

Virtual Shareholder Meetings in the Wake of COVID-19: Legal and Practical Considerations

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KEY POINTS

In wake of the Coronavirus Disease 2019 (COVID-19) and the public health concerns it raises, public companies should consider whether to hold virtual annual shareholder meetings. This advisory outlines some of the legal and practical issues companies should consider in making such a determination, including:

- Whether virtual shareholder meetings are permitted under applicable state law and a company's organizational documents (such as its charter and bylaws);
 - Logistical and practical considerations of holding a virtual meeting;
 - The views of institutional shareholders, institutional shareholder advocacy groups and proxy advisory firms (such as Institutional Shareholder Services (ISS) and Glass Lewis) about holding shareholder meetings virtually, including in the wake of COVID-19.
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In recent years, virtual annual shareholder meetings, where a company's shareholders attend its annual meeting remotely, have become increasingly utilized by public companies, either as the exclusive means to attend the annual meeting (a so-called "virtual-only" meeting) or in conjunction with a traditional in-person meeting (a so-called "hybrid" meeting). With the 2020 proxy season underway, many public companies are considering whether to hold virtual annual shareholder meetings in light of the public health concerns posed by the Coronavirus Disease 2019 (COVID-19). In light of the "shelter in place" and similar orders in effect in various cities and states, in-person meetings may not be permitted in originally planned or contemplated meeting locations (including, in many cases, company headquarters). Even if an in-person meeting is legally permitted to occur, in light of the serious consequences of COVID-19 and the recommendations for social distancing to contain its spread and protect lives, it may be unreasonable for companies with annual meetings planned for any time in the relatively near future to expect their officers, directors and shareholders to travel to, and gather at, a physical meeting location. So, we believe that all companies with upcoming shareholder meetings, to the extent that they are permitted do so as discussed below, should consider holding virtual-only meetings, as we indicated in a prior advisory, or, at a minimum, preserve the flexibility to do that. The following discusses some of the relevant legal and practical considerations for companies currently evaluating the possibility of holding a virtual-only (or hybrid) annual meeting.

Legal and Practical Considerations

As an initial matter, any US public company that is considering whether to hold a virtual-only or hybrid annual meeting should determine whether the laws in its state of incorporation and its organizational documents (charter and bylaws or other similar documents) permit it to do so.

State Law

Many states allow domestic companies to hold virtual or hybrid annual shareholder meetings. For example, Section 211 of the Delaware General Corporation Law (DGCL) provides that a Delaware corporation may hold its shareholder meetings “solely by means of remote communication,” so long as, (1) its charter and bylaws also permit it to do so, and (2) stockholders and proxyholders not physically present at a shareholder meeting can both participate in the meeting (including the opportunity to read or hear the proceedings of the meeting substantially concurrently with such proceedings) and be deemed present and vote at the meeting.

Some states technically permit their domestic companies to hold virtual meetings but require such companies to comply with challenging conditions in order to be able to do so. For example, under California law, a domestic California company must obtain unrevoked, unanimous prior shareholder consent in order to be able to hold a virtual-only meeting, and, if the shareholder consent is not unanimous, the company must either hold an in-person or a hybrid shareholder meeting. Other states, such as Georgia and South Carolina, prohibit domestic companies from holding any kind of virtual shareholder meeting, whether virtual-only or a hybrid meeting, while some other states, such as New York and North Carolina, prohibit domestic companies from holding a virtual-only meeting but permit hybrid meetings. In light of the challenges presented by COVID-19, however, some or all of these jurisdictions may take action to ease, at least temporarily, these restrictions on virtual meetings. Of particular note, as part of New York Governor Andrew Cuomo’s executive order on March 20, New York is providing temporary relief to allow New York corporations to hold their shareholder meetings as virtual-only meetings. Under the current executive order, the relief for New York corporations appears to apply to shareholder meetings held on or before April 19, although the duration of this relief may be extended depending upon the trajectory of COVID-19.

Organizational Documents

Assuming the laws of a company’s state of incorporation permit it to hold either a virtual-only or a hybrid shareholder meeting, a company should review its charter and bylaws (or other similar governing documents) to confirm that it may proceed with such a meeting, recognizing that provisions addressing requirements of a company’s shareholder meetings, including whether a meeting may be held by remote communication, are commonly included in a company’s bylaws rather than its charter. In Delaware, for example, if a company’s bylaws provide the board of directors with the discretion to determine a location (even if they only contemplate a physical location), the board is deemed to have the authority to hold a meeting by remote communication. If a public company’s bylaws expressly require that its annual shareholder meeting be held at a physical location, or the company is not incorporated in a state that affords as much latitude as Delaware, the bylaws may need to be amended to allow for a hybrid or a virtual-only meeting. Depending upon applicable state law and the provisions in the company’s charter and bylaws regarding bylaw amendments, however, the board of directors may likely be able to adopt any necessary bylaw amendment without a shareholder vote. To the extent a bylaw amendment is deemed necessary or appropriate, the bylaws should clarify that “shareholder meetings shall be held at such place or no place, or may be held solely by means of remote communication, as may be determined by the board of directors.” Note that any such amendment to a company’s bylaws by a domestic reporting company would need to be disclosed under Item 5.03 on a Form 8-K filed with the Securities and Exchange Commission (SEC).

Exchange Requirements

Although both Nasdaq and the New York Stock Exchange require listed companies to hold an annual meeting, neither imposes any restrictions as to where or how the meeting must be held. Accordingly, subject to the other considerations described above, Nasdaq- and NYSE-listed companies have flexibility to hold virtual-only or hybrid shareholder meetings.

Additional Considerations

Even if a public company is permitted under relevant state law and its governing documents to hold a virtual-only or hybrid shareholder meeting, it should be aware of, and give consideration to, related logistical and practical factors, as well as the views of its institutional shareholders and proxy advisory firms (i.e., Institutional Shareholder Services (ISS) and Glass Lewis) to the holding of virtual-only or hybrid meetings.

Logistics and Format of the Meeting. Under the DGCL and the statutes of several other states, meetings held by means of remote communication must provide shareholders with both a “reasonable opportunity to participate in the meeting” and the ability to be deemed present and vote at the meeting. For that purpose, the DGCL and other similar statutes require the company holding the remote meeting to implement “reasonable measures” to verify that each person who is deemed present and permitted to vote is, in fact, a stockholder or proxyholder and to maintain a record of any vote or action taken at such meeting. Practically speaking, this will mean that most, if not all, public companies holding a remote meeting will engage an outside service provider to provide a platform to host the meeting, verify that participants can validly attend the meeting and enable shareholders to vote (and, if permitted by the company, ask questions) during the meeting, whether the meeting will be audio-only or will also include video. While either format is acceptable, public companies that have held remote meetings have overwhelmingly chosen audio-only meetings, which are less expensive and technologically easier for the company than broadcasting live video. An audio-only virtual shareholder meeting may make even more practical sense in the wake of COVID-19, in light of travel-related and public health challenges for a company’s board of directors and executive officers to provide in-person content for a remote meeting with video. Also, companies deciding to hold their first virtual-only or hybrid meeting should ensure that the rules of conduct for the meeting and the related annual meeting script are appropriately reflective of the nature of the meeting.

Shareholder Participation and Engagement. Although not technically required, many in-person shareholder meetings provide shareholders with the opportunity to engage directly with a company’s board of directors and executive officers, typically through question and answer sessions. Companies that hold virtual shareholder meetings should take steps to ensure that they are continuing to engage with shareholders (including, in particular, if companies have historically held in-person meetings) in order to avoid the perception that virtual meetings are being used, even in part, to avoid such engagement. Such steps may include allowing shareholders to ask live questions on the telephone, similar to an earnings call. In order to give companies the ability to screen questions that it may answer during the meeting, some companies instead allow shareholders to submit live questions via chat, text or other electronic functionality during the meeting, which questions are not typically seen by other participants in the meeting. Alternatively, companies may require shareholders to submit questions in advance, whether through pre-recorded audio or video files or in writing (including via email or other electronic transmission), giving companies the greatest discretion in choosing which questions to answer during the meeting, although this approach may result in less candid and more scripted responses. To the extent companies permit shareholders to ask questions using any of the above approaches, they should take steps to alleviate the concern that they will “cherry pick” favorable questions and downplay, rephrase or ignore negative or hostile questions. A company may be able to accomplish this by providing transparency into how they select shareholder questions, committing to either (1) respond to all reasonable questions at the meeting, or (2) if too many questions are received, post all questions on a website available to shareholders and respond to them after the meeting. Companies should be prepared to respond to shareholder questions regardless of the format, including, in particular, questions related to COVID-19 and its business impact. In responding to such questions, as with any situation in which companies engage with, and answer questions from, shareholders, companies should be mindful of their obligation to avoid selective disclosure of material nonpublic information and general compliance with Regulation Fair Disclosure (Regulation FD).

Institutional Shareholder Feedback. Although many institutional shareholders have historically not supported virtual-only meetings, a number of institutional shareholders have not adopted formal voting policies concerning virtual-only meetings. Since one of the main criticisms of remote shareholder meetings is that such meetings negatively impact the extent to which management and the board of directors meaningfully engage with shareholders,

companies holding remote shareholder meetings may consider increasing their shareholder engagement efforts, both prior to and following the annual meeting, related to the logistics of the annual meeting itself, as well as other matters of concern to institutional shareholders. It is particularly important in the current environment for companies to develop Regulation FD compliant communication strategies, including to respond to investor questions that have arisen, and will continue to arise, in the wake of COVID-19.

Guidance from Proxy Advisory Firms and Institutional Investor Advocates. In light of COVID-19, it is important to consider the proxy guidelines and other guidance from proxy advisory firms and institutional investor advocacy groups (e.g., the Council of Institutional Investors (CII)), including any communications that clarify their positions on virtual shareholder meetings in the current environment.

ISS. As of the date of this advisory, ISS has not adopted a formal policy on virtual-only shareholder meetings and has not made any public statements regarding virtual-only or hybrid meetings being held in the wake of the COVID-19 pandemic.

Glass Lewis. Under Glass Lewis's standard policy on virtual shareholder meetings, it will recommend voting against members of a company's governance committee, where the company is planning to hold a virtual-only shareholder meeting and its proxy statement does not include robust disclosure assuring shareholders that they will be afforded the same rights and opportunities to participate in the virtual-only meeting as they would if the meeting were held in-person. According to Glass Lewis, such rights and opportunities include the ability of shareholders to ask questions during the meeting and posting shareholder questions, and the company's answers to such questions, on the company's website as soon as practical after the conclusion of the meeting. However, under its 2020 proxy voting guidelines and consistent with its March 19 policy update, if a company holds a virtual-only shareholder meeting between March 1-June 30, Glass Lewis will "generally refrain from recommending to vote against members of [a company's] governance committee on that basis, provided that the company discloses, at a minimum, its rationale for doing so, including citing COVID-19." If such a company opts to continue to hold virtual-only shareholder meetings for future proxy seasons, Glass Lewis expects that the company's proxy statements will "include robust disclosure concerning shareholder participation," as described in the Glass Lewis proxy voting guidelines.

CII. Although CII's [Corporate Governance Policies](#) provide that companies should hold shareholder meetings by remote communication only as a supplement to traditional in-person meetings, not as a substitute, on March 16, CII issued an update entitled, "CII Statement on Virtual Shareholder Meetings During Public Health Emergency." In that update, CII indicated that "[g]iven coronavirus concerns, it is entirely reasonable that some companies will go to virtual-only annual meetings." If a company determines to hold a virtual-only meeting, CII emphasizes the importance of following "best practices," including making such meetings participatory, replicating as much as possible the experience of an in-person meeting. Additionally, CII hopes that companies that host a virtual-only meeting in 2020 "will make it clear that [it] is a one-off, tailored for the current circumstances."

In addition to the considerations described in this advisory, please consult our advisory published on March 17, entitled, "[SEC Issues Guidance for Public Companies Holding Annual Meetings in Light of COVID-19 Impact](#)," which provides an overview of the SEC's recent guidance for issuers on conducting virtual-only or hybrid annual meetings in the wake of COVID-19. As discussed in that advisory, the SEC's guidance, among other things, clarifies that:

- Public companies that have not yet filed and mailed their definitive proxy materials should disclose in their proxy materials whether they plan to conduct a virtual-only or a hybrid shareholder meeting; and
- Public companies that have already filed and mailed their proxy materials do not need to mail additional materials solely to disclose a switch to a virtual or hybrid meeting, but such companies must (1) disclose the change in a press release announcing the change, which press release must be filed with the SEC on

EDGAR as definitive additional soliciting material, and (2) take all reasonable steps necessary to inform other intermediaries in the proxy process and other relevant market participants of the change.

This advisory is a summary for general information and discussion only. It is not a full analysis of the matters presented and may not be relied upon as legal advice. Any company exploring the possibility of hosting a remote shareholder meeting should consider engaging directly with legal counsel. To help our clients navigate the COVID-19 crisis, we have established a Coronavirus (COVID-19) Resource Center (accessible [here](#)) covering a wide range of issues and challenges.

CONTACTS

As the COVID-19 situation continues to evolve, please consult the COVID-19 Resource Center. For more information, or if you have any questions regarding any of the topics discussed in this advisory, please contact the authors of this advisory directly: Mark Wood, Mark Reyes and Alyse Sagalchik; the other members of the [Katten Corporate Securities](#) Practice listed below; or your primary Katten attorney.



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