring material expenditures to do so? Do you face any material resource constraints in implementing these plans?")

<sup>6</sup> CII, Policies on Corporate Governance, at [https://www.cii.org/corp\\_gov\\_policies#shareowner\\_meetings](https://www.cii.org/corp_gov_policies#shareowner_meetings)

<sup>7</sup> CII, Build a Better Meeting: Five tips for U.S. companies looking to convene a shareholder-oriented shareholder meeting, October 2017, at [https://www.cii.org/files/publications/10-17-17%20Build%20A%20Better%20Meeting\(1\).pdf](https://www.cii.org/files/publications/10-17-17%20Build%20A%20Better%20Meeting(1).pdf)

many or most companies would take the reasonable step of moving to virtual meetings this proxy season.<sup>8</sup>

However, we believe the necessity of virtual shareholder meetings has made it even more important that virtual meeting technology “should facilitate the opportunity for remote attendees to participate in the meeting to the same degree as in-person attendees.”

Based on anecdotes about some annual meetings early in the 2020 proxy season, we are concerned that too often, virtual meeting practices may be falling short. This may be attributable in part to the speed with which many companies have shifted from planned in-person or hybrid meetings to virtual-only meetings. Nonetheless, we are concerned that poor precedents may be set this spring.

We stress that these reports are anecdotal, but here are some problems we have heard about:

- Shareholders struggling to log in for meetings.
- Inability to ask questions in some cases if the shareholder has voted in advance by proxy.
  - We understand that one virtual meeting platform provides that for a beneficial owner to ask questions, the record holder must transfer a legal proxy to the beneficial owner. This would require the record holder to withdraw its vote if it already had voted before executing the required legal proxy because the voting would transfer to the beneficial holder. These rules unnecessarily hamper the ability of beneficial owners to participate in meetings, even at companies that use effective technology and rules for participation by shareholders who get into the meeting.
- Shareholders unable to ask questions during the meeting.
  - In some cases, questions are limited to those that can be submitted in writing in advance, which interferes with the potential for interplay between meeting content and questions or comments.
- Lack of transparency on questions asked by shareholders, making it possible that company officials cherry-pick questions to which to respond. This obviously is an issue if time limits for a meeting prevent responses to all questions. At one large company at which shareholder questions went unanswered, we understand the company provided only 10 minutes for Q&A.
- Conflicting channels for shareholder participation, with shareholder resolution proponents required to be on a line that is different than that used for general shareholder Q&A.
- At least one company prohibiting a shareholder proponent from speaking on behalf of their proposal.
- Snafus with control numbers not working to permit shareholders to log into a meeting.

Some of the log-in and connectivity issues could to an extent be mitigated if the company at least provides ability for guests to log in to listen to a meeting, without using shareholder identification credentials. We do not see good reason to limit the ability to hear (or view) virtual meetings live to public company shareholders exclusively, and providing easy access would reduce the number of times shareholders are entirely locked out from hearing shareholder meetings by some of the

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<sup>8</sup> CII Statement on Virtual Shareholder Meetings During Public Health Emergency, March 16, 2020, at <https://www.cii.org/march2020virtualmeetings>.

problems described above. Public company shareholder meetings are public events and involve public disclosure, and prospective shareholders and other market participants should be able to listen.

It may be useful for more companies to provide video for virtual meetings, not just audio. While we favored hybrid or in-person meetings in the 2019 context, we acknowledge that some companies had what appeared to be good, interactive, video-enabled virtual meetings last year, for example General Motors and Microsoft.<sup>9</sup> This may be beyond the SEC's remit, but as a general comment, we would urge companies to consider best practices for virtual participation in meetings, including the examples set by GM, Microsoft and certain other companies, as well as best practices recommended in the 2017 CII "Build a Better Meeting" publication, and in a 2018 white paper by the Best Practice Committee for Shareowner Participation in Virtual Shareholder Meetings, sponsored by Broadridge.<sup>10</sup>

Separately, some of our members report that it has been difficult during this time of Covid-19 related disruption to communicate with governance representatives at some companies that do not provide in the proxy statement electronic addresses for the appropriate corporate governance and/or board contacts. Where only physical addresses are available, but offices are closed, it is not apparent in all cases that hard-copy letters are getting to the right place.

It would be helpful for the SEC to require proxy statement disclosure for companies holding virtual shareholder meetings on how companies are complying with state law rules about shareholder ability to participate in meetings. It is not clear to us that in all cases companies are compliant with those rules. And it also would be useful for the SEC to require that proxy statements include an electronic address for contacting a board representative, and for communications on shareholder proposals or other shareholder concerns.

It is particularly important that any virtual-only meeting in the context of a proxy fight be participative and provide an even playing field for the incumbents and dissidents. We are aware that on April 28, 2020, Tegna Inc. held its contested annual meeting. We did not participate in the meeting and have not yet reviewed it, and do not have comments now on how the meeting was conducted.

However, it is clear that the potential for disruption of contested meetings due to pandemic is yet another reason to assure that shareholders can vote by proxy at a contested meeting in the same way they can at the annual meeting – through the use of universal proxies. We urge the SEC to complete its rulemaking for universal proxies<sup>11</sup>

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<sup>9</sup> For the 2019 General Motors annual meeting, see <https://east.virtualshareholdermeeting.com/vsm/web?pvskey=GM2019>. For the 2019 Microsoft annual meeting, see <https://east.virtualshareholdermeeting.com/vsm/web?pvskey=MSFT19>.

<sup>10</sup> See CII, Build a Better Meeting, op. cit.; and Broadridge, Principles and Best Practices for Virtual Annual Shareholder Meetings: Recommendations from the Best Practices Committee for Shareowner Participation in Virtual Annual Meetings, 2018, at <https://www.broadridge.com/assets/pdf/broadridge-vasm-guide.pdf>. CII participated as a member of this committee.

<sup>11</sup> SEC, Universal Proxy, Release No. 34-79164, October 26, 2016, at <https://www.sec.gov/rules/proposed/2016/34-79164.pdf>; see, e.g., Letter from Jeffrey P. Mahoney, General Counsel, CII to Vanessa Countryman, Secretary, Securities and Exchange 2-3 (July 18, 2019),

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Thank you for considering our views on these matters. Please contact us with any questions.

Sincerely,

A handwritten signature in black ink that reads "Kenneth A. Bertsch". The signature is written in a cursive style with a light grey rectangular background behind it.

Kenneth A. Bertsch  
Executive Director

A handwritten signature in black ink that reads "Jeff Mahoney". The signature is written in a cursive style.

Jeffrey P. Mahoney  
General Counsel