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### COVID-19: Public Company Annual Meeting Considerations



As the effects of the coronavirus (COVID-19) continue to develop, public companies are faced with a variety of concerns, including the impact "social distancing" recommendations and restrictions will have on annual shareholder meetings.

National, state, and local government recommendations and restrictions relating to travel and gatherings of people are evolving on a daily basis. For example, early in the outbreak, California banned meetings of over 1,000 people and Washington banned meetings of over 250 people, with the possibility that the bans will become stricter. For companies that have already filed proxy materials for an annual meeting or are preparing to file proxy materials, the question of the hour is whether to change the annual meeting location to a virtual-only meeting, offer a hybrid format allowing for remote attendance, or simply provide shareholders with additional access to a webcast or telecast of the annual meeting.

Whether to adjust the annual meeting format and in what way will vary depending on several considerations, including a company's typical attendance at its annual meeting and state of incorporation. For consumer-facing businesses and others with a large retail shareholder base that generally have high annual meeting turnout, a virtual-only meeting may be the clear choice as long as it is permitted by state law. For those companies that generally only see officers and directors in attendance at the annual meeting, it may be less critical to change to a virtual-only meeting but might still be desirable to permit remote access.

### **Virtual Meeting Considerations**

*Is a virtual-only annual meeting or hybrid format permitted under state law?*

Whether a company may hold a virtual-only meeting or permit shareholder attendance through remote communications is a question of state law. Delaware changed its corporate statute in 2000 to allow for virtual shareholder meetings. Over the past 20 years, many states have followed suit. For example, see our [update on Washington's 2018 amendments](#) permitting virtual-only annual meetings. Following the change in Washington law, the Model Business Corporation Act (MBCA), on which many state corporate laws are based, was similarly updated in 2019. States that permit virtual-only meetings or remote shareholder attendance generally have requirements for what constitutes attendance, whether the charter or bylaws need to be amended to allow remote attendance, and specific information regarding remote attendance to be included in the meeting notice. In addition, in [guidance](#) issued on March 13, 2020, the SEC staff noted that it expects companies using a virtual-only or hybrid meeting format to provide clear directions as to logistical details of the meeting, including how shareholders can access, participate in, and vote at such a meeting.

There are several service providers that can accommodate virtual-only and hybrid format meetings. Once a company determines its meeting format, it should coordinate with its service provider to confirm that all state law requirements can be met with the platform. If a company changes to a virtual-only format after it has delivered its proxy materials, it may not be able to take advantage of all virtual meeting service providers, as some may require that certain codes be included on proxy cards for purposes of shareholder verification at a virtual meeting. Service providers are generally able to work quickly to provide virtual meeting services, but may require additional advance notice given the significantly increased interest in virtual meetings this season.

### *What practices should a company consider when hosting a virtual-only meeting?*

Many institutional investors and investor groups have raised concerns over the last several years about drawbacks of virtual-only meetings, including whether the virtual format is effective in allowing shareholders to communicate with management and the board. While investors may give companies a break on this front if the meeting location is changed for public health reasons, companies should still consider implementing certain practices recommended by institutional investors and other interested parties. These practices include the following:

- Allowing shareholders to post questions to the company prior to, as well as during, the meeting.
- Prior to the meeting posting rules of conduct for shareholder questions, including time limitations, types of questions allowed, and how questions and comments will be recognized and disclosed to meeting participants.
- Posting Q&A from the meeting on the annual meeting website after the meeting. For companies that receive significant volumes of shareholder questions, this may include questions not addressed during the meeting.
- Posting information regarding how shareholders can get technical assistance before and during the meeting.

For further discussion of virtual meeting practices, see our [2018 reporting season](#) updates.

### *What are the alternatives to a virtual-only meeting?*

**Hybrid Meetings.** Hybrid meetings permit shareholders to attend through remote communication and be considered present at the meeting. Generally, for a shareholder to be considered present at the meeting, all of the features of a virtual-only meeting would need to be available, meaning that the company would likely need to use a virtual meeting service provider. A hybrid meeting requires the expense of a virtual meeting without alleviating the need to host a physical location for the meeting, meaning that it may not be a practical solution for a company addressing COVID-19 concerns.

**Webcast or Audio Access.** If a company does not have the time, resources, or need to change to a virtual-only or hybrid meeting but wants to make the meeting available to shareholders and possibly discourage live attendance, it might also consider providing a webcast or audio feed of the meeting. However, without the features of a remote access service, shareholders taking advantage of the webcast would not be considered present at the meeting and would not be able to vote. In addition, a company may be unable to limit access to the meeting to shareholders only without using a virtual meeting service provider.

**Remote Access for Directors and Management.** A company might also consider making remote access to the meeting available to only a limited group, such as the board of directors or management members participating in the meeting. This option might be advantageous where directors are not willing or able to travel due to the coronavirus outbreak but the company encourages or requires director attendance at the annual meeting. However, if remote access is provided only to directors, it likely would not count as presence at the meeting for state law purposes and may require explanatory disclosure in next year's proxy statement disclosure regarding director attendance at the annual meeting.

## **Proxy Materials Have Already Been Delivered, But Location May Need to Be Changed**

### *When does the location need to be determined?*

State corporation laws and company bylaws typically include a deadline by which notice of the meeting, including meeting location, be sent to shareholders. For example, both the Delaware General Corporation Law (DGCL) and the MBCA require at least 10 days' notice. If a company changes to a virtual-only format without time to provide proper notice, or otherwise decides not to fully comply with state law notice requirements due to the emergency nature of the change, it may risk future challenges to actions taken at the meeting. This concern is greater for companies with agenda items such as charter amendments, equity plans, and controversial shareholder proposals. To guard against the distraction, uncertainty, and potential costs of such challenges, particularly for critical agenda items, the most conservative approach would be to comply with annual meeting notice requirements, including delivery of the updated meeting location in a manner consistent with delivery of other proxy materials. This may mean sending a postcard, electronic transmission, or other public disclosure, as permitted by applicable state law. Also, depending on timing and specific state law and bylaw requirements, it may mean that a change to a virtual-only meeting would not be available.

Companies should build extra time into their timelines for a meeting location change, including for preparation, filing, and mailing of a notice or other appropriate action. Companies with only ordinary agenda items that are less susceptible to legal challenge might consider providing notice of a location change to a virtual-only format through annual meeting website posting, press release, and Securities and Exchange Commission (SEC) filings.

Companies will also need to comply with SEC proxy statement rules, which require that the meeting notice include the meeting location. To comply with SEC rules, a company can post the update on its annual meeting website and file supplemental proxy materials. On March 13, the staff of the SEC's Division of Corporation Finance and Division of Investment Management [confirmed](#) that a company that has already filed its definitive proxy materials can comply with SEC proxy rules in connection with changing the date, time, or location of its annual meeting through (1) issuing a press release announcing the change, (2) filing the announcement as definitive additional soliciting materials on EDGAR, and (3) taking all reasonable steps necessary to inform other intermediaries and market participants of the change. The staff guidance specifically notes that it does not

address any notice or other requirements regarding an annual meeting change under applicable state law, company governing documents, or stock exchange listing standards.

The guidance also recommends that companies include information regarding how shareholders can access, participate in, and vote at a virtual-only or hybrid meeting in the notice of the change. SEC rules do not have a specific deadline for such an update but the staff guidance emphasized the expectation that announcements regarding a change would be made promptly and sufficiently in advance of the meeting to alert the market.

***Does the board need to approve a change to a virtual-only meeting?***

A company should review state law, charter, bylaws, and annual meeting resolutions to determine whether company officers have the authority to change the meeting location to virtual-only, or whether the board must act. Companies should build this additional step into their timelines as they consider setting a reasonable deadline for a decision to change location.

***Can the company continue to accept previously-issued proxy cards?***

If a company changes its meeting location, it should review its previously-issued proxy materials and applicable law to confirm that there is no impediment to accepting its original proxy cards. The company may want to consider affirmatively stating that it will be accepting such proxy cards in its notice of location change.

**Companies That Have Not Yet Filed Proxy Materials**

***Should the proxy materials disclose the possibility that the meeting location may change to virtual-only?***

If a company that has not yet filed proxy materials is considering changing to a virtual-only meeting but is uncertain at the time of filing as to whether such a step is necessary, disclosing the possibility in its proxy materials may help alleviate some of the concerns discussed above. In particular, if a company were able to provide alternative locations in its proxy materials—a physical location as well as instructions on how to access the meeting virtually if the company decides to change to virtual-only—it may be able to meet state law notice requirements without having to do an additional mailing. The SEC's [March 13 guidance](#) included a recommendation to include disclosures regarding how shareholders can access, participate in, and vote at a virtual-only or hybrid meeting in proxy materials if the company anticipates potentially switching to such a format.

Companies considering this alternative should check with their service providers to confirm if virtual meeting information can be provided prior to the company making a final decision on whether to host a virtual meeting. An example of such disclosure is:

*We are actively monitoring the health and safety concerns and government recommendations and restrictions relating to the COVID-19 pandemic. In the event it is not possible or advisable to hold our annual meeting at a physical location, we will host a virtual-only annual meeting. We anticipate making a final decision on our meeting location by \_\_\_\_\_, 2020, and will announce our decision by press release and posting on our website at [http://\\_\\_\\_\\_\\_](http://_____), as well as through an SEC filing. If you are planning to attend the annual meeting, please be sure to check our website for any updates in the days before our annual meeting. As always, we encourage you to vote your shares prior to the annual meeting.*

As companies continue to address challenges relating to the COVID-19 pandemic on multiple fronts, we recommend considering annual meeting planning as early as possible, including contacting experienced local counsel for state-specific questions.

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