

The Legal Intelligencer

Virtual Shareholder Meetings in the Time of COVID-19

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As the coronavirus (COVID-19) pandemic continues its devastating impact on individuals, families and communities across the globe, companies are experiencing a myriad of obstacles as they struggle to maintain operations and balance their responsibilities to employees, customers, investors and the public at large during these unprecedented times. With over 40 states issuing shelter-in-place orders and recommendations from public health agencies to limit public gatherings, public companies now face the dilemma of how to conduct their annual shareholder meetings during the 2020 proxy season. Advances in technology have facilitated the use of virtual meetings in recent years, but hosting shareholder meetings at a physical location had remained the most common approach for U.S. companies. Given the current environment, however, we are seeing companies forced to adopt a virtual shareholder meeting platform. This article discusses some of the key considerations public companies should take into account as they transition from a physical in-person shareholder meeting to a virtual meeting format.

STATUTORY CONSIDERATIONS

Companies considering whether to hold a virtual annual shareholder meeting should first consult the applicable corporation statutes of their state of incorporation. Shareholder meetings are a matter of state law and generally not all states permit virtual meetings. Prior to COVID-19 for those states that allow a virtual format, each one may impose different requirements with which companies must comply. For example, Delaware permits companies to hold shareholder meetings solely by means of remote communication, provided the company takes reasonable measures to verify meeting participants and there is a reasonable opportunity to participate in and vote at the meeting. California permits virtual-only shareholder meetings as long as all shareholders provide prior consent. Companies incorporated in New York may include a virtual component (subject to certain conditions), but an in-person meeting is still required. States such as New Jersey and North Carolina similarly allow a hybrid virtual/in-person meeting format, while the corporation statutes in Georgia, Alabama, South Dakota and five other states do not permit virtual shareholder meetings.

That being said, in response to the COVID-19 pandemic, a number of states have recently issued emergency declarations that revise or suspend certain of their state's statutory provisions affecting in-person shareholder meeting requirements. New York Gov. Andrew Cuomo temporarily suspended the sections of the state's corporation statutes that require shareholder meetings to be noticed and held at a physical location. Delaware's State of Emergency Declaration permits a company's board of directors to change a shareholder meeting currently noticed for a physical location to a meeting conducted solely by means of remote communication, provided the company files a notice of the change with the Securities and Exchange Commission

(SEC) and publishes a press release on the company's website. Georgia's governor issued an executive order allowing companies incorporated in Georgia to hold their annual meeting by remote communication, subject to certain conditions. For companies incorporated in California that have shareholder meetings scheduled before June 30, the requirement that companies obtain consent from all shareholders prior to holding a virtual shareholder meeting has been temporarily suspended. On account of these rapidly evolving developments, companies should check their state of incorporation's virtual meeting laws for updates, time limits, and other pertinent information during this time.

GOVERNING DOCUMENT CONSIDERATIONS

Whether virtual meetings are permitted and how they must be conducted under state law is only one consideration. Companies should also review their bylaws and articles of incorporation for provisions that either prohibit or limit their ability to hold virtual-only shareholder meetings. Despite many states issuing emergency declarations suspending in-person meeting requirements, companies whose governing documents mandate a physical location for shareholder meetings may not, depending on the state, rely on emergency measures to hold a virtual-only meeting during the 2020 proxy season. In those instances, an amendment to the bylaws or articles would be required, which in some cases can be done by the board of directors and in some cases may require the consent of the company's shareholders. In the case of the latter, which will be difficult to obtain, companies may be able to adjourn the meeting to a later date. For example, Delaware's current State of Emergency Declaration permits companies who have notified their shareholders of the physical place and time of their annual meeting to adjourn the meeting to another date or time if it is impracticable to convene at the physical location due to the public health threat caused by COVID-19. Finally, companies should determine whether their governing documents require board authorization for virtual-only meetings.

FEDERAL SECURITIES LAWS AND EXCHANGE RULES CONSIDERATIONS

Companies should also consider whether federal securities laws or exchange rules provide guidance or rules regarding virtual-only shareholder meetings. Federal securities laws address proxy solicitations and shareholder proposals, but generally leave the details of how companies should hold shareholder meetings to the company's management. It can be a daunting task determining how to shift an in-person meeting to a virtual meeting under the SEC rules and regulations. Fortunately, on March 13, 2020, the SEC issued guidance that streamlined the process efficiently and effectively. The SEC stated that if an issuer has already filed and mailed its definitive proxy materials, the issuer can meet its SEC shareholder notice obligations without mailing additional soliciting materials or amending its proxy materials if the company (i) announces a change in the location or meeting format via a press release; files the announcement as definitive additional soliciting material on the SEC's electronic submission system (EDGAR); and informs any and all intermediaries involved in the proxy process, including the proxy service provider and other market participants, of the change.

In addition, companies listed on a national securities exchange should consider whether any exchange rules pertain to shareholder meetings. Aside from requiring that listed companies hold an annual shareholder meeting, both the New York Stock Exchange and Nasdaq leave the details of how to conduct these meetings to company management. Nasdaq, however, does require companies provide shareholders an opportunity to discuss company affairs with management as an additional caveat. As with changes in state laws, companies subject to the federal securities laws and those listed on an exchange should consult and consider the rules and requirement before proceeding with a virtual-only format.

OUTSIDE SERVICE PROVIDER CONSIDERATIONS

Once it is determined that a virtual-only shareholder meeting is permissible, companies that choose to hold their

shareholder meeting solely by remote means must consider how best to comply with the applicable statutory meeting format requirements. State law often prescribes requirements for how these meetings are conducted, such as requiring that companies implement certain measures to allow shareholders to vote in a secure manner and participate in the meeting as it is occurring as noted above with Delaware corporations. These requirements can pose logistical problems for companies that do not have the infrastructure or technology to ensure compliance. Engaging an outside service provider specializing in virtual meeting platforms is one way companies can address these issues. Companies that choose to use an outside service provider's platform should work collaboratively with the vendor to determine how best to meet the various state law requirements. Outside vendor considerations that companies should keep in mind include whether the meeting format can be presented in audio and/or video, how shareholder questions can be asked and answered, whether the meeting platform provides sufficient security, whether the platform has features that enable the company to verify that each person present at and permitted to vote on the matters at the meeting is a stockholder or proxyholder, and whether the platform can confirm the security and accuracy of online voting. Given the current environment, companies should be proactive during this 2020 proxy season to ensure any outside service provider can accommodate their requests for services sooner than later.

CONCLUSION

While uncertainty surrounding the global pandemic continues, virtual-only shareholder meetings are an option companies should consider to ensure they continue to meet their obligations to investors during this time. Considerations such as the statutory requirements, governing documents, federal securities laws and exchange rules, and whether to use an outside service provider to host a virtual shareholder meeting should be at the forefront of companies' minds as they prepare for the 2020 proxy season. In the meantime, the authors of this article want to extend their wishes that everyone remain safe and healthy and protect themselves and others by adhering to health care provider recommendations. Stay safe, stay calm, stay home.

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