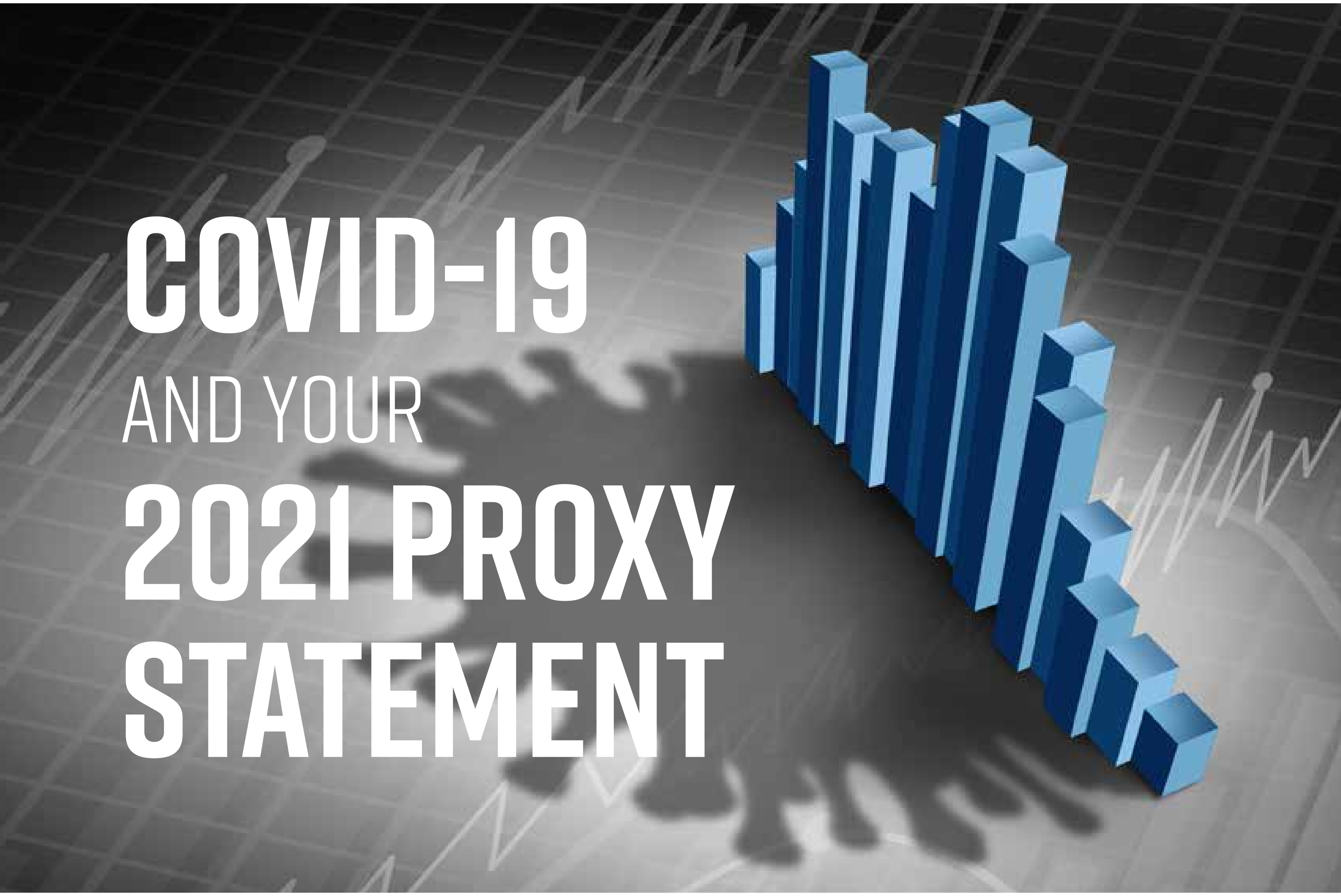

COVID-19 AND YOUR 2021 PROXY STATEMENT

Uncertainty continues in the market as COVID-19 is projected to extend well into next year. Advance planning can help your company navigate proxy disclosures during these challenging times.

BY LOIS YUROW

Companies that filed their proxy statements in early 2020 might not have mentioned COVID-19 at all. Mid-year filers likely discussed the pandemic once or twice, but – due to time constraints and general uncertainty – without much detail.

Next year will be different. Investors, the U.S. Securities and Exchange Commission (SEC), and proxy advisors will expect public companies to discuss COVID-19 in their 2021 proxies in at least three contexts: the meeting format, governance, and compensation. This article summarizes the issues you should consider addressing.

Meeting Format

We all hope the virus will diminish by early 2021. Nevertheless, you should anticipate a virtual annual meeting, or at best a hybrid of in-person and virtual options.

Companies that switched from physical to virtual meetings in early spring were largely forgiven for any snafus their shareholders encountered when they tried to participate. In 2021, with several months to prepare and retain needed technology or expertise, you will be expected to get it right. A critical part of getting it right will be explaining your plan in the proxy statement.

SEC guidance calls for companies to provide "clear directions as to the logistical details of [a] 'virtual' or 'hybrid' meeting." Glass Lewis will look for "robust disclosure . . . concerning shareholder participation." What does this mean? At a minimum, you should explain:

- Whether company leaders will be on video or audio only.
- When (date and time) and where (a specific weblink or phone number) people can access the meeting.
- Any requirements to gain access, such as a control number, and how to obtain those requirements.
- How shareholders can vote during the meeting.
- How to submit questions, how you intend to answer them, and whether all questions will be answered.
- How to get technical assistance.
- Whether a replay of the meeting or answers to submitted questions will be available when the meeting ends, and if so, where.

A reference guide from Proxy Analytics and Soundboard Governance raises some other logistical considerations. Finally, ISS encourages companies holding virtual-only meetings "to disclose clearly the reason" for that meeting format, and to commit to offering an in-person meeting option as soon as practicable.

Two companies that did a laudable job with virtual meeting disclosure are Rite Aid and Ralph Lauren. Since Glass Lewis explicitly reverted to its standard policy for virtual meetings that occur after June 30, 2020 (rather than the more lenient approach they took for the first few months of the year), proxies filed for early 2020 meetings may not be good disclosure models.

Governance Issues

There are many COVID-related governance topics your 2021 proxy should cover.

Risk oversight. You should explain whether all COVID-related risk management concerns have been delegated to a single board committee (either pre-existing or newly formed), or whether each committee is responsible for a discrete set of issues. Depending on your business, probable COVID-related risks include (in no particular order):

- Securing the supply chain.
- Ensuring business continuity when travel, personal meetings, and full offices (and factories, laboratories, and stores) are impractical.
- Monitoring and complying with inconsistent operating regulations across several jurisdictions.
- Safeguarding confidential information and avoiding cybersecurity nightmares when employees are working remotely and company computers and other technology assets are widely dispersed.
- Protecting the health and safety of employees, customers, and suppliers in company facilities.
- Ensuring financial stability and continued access to capital.
- Maintaining a flow of timely and accurate information between the company and investors, employees, suppliers, and other stakeholders.

Leadership. This may be the year to expand discussion of the skills and experience represented on your board. Are there particular directors whose backgrounds make them well suited to navigating the company through a pandemic? Conversely, has the board identified some expertise that it lacks, and started searching for potential directors to fill those gaps? If so, how will they conduct interviews?

Next, investors may be comforted to know the company has an emergency succession plan—not just for the CEO but also for other key officers. If true, your disclosure should say that your plan anticipates that several of your senior executives could become incapacitated by the coronavirus (or otherwise) at the same time – meaning they cannot fill in for each other. It's also not a bad idea to disclose a plan for the possibility that the board chair or lead director falls ill. A recent survey indicates that most companies (85 percent) have emergency succession plans for at least the CEO, but fewer (56 percent) have such plans at the board level.

Finally, is the board meeting more frequently or for longer periods of time? If so, has the added time commitment prompted the company to increase the size of the board, adjust director compensation, or reduce the number of other boards a director can join?

Human capital management. Calls for more, better, and consistent disclosure about human capital management were brewing before we ever heard of COVID-19. Proponents of this disclosure argue that investors need more information about issues such as training, turnover, diversity, productivity, and compensation incentives. The pandemic has made these concerns more pressing, and added more topics to the list. Where applicable, 2021 proxy statements should address:

- Employee physical and mental health and morale.
- Whether employees were able to continue working remotely, and how the company ensured everyone received the necessary supervision and support.
- How any layoffs and furloughs were handled, especially with respect to insurance and severance pay.
- What steps were (or are being) taken to make workplaces safe for employees to return.
- Whether accommodations will be made for employees who cannot (or prefer not to) return full-time to a company facility.
- Whether adjustments were made to compensation—both for employees who could not perform their jobs and for employees deemed essential, who possibly worked extra hours and assumed substantial risk.

ESG. Many companies have stepped up the "social" part of ESG in response to the pandemic. Goods and services have been donated to assist health care professionals. Pharmaceutical companies have devoted extensive resources to developing COVID tests, vaccines, and treatments. Clothing manufacturers are producing personal protective equipment, alcohol distillers are bottling hand sanitizer, and food service companies are providing meals and groceries to those in need. If your company shifted business operations to support efforts to mitigate the virus or to help those affected by the economic downturn, the proxy statement should say so – especially if that shift enabled you to avoid layoffs. Similarly, if your company (or the company's charitable arm) targeted monetary donations for these purposes, disclose that.

Contact information. Your proxy tells shareholders, whistleblowers, and other interested parties how they can contact directors. If you typically provide only a physical mailing address, the 2021 proxy should include one or more email addresses as well. Between reductions in office staff and interrupted postal service, written correspondence may be unacceptably delayed.

Executive and Director Compensation

Each of the typical compensation elements presents a different disclosure issue.

Base salaries and annual retainers. Directors and executives at many companies voluntarily (or not) took pay cuts or declined salaries and retainers altogether in 2020. Your 2021 proxy should say how long any reductions lasted, whether pay cuts are still in effect, and whether the company intends to make affected leaders whole when the pandemic is behind us.

Annual bonuses. Certain sectors of the economy are booming right now. Companies that provide virtual anything (conferencing, fitness, entertainment), delivery anything (food, household staples), or cleaning products are likely to meet or exceed whatever 2020 performance goals were set in pre-pandemic days. Boards at these companies will need to decide whether to pay executives the (generous) annual bonuses they are entitled to, and how to set performance goals for an uncertain 2021. The CD&A should explain those decisions.

Conversely, many companies will not only fail to meet 2020 performance goals, but also have laid off employees and seen their stock prices tumble. These boards will need to decide whether executives who scrambled to meet unprecedented challenges deserve bonuses that aren't justified based on the company's performance against pre-pandemic goals. The SEC, ISS, and Glass Lewis all have guidance about the disclosure required when boards exercise discretion to alter incentive compensation. Here it is in a nutshell: explain exactly what you did and why you did it.

Long-term equity. Shareholders are likely to be wary of changes that make long-term equity arrangements more forgiving. By their nature, long-term plans anticipate a mix of good and bad years. You will need a persuasive explanation for any action that, for example, shortens an ongoing performance period to exclude results from beyond March 2020, or changes the performance metrics or goals for in-flight awards. Companies that accept potentially bad 2020 results but shift 2021 grants to time-vested restricted stock, or performance shares tied to relative performance rather than absolute goals, may find their disclosure easier to craft.

The Rest of the Proxy

COVID-19 will lurk over your entire proxy next year. In addition to the topics discussed above, a CEO or chair letter that doesn't mention the pandemic will ring hollow. Still, be sure you don't neglect the other critical disclosures – on matters such as business strategy and shareholder engagement – that will show investors you intend to be here for the long haul.

Lois Yurow is President of Investor Communications Services, LLC; lois@securitieseditor.com.