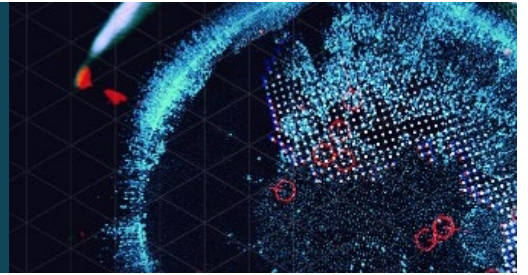


Managing COVID-19: Virtual Annual Shareholder Meetings



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Companies incorporated in the United States are required to hold annual shareholder meetings. These meetings have traditionally been held at a physical location, sometimes with the option to participate remotely. In recent years, however, some public companies have adopted virtual-only annual shareholder meetings. Due to growing concerns around the global coronavirus (COVID-19) pandemic, more companies are expected to utilize the virtual-only format for their upcoming annual shareholder meetings. Below are considerations for public companies contemplating a move to virtual-only annual shareholder meetings.

1

What is a virtual-only shareholder meeting?

- A virtual-only shareholder meeting is a meeting where all shareholders attend the meeting via online broadcast, and there is no physical location for in-person participation.
- A hybrid of this is a shareholder meeting with both a physical location for in-person attendance and arrangements whereby shareholders may attend via electronic means of communication, including an online broadcast.
- While most virtual components to shareholder meetings take place via audio broadcast, some companies choose to hold their meetings via video live streaming.

2

What permits a company to hold a virtual-only or hybrid shareholder meeting?

- State corporate laws and a company's governing instruments determine the requirements for annual shareholder meetings and the availability of the virtual-only or hybrid meeting formats.
 - Under state corporate laws, the board of directors must determine the date, time and place of a shareholder meeting.
 - Most states, including Delaware, permit virtual-only meetings because they allow boards to determine that the "place" need not be a physical location and that the meeting instead may be held solely by means of electronic communication.
 - Other states permit hybrid meetings or require meetings to be held in-person, without providing shareholders the ability to participate remotely.
- In light of COVID-19, some states that permit only hybrid or in-person meetings have taken action to allow virtual-only shareholder meetings. For example, in the last week, New Jersey, Georgia, Connecticut and New York (currently effective through April 19,

2020) have provided relief allowing corporations to hold shareholder meetings in part or solely by means of remote communication. Similar changes are underway in other states.

- Public companies should review their charters and bylaws to confirm that they do not preclude virtual-only annual shareholder meetings. They should also check these documents for other requirements, including provisions for meeting notices and minimum notice periods, to make sure that such provisions can be satisfied if the company holds a virtual-only meeting and whether additional board action would be required.

3

If a virtual-only or hybrid shareholder meeting is permitted for a company, what steps must the company take to notify shareholders of a change to one of those formats?

- Federal securities laws require companies to deliver proxy materials to shareholders for annual meetings at which votes will be taken. The Securities and Exchange Commission (SEC) regulates the filing and mailing of proxy solicitation materials, which must include a proxy statement that has information about the annual meeting, including the date, time and location of the meeting, and the proposals under consideration. For a virtual-only or hybrid annual meeting, the proxy statement should also include instructions for how shareholders can join the meeting and ask questions, cast votes electronically and address technological and logistical procedures for attending and participating in the meeting.
- The SEC has recently put out [guidance](#) from its staff to give flexibility to companies seeking to change the date, time or location of their shareholder meetings and use virtual shareholder meetings. This guidance provides some relief from the mailing requirements of the SEC's proxy rules, but does not address state law notice requirements. Under the guidance:
 - A company can notify shareholders of a change in the date, time or location of its annual meeting without mailing additional soliciting materials or amending its proxy materials, and without incurring the related costs, if it:
 - issues a press release announcing such change;
 - files the announcement as additional soliciting material on EDGAR; 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.
 - A company should notify its shareholders, intermediaries in the proxy process, and other market participants of plans to conduct a virtual-only or hybrid meeting in a timely manner and disclose logistical details of the meeting, including how shareholders can remotely access, participate in, and vote at such meeting.
 - For companies that have not yet filed and delivered their definitive proxy materials, such disclosures should be included in the definitive proxy statement and other soliciting materials.

- The SEC’s proxy rules will not require companies that have already filed and mailed or posted their definitive proxy materials to mail additional soliciting materials (including new proxy cards) solely for the purpose of switching to a virtual-only or hybrid meeting if they follow the steps described above.
 - Companies that are considering holding a virtual-only or hybrid meeting, but have not made a decision by the time they file their definitive proxy materials may consider disclosing this possibility in their definitive proxy statements. Companies that subsequently elect to move to a virtual-only or hybrid meeting may follow the steps described above and will need to evaluate whether, under applicable state law, an updated notice needs to be provided and whether such notice must be sent by mail or may be transmitted electronically.
 - To the extent feasible under state law, a company conducting a virtual-only meeting will want to make sure that it provides shareholder proponents, or their representatives, instructions on how to present their proposals at the meeting. If a shareholder proponent, or its representative, is precluded from attending an annual meeting or presenting the proposal at the meeting due to COVID-19 complications, the SEC will consider this to be “good cause” should a company argue that under Rule 14a-8(h)(3) it may exclude a future proposal submitted by the proponent at a meeting held in the next two years.
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4

What points should a company consider in moving to a virtual-only or hybrid shareholder meeting in light of COVID-19?

- Travel bans, quarantines, orders to stay inside residences and limit crowds and the general spread of COVID-19 may make it impossible or dangerous for shareholders, directors and executives to attend an in-person meeting and for the company to plan for and conduct such a meeting without violating these orders. A virtual-only or hybrid annual meeting would allow shareholders to participate in the meeting without facing the risks presented by COVID-19.
- Even if companies can ordinarily provide sufficient technological capability and support for a virtual-only or hybrid shareholder meeting, they and their virtual meeting providers may also need to assess whether the timing of other companies’ shareholder meetings or the current “work from home” environment caused by COVID-19 will strain the bandwidth for remote communications and impact shareholder participation.
- To assist with shareholder authentication, companies should remind shareholders to have their control numbers on the proxy card or voting instruction form in hand when joining the meeting virtually. Companies should be prepared for potential contingencies, including working with the virtual meeting provider, in case shareholders do not have their control numbers when they try to join the meeting.
- Historically, proxy advisory firms and some institutional shareholders have opposed virtual-only meetings as limiting shareholder engagement and participation. However, in light of the COVID-19 pandemic, some of these parties have, at least temporarily, publicly provided support for virtual meetings. For example:
 - The Council of Institutional Investors (CII) released a [statement](#) that it believes virtual-only meetings should be “one-off, tailored for current circumstances.” CII also

urged companies to follow best practices “for making virtual meetings participatory, replicating as much as possible the experience of an in-person meeting.”

- Glass Lewis recently issued a [policy update](#) that will apply for the remainder of the 2020 proxy season. Specifically, Glass Lewis provided that for companies opting to hold a virtual-only shareholder meeting due to COVID-19 between March 1, 2020 and June 30, 2020, Glass Lewis will generally refrain from recommending to vote against members of the governance committee on this basis, provided that the company discloses, at a minimum, its rationale for doing so, including citing COVID-19.

5

What points should a company consider if it cannot move to a virtual-only or hybrid shareholder meeting in light of COVID-19, whether because it is not permitted or is no longer feasible?

- A company may need to consider whether the meeting could be postponed or adjourned.
- A company may need to move forward with the in-person meeting.
 - We know of one company that has determined it is too late to switch to a virtual meeting and plans to move forward with an in-person physical meeting. The company will limit the meeting only to its formal business section and essentially encourage shareholders not to attend in-person. This company will also include an audio component by which shareholders can hear but not participate in the meeting.
 - If a company anticipates a risk of not obtaining a quorum for the meeting, it should address this with its proxy solicitation firm to assist with getting out the vote or in-person participation at the meeting.

If you have any questions concerning the material discussed in this client alert, please contact the following members of our Capital Markets and Securities practice:

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