Considerations for virtual annual shareholder meetings in light of the coronavirus (United States)

Corporate Governance Alert

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By: Andrew D. Ledbetter | John J. Gilluly III | Brent L. Bernell

In light of the recent coronavirus outbreak and its related public health concerns, an increasing number of companies are restricting avoidable travel, canceling external conferences, restructuring internal meetings, and even closing their physical offices and having all employees telecommute.

With the proxy season upon us, many US public companies are also considering how best to hold annual shareholder meetings in light of public health and safety concerns. Although the number of companies holding virtual meetings has grown in recent years, it has still represented a significant minority practice among US public companies. However, in response to the coronavirus outbreak, we anticipate that many public companies will take a closer look at virtual meetings. For example, on March 3, Starbucks Corporation changed its upcoming annual meeting from a physical location in Seattle to a “virtual-only” format. And on March 4, The Bank of New York Mellon Corporation filed a proxy statement for an in-person meeting in New York but specifically advised shareholders that, as a precaution in light of the coronavirus, it is planning for the possibility of changing to a virtual-only meeting.
This alert is intended to provide additional information and considerations for companies considering a “virtual-only” or “hybrid” annual meeting.

What is a “virtual-only” meeting?

Under state corporation laws, the board of directors must determine the date, time and place of shareholder meetings. Approximately 30 states (including Delaware, California, Texas and Washington) allow boards to determine that the “place” need not be a physical, geographic location and instead may be held solely by means of “remote communication.” An additional 11 states permit participation in physical meetings by remote communication. Meetings that solely occur via remote communication are often referred to as “virtual-only” meetings. Meetings that have both a physical place and the ability to participate via remote communication are often referred to as “hybrid meetings.” A “virtual meeting” usually refers generally to both virtual-only and hybrid meetings.

For “remote communications” to be generally acceptable for a virtual meetings, they must reasonably be able to verify the identity of shareholders and provide them an opportunity to participate in the meeting, read or hear the proceedings substantially as they occur and vote. Boards may adopt further guidelines or procedures, but otherwise there is flexibility for the technology undergirding an acceptable remote communication.

Are virtual meetings controversial?

Some shareholder advocacy groups have expressed concern that virtual meetings may risk not providing the same level of shareholder participation, including the ability to ask questions and engage with independent directors. Some proxy advisors have stated that they expect companies holding virtual meetings to provide robust disclosure in the proxy statement to the effect that shareholders will have the same opportunities to participate as they would at an in-person meeting. In light of the public health concerns presented by the coronavirus, however, we expect that shareholder advocacy groups and proxy advisors may temper their criticisms of companies that determine to hold a virtual meeting – at least for this year, with a clear explanation for the decision, and assuming the company faces no controversial issues (such as contested director elections, “vote no” campaigns, or significant shareholder dissension).

If we have already called our annual meeting, can we change it to call a virtual meeting?

Companies that have already called a physical annual meeting may be able to change to a virtual meeting, but corporate considerations include:

- **State of incorporation** – The company must be incorporated in a state that permits virtual meetings.
- **Bylaws** – The company’s bylaws (and perhaps its certificate or articles of incorporation) contain provisions regarding the conduct of shareholder meetings. Although in our experience most recent forms contemplate virtual meetings consistent with applicable corporate law, check to see if the company’s governing documents contain language that could limit or condition the circumstances in which the board may call or shareholders may participate in meetings via remote communication.
- **Notice of meeting** – State corporation statutes require companies to provide shareholders written notice of annual meetings, which generally must state, among other things, the place of the meeting (if any) and the means of remote communications (if any) by which shareholders may participate in the meeting. If the company already called a meeting with just a physical location, it may need to provide a new notice of meeting – and do so no fewer than ten nor more than sixty days before the meeting date. If the meeting is still at least 10 days away, it may be possible to provide a new notice to shareholders. As a practical matter, though, a few days will be needed to give the board the opportunity to consider and approve the change of location, to print the new notice and to arrange for its delivery to shareholders.

If we change to a virtual meeting, do we need to worry about the meeting location stated in our previously distributed proxy materials?

Most of the company’s proxy materials probably state a physical location for the meeting, including the proxy statement and form of proxy card, and potentially the notice of internet availability of proxy materials and any
additional soliciting material (such as a CEO letter or proxy solicitor notices). The main considerations are:

- **Supplemental disclosure** – Companies should file with the SEC, as additional soliciting material, the new corporate law notice and disclosure regarding the virtual-only or hybrid meeting details. Consider disclosing why the decision was made, how the virtual proceedings will work, and how shareholders will have the same opportunities to participate as they would at an in-person meeting. This likely adequately addresses, as a disclosure matter, references to the prior physical location of the meeting that appear in previously circulated proxy materials.

- **Proxy cards and VIFs** – Proxy cards for record shareholders, and voting information forms (VIFs) for beneficial holders, generally refer to the place of the meeting. Many shareholders may have already returned these forms, and in any event there could be thousands of proxy cards and VIFs with incorrect or incomplete meeting location information. The past and continued use of these forms may well be valid, but check with the legal team. Consider including disclosure regarding proxy cards and VIFs in additional proxy solicitation materials.

- **Virtual votes** – Shareholder proxies are generally revocable, and they will be deemed revoked automatically by the shareholder’s vote at the meeting. For a virtual meeting, this means a virtual vote will revoke a proxy. Accordingly, it is important to coordinate with the inspector of elections to ensure proper reconciliation of virtual votes.

**What if we have shareholder proposals to consider at the annual meeting?**

Shareholder proposals are usually not a material factor in deciding to hold a virtual meeting. Even if the company previously arranged with the shareholder to make a brief in-person presentation at the physical meeting, the company can likely change to a virtual meeting. Shareholders commonly present remotely – and the shareholder may prefer to do so in light of coronavirus concerns.

**Should we develop rules specially governing the conduct at the virtual meeting?**

Having rules of conduct available for shareholders before the meeting is generally regarded as a best practice. As to virtual participation, rules may address the opportunity to submit questions in writing before or during the meeting, or via toll-free calls, as well as the process for screening, combining and responding (or declining to respond) to questions. Rules of conduct may also establish time limitations, guidelines for behavior that is out of order, a process for online posting of questions received and the meeting itself, and technology support.

**How developed and reliable is virtual meeting technology?**

Most companies want virtual meetings to be easy for shareholders to use, to reflect professionalism, and to make shareholders feel meaningfully involved. If the company changes mid-process to a virtual meeting, time will be short and it will be critical to coordinate with technology vendors, including to ensure the format is intuitive and provides opportunities to engage with directors and for Q&A.

Most of the large transfer agents and proxy centers have had virtual meeting solutions available for several years. The company’s proxy solicitor and legal team may have other suggestions. With a general increase in the use of videoconferencing applications, there is also an increased general familiarity among shareholders (and management) as to how to use this type of technology. Consider involving the company’s IT and IR teams to address security, use of presentation materials and other communications strategies.

**If we don’t have time to change to a virtual meeting and send a new notice, can we still provide shareholders access to our meeting via remote communications even if they don’t vote that way?**

Yes, just remember that shareholders may not participate this way in a corporate law sense. To be counted for quorum purpose and to vote, shareholders need to appear in person at the physical location of the meeting or appoint a proxy to do so. Shareholders not desiring to attend in person should return a proxy card to the company or a VIF to their broker or other nominee; their access to the meeting through a webcast is simply a helpful accommodation that facilitates shareholder engagement.
If the company desires to pursue this approach, our general suggestions are to:

- Develop with the company’s IR and legal teams a message that, in light of the coronavirus and related concerns about travel and in-person meetings, the company has decided to webcast the meeting.
- Encourage shareholders to vote through the means previously described in the proxy statement, by its deadlines, since official action cannot be taken through the webcast.
- File any shareholder communications regarding the meeting with the SEC as additional soliciting material.
- Consider available webcast technology for the meeting and engage vendors as needed.
- Consider updating the company’s rules of conduct for the meeting.

If we have not already called our annual meeting, but we intend to do so shortly, do we still have time to consider a virtual meeting?

Yes. The primary steps to take are to:

- Ensure state corporate law and governing documents permit virtual meetings.
- Have the board of directors, and potentially the nominating and corporate governance committee, consider and approve holding a virtual meeting.
- Consider the technology solutions available to support the virtual meeting and engage vendors as needed.
- Ensure the notice of meeting states the means of remote communications by which shareholders may participate in the meeting.
- Include in the proxy statement disclosure about the virtual meeting. This most notably appears in the general information about the meeting, with brief references in the notice of meeting, the proxy card, any CEO letter and any summary. Consider explaining why the decision was made, how the virtual proceedings will work, and how shareholders will have the same opportunities to participate as they would at an in-person meeting.

May we plan to hold a hybrid meeting, but reserve the ability to cancel the in-person component if circumstances require?

Yes, it may be possible to cancel the in-person component. Confer with counsel as to the appropriate state corporation law formulation of the notice of meeting, including consideration of whether canceling the in-person component triggers the need for a new notice of meeting. We would also generally suggest disclosing in the proxy statement this possibility and the company’s plans for keeping holders apprised.

Concluding Thoughts

The coronavirus is commanding attention and compelling companies to rethink travel and meeting protocols. For public companies, we expect a continued increase in virtual meetings. Should you have any questions about virtual meetings, corporation law, related disclosure, or other matters bearing on coronavirus preparedness, please don’t hesitate to reach out to your DLA Piper contact. Please visit our COVID-19 landing page for additional publications and webinars on legal issues related to COVID-19.

AUTHORS

Andrew D. Ledbetter
Partner
Seattle | T: +1 206 839 4800
andrew.ledbetter@dlapiper.com

John J. Gilluly III
Partner
Austin | T: +1 512 457 7000
Houston | T: +1 713 425 8400
Dallas | T: +1 214 743 4500