Virtual and Hybrid Shareholder Meetings in the Era of COVID-19: What Public Companies Need to Know

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With annual reports on Form 10-K publicly filed and first quarter earnings releases getting underway, proxy season – the annual practice of filing and distributing proxy statements, reserving meeting venues and courting shareholders – is now in full effect.

In response to the COVID-19 pandemic disrupting normal business operations around the world, many publicly-traded companies in the United States are now forced to reevaluate their annual shareholder meeting plans for this Spring. In addition to weighing health concerns for meeting participants, companies must comply with various “stay-at-home” orders currently in effect which may render an in-person meeting unlawful in many jurisdictions. As of this writing, 43 states have implemented some form of a “stay-at-home” order, which generally prohibits gatherings of ten or more individuals.

“Virtual” shareholder meetings (i.e., a meeting held entirely in an electronic, non-physical format) may provide the perfect solution for companies seeking to mitigate health and legal concerns, all the while complying with federal securities laws, applicable state law and their traditional corporate governance practices. Another option to consider is a “hybrid” shareholder meeting where participants can attend in-person or remotely (e.g., certain members of the board of directors and/or executive officers may attend in-person, subject to compliance with the applicable “stay-at-home” order(s), and shareholders and other participants may attend remotely by audio/video or audio-only connection).

Below, we present considerations surrounding a decision regarding whether to hold a virtual or hybrid meeting from planning to execution, including from a state law and federal regulatory perspective for publicly-held corporations.

Step 1: Consider State Law

Virtual and hybrid meetings are not a recent innovation of corporate law. In fact, Delaware law has authorized a meeting of shareholders in electronic-only format for 20 years. Section 211 of the Delaware General Corporation Law allows a board, if authorized by a corporation’s certificate of
incorporation or bylaws, to determine the place of a meeting of shareholders, including whether the meeting may be held by “remote communication,” subject to three conditions:

1. the corporation must verify that each person deemed present and permitted to vote at the meeting is a stockholder or proxyholder;

2. the corporation must implement reasonable measures to provide stockholders or proxyholders to participate in the meeting and to vote on matters submitted to the stockholders, including an opportunity to read or hear the proceedings of the meeting “substantially concurrently” with such proceedings; and

3. if any stockholder or proxyholder votes or takes action at the meeting by means of remote communication, the corporation is required to retain a record of this action.[1]

On April 6, 2020, Delaware Governor John Carney issued a modified executive order that allows certain Delaware corporations to change a previously noticed in-person shareholder meeting to a virtual-only meeting without the need for redistribution of notice materials. If a corporation is subject to the reporting requirements of Section 13(a) or 15(d) of the Securities Exchange Act of 1934, a corporation’s board may effectuate the change to a virtual meeting by filing a publicly available document with the Securities and Exchange Commission, such as a current report on Form 8-K, and a press release that is posted on the company’s website. Additionally, should the COVID-19 pandemic render a previously announced in-person meeting impracticable, the order permits a corporation to adjourn a meeting to be held in virtual format upon the filing of a report with the SEC and a concurrent press release posted on a company’s website. Governor Carney’s order can be found here.

This relief, in conjunction with recent SEC guidance that we discuss herein, effectively provides public Delaware corporations with the ability to transition to a virtual or hybrid meeting in a swift, seamless and cost-efficient manner from both a state law and federal regulatory perspective.

Other states permit virtual or hybrid meetings, albeit with some additional restrictions. Selected state law requirements include the following:

- **New York.** The New York Business Corporation Law (“NYBCL”) permits shareholders of New York corporations who are not physically located at a meeting to participate via electronic communication. However the NYBCL does not expressly authorize virtual-only meetings. [New York Governor Andrew Cuomo issued Executive Order No. 202.8 on March 20, 2020 to ease these restrictions.](https://www.governor.ny.gov/news/governor-cuomo-issues-executive-order-extension-issued-march-12-2020) The order temporarily suspends certain subsections of the NYBCL that require meetings of shareholders to be held at a physical location.

- **California.** The California Corporations Code permits corporations to hold virtual meetings, **provided, that all** stockholders consent to such format. This unfortunately has the likely effect of preventing such a meeting for a California corporation from a practical perspective, as it would be difficult for a publicly-held corporation to comply with this requirement. Like New York, [California Governor Gavin Newsom issued Executive Order N-40-20 on March 30, 2020 suspending, temporarily, the requirement for California corporations to obtain shareholder consent to hold a virtual shareholder meeting.](https://www.governor.ca.gov/press-releases/governor-newsom-orders-businesses-to-close-to-cut-down-covid-19-spread)
New Jersey. Until recently, the New Jersey Business Corporation Act ("NJBCA") permitted shareholders to participate in meetings of shareholders by electronic means only if a corporation’s board of directors authorized such participation. Importantly, however, shareholder meetings were still required to be held at a physical location. **In response to the COVID-19 crisis, the New Jersey legislature passed a change to the NJBCA that permits a true virtual meeting during a state of emergency, provided that a corporation’s board authorizes the format and provides guidelines to shareholders regarding participating in the approved format. New Jersey Governor Phil Murphy signed the bill into law on March 20, 2020.**

Texas. The Texas Business Organizations Code permits the owners, members, or governing persons of an entity, or a committee of the owners, members, or governing persons, to hold meetings by means of a conference telephone or similar communications equipment, or another suitable electronic communications system, including videoconferencing technology, the internet, or any combination thereof, if the telephone or other equipment or system permits each person participating in the meeting to communicate with all other persons participating in the meeting.

Florida. The Florida Business Corporation Act authorizes shareholders or proxyholders to participate in a shareholder meeting by means of remote or electronic communication to the extent a corporation’s board of directors authorizes such format. Additionally, if the board of directors is authorized to determine the place of a shareholders meeting in a Florida corporation’s charter or bylaws, the board of directors may, in its sole discretion, determine that the meeting shall be held solely by means of remote communication.

Other States. Many other states currently permit some form of virtual, hybrid, or remote shareholder meetings, subject to various state specific conditions. Certain states, however – eight in fact – don’t provide for virtual meetings at all. These are Alabama, Alaska, Arkansas, Georgia, Idaho, New Mexico, South Carolina and South Dakota.

As noted above, notwithstanding these statutory schemes, governors of several states have taken executive action to ease the annual meeting process. Given the spread of the COVID-19 coronavirus, we expect that these orders will be extended past their anticipated limits and that other states will take similar measures.

**Step 2: Consider Disclosure in Proxy Statements and SEC Guidance**

If an issuer has **not yet filed** its definitive proxy statement with the SEC and is considering changing the format of the meeting to be virtual or a hybrid meeting, relevant disclosure should be included in the proxy statement sent to shareholders, both in the meeting notice and in the proxy statement itself. **To avoid shareholder confusion, disclosure related to virtual or hybrid meeting mechanics should be conspicuous and easily understood.**

If an issuer has **already filed** its definitive proxy statement with the SEC, recent action may provide some relief. Acknowledging that some issuers are considering possible changes to their annual meetings, including the date, time, location, or format, the SEC on March 13, 2020 published [guidance](#) to assist public companies, investment companies, shareholders, and other
market participants affected by the COVID-19 coronavirus with their annual shareholder meetings. The Staff stated that the guidance was intended to support companies who choose to make use of modern technology and “engage with shareholders while complying with the federal securities laws.”

The guidance provides that an issuer that has already mailed and filed its definitive proxy materials can notify shareholders of a change in the date, time, location, or format of its annual meeting without mailing additional soliciting materials or amending its proxy materials if it:

1. issues a press release announcing the change;
2. files the announcement as definitive additional soliciting material on EDGAR; and
3. takes all reasonable steps to inform other intermediaries in the proxy process (such as Broadridge Financial Solutions or Mediant) and other market participants (such as NASDAQ or NYSE) of the change.

**Step 3: Consider Meeting Logistics and Shareholder Engagement**

In light of the COVID-19 pandemic, many vendors (including transfer agents and intermediaries such as Broadridge Financial Solutions) provide services and platforms to facilitate virtual or hybrid annual meetings. Below are a few relevant considerations when organizing a virtual or hybrid meeting:

- **Plan ahead.** With heightened interest in organizing virtual or hybrid meetings, vendors may increasingly have limited availability or capacity when scheduling a meeting. Companies should consider contacting their selected vendor representatives to schedule a meeting time and date as soon as possible. Meeting participants such as an issuer’s independent registered public accounting firm should also be consulted for availability.

- **Ensure Accessibility.** Review with the vendor the ways in which shareholders can join the annual meeting and participate. Any device that has access to the internet, such as a smartphone, tablet or computer generally will provide access to meeting participants. Vendors typically provide a unique website address for the meeting and then provide shareholders with a control number unique to them. Some vendors also provide “read-only” access to guests, if desired. Meetings can be in audio only or video with audio format, with questions from shareholders submitted in a chat function or over the phone.

- **Review Meeting Materials and Rules of Conduct.** While a company may have rules of conduct from previous annual meetings, such documents and procedures should be reviewed and updated to account and accommodate for participation via electronic means. Management should consult with legal counsel and investor relations professionals regarding content in any scripts or other statements and documents prepared for the meeting. Additionally, other state law requirements applicable to the meeting still apply in the virtual context, including, for example, that a shareholder list be on display during the course of the meeting.

- **Evaluate Security and Data Privacy.** Ensure that a virtual meeting platform provides industry standard encryption and security protocols. With bad actors recently hijacking teleconference platforms, companies should make sure to adequately safeguard the integrity of their meetings and participants.
Prepare for and Embrace Shareholder Participation. Some public companies may be accustomed to low levels of in-person attendance by shareholders, yielding very little shareholder interaction with management. A virtual or hybrid meeting might have the opposite effect. Companies should be prepared for increased participation and should consider using the virtual medium as a tool for shareholder engagement and communication. For example, when reviewing and revising rules of conduct for the meeting consider addressing rules specific to questions from shareholders during the formal meeting itself, as well as during any Q&A session held after the formal meeting is adjourned.

Step 4: Consult Counsel and Other Experts

Lastly, during these extraordinary and constantly changing times, we think it prudent for issuers to consult with legal counsel before making a decision in connection with their shareholder meeting. Many factors play into such a determination and issuers should consult with all relevant parties, including legal counsel, accountants and auditors, proxy solicitors, proxy intermediaries, transfer agents and other market participants such as Broadridge Financial Solutions and any relevant exchange.

As you are aware, things are changing quickly and there is no clear-cut authority or bright line rules. This is not an unequivocal statement of the law, but instead represents our best interpretation of where things currently stand. This article does not address the potential impacts of the numerous other local, state and federal orders that have been issued in response to the COVID-19 pandemic.

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