How to Hold a Virtual Annual Meeting During the COVID-19 Pandemic

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State laws require companies to hold annual meetings of their shareholders to elect directors and to allow their shareholders to vote on matters that require shareholder approval. Due to the ongoing COVID-19 pandemic, and the resultant recommendations that public health officials and federal, state, and local governments have to date issued in response, many public companies are evaluating the use of remote technology to host a virtual meeting, either in addition to or in place of their in-person shareholder meeting. The following discussion highlights both practical information about virtual meetings and the legal considerations companies should evaluate when considering hosting a virtual meeting.

What Is a Virtual Meeting?

A virtual meeting is exactly what the name implies: a meeting conducted by means of remote communication. Virtual meetings can take two forms: (1) a virtual-only meeting and (2) a hybrid meeting. Virtual-only meetings are conducted solely by remote communication and do not allow for in-person attendance; shareholders and company representatives meet only via remote communication, which can be audio-only or include video. Hybrid meetings are virtual meetings that comprise both a physical, in-person meeting and the option to participate remotely.

While virtual meetings have been around for years, they are not without controversy. Though virtual participation in shareholder meetings presents an opportunity for shareholders who cannot travel, to more easily attend and participate, detractors have raised concerns that virtual-only participation could diminish the ability of shareholders to fully participate and have their questions and concerns heard by company representatives. However, due to COVID-19, most institutional investors and proxy advisors have expressed their tolerance of virtual meetings for a limited period in 2020, particularly with respect to companies that do not have any shareholder proposals being presented.[1] Companies should consider whether they are making proper disclosures as part of their switch to a virtual meeting. Institutional investors are encouraging companies to clearly explain the reason for the switch (i.e., COVID-19) and the ability of shareholders to participate in the meeting.
including by asking questions and providing feedback.

**Legal Considerations When Moving to a Virtual Meeting**

Companies planning to host a virtual meeting should ensure that they comply with state law, their organizational documents, and recent Securities and Exchange Commission (SEC) guidance.

- **State Law Governing Virtual Meetings Varies.** When considering the switch to a virtual meeting, whether a virtual-only or hybrid meeting, public companies should first check their state’s law as it will govern the company’s ability to conduct such a meeting. Most states permit hybrid meetings, and more than a majority of states allow virtual-only meetings, though many impose significant restrictions on virtual-only meetings. Under Section 211 of the Delaware General Corporate Law (DGCL), a board of directors, if authorized by the company’s charter or bylaws, may determine the place (which includes if a company opts for a virtual format) of a meeting of shareholders, including meeting solely by means of remote communication. Other states that generally forbid virtual-only meetings have provided for exceptions to the physical meeting requirements in light of COVID-19; for example, New York has suspended the law requiring in-person components to annual meetings through April 19. Further, some states where the law is unclear with respect to whether virtual-only meetings are permitted have specifically suspended any provisions that would arguably require an in-person meeting; for example, Louisiana Governor John Bel Edwards issued a proclamation on March 26, which is discussed in more detail here.

- **Organizational Documents Must Not Prohibit Virtual Meetings.** Companies should also review their charter and bylaws (or similar organizational documents) to ensure these documents do not prohibit virtual meetings. In addition, companies should review these documents for any restrictions or particular processes that must be followed in order to authorize a virtual meeting. For instance, some companies may require board approval of the virtual meeting format.

- **Companies Must Meet Federal Requirements.** When companies with securities registered under Section 12 of the Securities and Exchange Act solicit proxies from their shareholders in connection with their annual meeting, they are required to comply with the federal proxy rules, which require, among other things, the delivery of proxy materials (such as proxy statements and proxy cards).

On March 13, the Division of Corporation Finance of the SEC issued guidance to facilitate the ability of companies to hold annual meetings, including through the use of remote communications, and to engage with shareholders while complying with federal securities law.

- **If You Have Already Mailed and Filed Your Proxy Materials.** The guidance requires companies who have already filed their proxy materials and are seeking to change the date, time, or location of their annual meeting, including to a virtual-only meeting because of COVID-19, to (i) issue a press release announcing such change; (ii) file the announcement with the SEC as definitive additional soliciting material; and (iii) take all reasonable steps necessary to inform other intermediaries in the proxy process, such as any proxy service provider, like DTC, AST, and Broadridge, and other relevant market participants (such as NASDAQ and NYSE), of such change.
If You Have Not Mailed or Filed Your Proxy Materials. For those companies that have not filed their proxy materials, the guidance notes that companies should consider whether to include disclosures regarding the possibility that the date, time, or location of the annual meeting will change due to COVID-19.

Conditional Exemption; Disclosure Guidance. In addition, on March 25, the SEC issued an order to, among other things, extend the conditional exemption from proxy delivery requirements for companies affected by COVID-19, and issued guidance discussing, among other things, the SEC’s views regarding disclosure considerations related to COVID-19. This guidance is discussed in more detail here.

Planning Considerations When Moving to a Virtual Meeting

- **Initial Steps (Board Approval; Selecting Vendor).** First, companies should determine whether affirmative action of the board or other authorized person, via resolutions or other steps, must be taken to authorize a virtual meeting. In addition, companies should consider hiring a vendor to conduct the virtual meeting as soon as possible, as demand for these services has risen significantly in 2020. When considering vendors, the company should ensure the vendor’s virtual meeting platform permits shareholders to exercise all rights and privileges guaranteed to them under both federal and state securities laws and should consider the technical capabilities, such as technical support, available to the company and its shareholders. Once the company decides on a vendor, the company will have numerous logistical matters to decide (such as whether guests will be permitted to access the virtual meeting, whether shareholders will be permitted to ask questions live during the meeting, or whether shareholders will be required to pre-submit their questions, and whether the meeting will be audio-only or whether there will be a presentation and/or video webcast).

- **Disclosure Considerations.** The disclosure regarding the company’s meeting format and logistics will depend in part on whether the company has filed and mailed its proxy materials or notice to shareholders prior to making the decision to switch to a virtual meeting.

  - **If You Have Already Mailed and Filed Your Proxy Materials.** If a company has already sent its proxy materials and then makes the decision to switch, the company should follow the steps provided in the SEC guidance discussed above.

  - **If You Have Not Mailed or Filed Your Proxy Materials.** Generally, the cleanest approach would be to commit to a virtual meeting and select your vendor prior to filing and mailing your proxy materials; however, in light of COVID-19, this approach may not be an option for many companies. To the extent that a company has not yet mailed and filed its definitive proxy materials but also has not yet made the affirmative decision to switch, the company should consider whether to include disclosures regarding the possibility that the date, time, or location of the annual meeting will change due to COVID-19 as recommended by the SEC’s guidance.

- **Notice Requirements.** Companies also need to be cognizant of the notice requirements under state law and (as applicable) the SEC rules, with respect to both timing and content. Companies that, after mailing and filing their proxy materials, elect to move to a virtual meeting may follow the steps described above and will need to evaluate whether, under applicable state law, an updated notice will need to be provided and whether such notice
must be sent by mail or may be transmitted electronically such that a press release would suffice. For example, under the DGCL, companies must give notice of their annual meeting at least 10 days and no more than 60 days before the anticipated meeting date. The date, time, and location of the annual meeting must be included in the notice. Because the company should include the logistics for how to participate in a virtual meeting in the notice to shareholders (whether in the original notice or in any notice of change of location depending on the timing of when the company decides to switch to virtual-only), the vendor will have to provide details about its specific processes, which will need to be conveyed to shareholders.

- **Meeting Preparation.** Finally, note that a decision to switch to a virtual-only meeting will impact routine meeting preparation, including the script for the meeting, the rules of conduct, and the technical support needed during the meeting.

## Conclusion

Companies should continue to monitor the status of the public health response to COVID-19, including the recommendations of public health officials and any stay-at-home or shelter-in-place orders issued by federal, state, and local governments. To protect the health and safety of their employees and shareholders, it may be necessary for more companies to switch to a virtual meeting format. A company planning for this switch should ensure legal compliance and consider the practicalities of planning a virtual meeting. There are a number of such legal and practical issues that a company must consider if holding a “virtual-only” meeting, and Jones Walker is available to assist.


[2] For example, Section 219 of the DGCL provides that if a stockholder meeting is to be conducted solely by means of remote communication, the list of stockholders entitled to vote at the meeting shall be made available during the whole time of the meeting on a reasonably accessible electronic network (with the information required to access such list provided with the notice of the meeting).

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