



Annual Meetings No Longer a Spectator Sport: How to Prepare Your Company for Virtual Annual Meetings in Response to Coronavirus

MARCH 13, 2020

Updated as of March 13, 2020

Much like March Madness fans, stockholders may not be able to score courtside seats to many of this year's annual meetings. On March 11, 2020, the World Health Organization declared COVID-19 a pandemic, and governments around the world have been ordering workers to stay home and banning large gatherings of people, even mandating "social distancing" to prevent the spread of the coronavirus. As companies enter the 2020 proxy season and plan their annual meetings, they should prepare for the possibility that their annual meetings may be forced into a virtual setting as stockholders, officers, and directors would not be able, or willing, to travel.

In this post, we'll discuss the top four things companies need to do to prepare for annual meetings in the face of the coronavirus threat:

1. Determine Whether Your Company Can Hold a Virtual Meeting

State of Incorporation

Companies considering virtual meetings should first determine whether their state of incorporation permits non-physical meetings. Thirty states currently allow virtual-only meetings, but with varying restrictions. Some states, like Delaware, permit virtual-only meetings with few limits (e.g., verifying the identity of stockholders participating virtually, creating tools for stockholders to meaningfully participate in the meeting while not being present, and maintaining records of virtual votes). Other states, like California, technically permit virtual-only meetings but impose such exacting restrictions that holding a virtual meeting becomes impractical. Additionally, 42 states permit remote participation in annual meetings (i.e., a "hybrid" meeting with both physical and virtual components), which would permit stockholders to call in to meetings or stream them online.

Charter and Bylaws

If your company's state of incorporation permits virtual meetings, you must then determine whether your charter and bylaws allow for such meetings. Most recently drafted bylaws contemplate virtual or hybrid meetings; however, it is important to verify whether there are any restrictions on such meetings and what differences, if any, there are for notice requirements for virtual meetings.

2. Adding Contingency Language to Your Proxy Statement

If your company has already filed the proxy statement announcing the place and time of its annual meeting and contemplating an in-person meeting only, the SEC has recently released guidance allowing changes to the date, time or location of an annual meeting without mailing additional soliciting material or amending its proxy materials. In order to utilize this exception, an issuer must:

- issue a press release announcing such change;
- file the announcement as definitive additional soliciting material on EDGAR; and
- take 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.

The SEC expects that issuers take the above actions promptly upon deciding to change the date, time or location of the meeting so that investors may be made aware in a timely fashion.

If your company has not yet filed its proxy statement, you should strongly consider adding language that explicitly describes the procedures related to a virtual-only meeting, including how stockholders can participate in the meeting, why the meeting may be switched to a virtual setting, and any other material information explaining the new setup. Alternatively, companies may consider including language describing a “contingency plan” if a virtual meeting becomes necessary.^[1] The SEC has advised issuers to include disclosures regarding the possibility that the date, time, or location of the annual meeting will change due to COVID-19. In that case, the proxy should describe how any future decision to switch to a virtual meeting will be announced and how stockholders will be able to access additional information regarding how to participate in the virtual meeting. Additionally, companies should include similar language about their contingency plans on their proxy cards and notices.^[2] As described in more detail below, a virtual annual meeting may require different rules of conduct than are typically used in physical meetings. Companies should include alternate rules of conduct for virtual meetings in their proxy materials if they are available, or begin the process of drafting new rules if they have not already.

3. Preparing for the Practicalities of a Virtual Meeting

Virtual and hybrid annual meetings have different atmospheres and challenges than a standard physical meeting. First, companies should ensure that they have technology (or vendors) that can give stockholders a stable, reliable way to participate in the meeting. Stockholders will need to be able to ask questions, bring proposals, vote, and interact with each other as in a physical meeting, and any technical issues should be addressed quickly by a technology rapid-response team. Second, a virtual meeting, paradoxically, has the potential to draw many more participants than a physical meeting. It is easier to be a click away from voting rather than traveling, so companies should prepare to support larger numbers of participating stockholders as well as larger numbers of votes. Finally, your virtual or hybrid meeting may require new rules to facilitate participation and to make sure the meeting runs smoothly. Questions will be coming in through the phone or submitted by chat or email instead of in writing or in person; voting will require new identification procedures and submission of ballots; and presentations and commentary will come through virtual PowerPoints or webcast.

4. Focus on How Coronavirus Can Impact Other Facets of Your Company

Coronavirus is not just impacting how and when companies are holding their annual meetings, and companies should take stock of how they should be reacting to COVID-19. First, companies should think about how their boards and officers are communicating with the public, especially on analyst conference calls. Second, the federal government and health care industry’s reaction to the coronavirus has necessitated that companies review their employee health care plans to ensure that employees are getting the care they need and that HSA plans are calibrated to current conditions. Finally, companies should update their SEC filings to make sure that

their disclosures are complete and accurate, especially with respect to risk factors and MD&A in annual and quarterly reports.

[1] For example, a proxy statement could include a stipulation in the opening stockholder letter and/or wherever the meeting location is referenced, such as: “We intend to hold our annual meeting in person. However, we are monitoring the situation regarding COVID-19 (Coronavirus), taking into account guidance from the Center for Disease Control and Prevention and the World Health Organization. The health and well-being of our employees and stockholders is our top priority. Accordingly, we are planning for the possibility that the annual meeting may be held solely by means of remote communication if we determine it is not advisable to hold an in-person meeting. We will announce any such updates as promptly as practicable, and details on how to participate will be issued by press release, posted on our website, and filed with the SEC as additional proxy materials. As always, we encourage you to vote your shares prior to the annual meeting.”

[2] For example, the following language may be added to the proxy card and notice: “The Company is monitoring the situation with COVID-19 (Coronavirus), and in the interest of health and safety, we may hold our meeting solely by means of remote communication. We will announce any such updates as promptly as practicable, and details on how to participate will be issued by press release, posted on our website, and filed with the SEC as additional proxy materials.”

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