

# Virtual and Hybrid Annual Shareholder Meetings During the Coronavirus Pandemic

---

March 20, 2020 Bruce Newsome

---

**PRACTICES** Portfolio Companies and Investors, Capital Markets and Securities, Corporate Governance, Corporate, Private Equity, Investment Management

---

As the coronavirus (“**COVID-19**”) pandemic continues, many public companies are examining how best to accommodate their upcoming annual shareholder meetings in light of complying with government orders and recommendations limiting public gatherings and non-essential travel. Accordingly, many corporate executives are now considering moving their annual shareholder meetings to a virtual or “hybrid” format in light of current public health and safety concerns. With the COVID-19 pandemic stretching well into proxy statement season, we expect many U.S. public companies to make the switch or provide for the flexibility to do so in their proxy statements.

Virtual-only meetings allow a company to host its annual shareholder meeting without a physical location. They can be conducted either online or over the phone. Virtual meetings conducted online include a live video feed whereas virtual meetings conducted over the phone are audio only (similar to an earnings call). Most companies holding virtual-only meetings have tended to provide an audio-only format.

Alternatively, hybrid meetings combine aspects of both virtual and in-person meetings by conducting the meeting at a physical location while also providing a remote means of participation for shareholders who are not physically present.

For companies considering a virtual or hybrid format for this year’s annual shareholder meeting, we set forth various legal, logistical, and practical considerations below.

## **Permissibility of Virtual Meetings Under Relevant State Law and Bylaws**

In assessing the legal considerations of holding a virtual or hybrid annual shareholder meeting, companies must determine if virtual or hybrid shareholder meetings are permitted under both (i) the company’s state law of incorporation and (ii) the company’s bylaws.

State law controls the form and location of the annual shareholder meeting. Currently, numerous states—including Delaware and Texas—allow companies to hold virtual-only meetings. For example, Section 211(a)(1) of the Delaware General Corporation Law permits companies to hold virtual-only meetings by means of remote communication provided that:

- The format is authorized by the company’s board of directors;
- The meeting conforms to the guidelines and procedures adopted by the board of directors (which would typically be set forth in the company’s bylaws);
- The company implements reasonable measures to verify that each person deemed and permitted to vote at the meeting by means of remote communication is a shareholder or proxyholder;
- The company implements reasonable measures to provide shareholders and proxyholders a reasonable opportunity to participate (normally, this means a way to transmit written

- messages and ask questions);
- The company provides reasonable means to vote on matters submitted to shareholders, including an opportunity to read or hear the proceedings of the meeting substantially concurrently with such proceedings; and
  - If any shareholder or proxyholder votes or takes other action at the meeting by means of remote communication, the company maintains a record of such vote or such other action.

Moreover, many other states allow hybrid meetings. For example, after recently amending Section 602 of the New York Business Corporation Law, New York now permits companies to provide shareholders the opportunity to participate through remote communication if certain statutory conditions are met. However, New York *still requires* that an annual shareholder meeting be held at a physical location so that a hybrid meeting but not a virtual-only meeting is permitted.

However, while some states statutorily allow for a virtual-only format, they impose strict conditions that make it exceedingly difficult to do so. For example, although Section 600 of the California Corporations Code permits companies to hold their annual shareholder meetings conducted wholly by means of electronic transmission, the company must obtain the *unrevoked consent of all shareholders* to do so. Absent such consent, the meeting must be held at a physical location. Therefore, practically, the California Code permit a hybrid meeting but not a virtual-only meeting.

## Permissibility of Virtual Meetings Under SEC and Exchange Rules

Since shareholder meetings are governed by state law, federal securities laws are largely silent on the conduct of the annual meeting. However, the Securities and Exchange Commission (the “**SEC**”) has affirmed its view through a series of no-action letters that the decision to host a virtual annual shareholder meeting is left to the company’s management, subject to state law requirements.<sup>[1]</sup>

Similarly, the NYSE and the NASDAQ rules only require listed companies to hold annual meetings, with NASDAQ requiring companies to afford shareowners an opportunity to discuss company affairs with management.

## Notice Requirements and Recent SEC Guidance

Assuming that participation at the annual shareholder meeting via means of remote communication is permitted under both state law and the company’s bylaws, then the company must take additional steps in notifying its shareholders and satisfying its SEC filing obligations.

### *Changes from Annual Meeting Information in Previously Filed Proxy Statement*

Many proxy statements that have been filed in March have planned on a physical annual meeting; however, they have included the possibility of a change to a virtual or hybrid meeting and told shareholders to be alert for updated information from the company on the addition of remote meeting access. Under SEC rules, any changes to the location or timing of the annual shareholder meeting must be filed with the SEC. However, a recent [SEC announcement](#) on March 13, 2020, provides guidance to companies that have already filed their proxy statement but decide to switch to, or in addition provide for, a virtual format in light of COVID-19 concerns. Under this guidance, the company should issue a press release announcing the change and file it on EDGAR as definitive additional soliciting material. The company must also 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. In its filing, we also recommend that the company (i) discuss why the decision to move to a

virtual meeting was made; (ii) to preempt comments from proxy advisor firms, state that change is anticipated to be for 2020 only; (iii) explain how the virtual proceedings will work; and (iv) disclose how shareholders will have the same opportunities to participate as they would have at an in-person meeting.

Typically under state law, changes to annual meetings must be communicated to shareholders within a certain timeframe. Many states—including California, Delaware, New York, and Texas—all require that notice of the annual meeting be given no less than 10 and no more than 60 days before the date of the meeting. Filing the press release with the SEC within this time frame should suffice as proper notice; however, companies should check the applicable law of their state of incorporation.

### *Virtual or Hybrid Meeting Announced in the Proxy Statement*

If the company has not yet filed its proxy statement with the SEC, then it can include the typical physical annual meeting information in the proxy statement and include the possibility of a change to a virtual or hybrid meeting and warn shareholders to be alert for updated information from the company on the addition of remote meeting access. Alternatively, the company can commit to a virtual or hybrid meeting in the proxy statement. This disclosure should state the means of remote communication by which shareholders may participate and also include the same explanations and disclosures we recommend submitting as part of the additional soliciting materials discussed above.

### **Logistical and Best Practice Considerations for Virtual or Hybrid Meetings**

Companies considering a virtual or hybrid format will need to consider the logistics of managing the means of remote communication and participation. Some of the best practices for conducting a virtual or hybrid meeting include:

- Ensuring that the remote forum permits shareholders to exercise all rights and privileges guaranteed to them under both federal and state law;
- Determining how shareholders will be able to (i) ask questions and make comments that can be heard by others and (ii) receive answers during the meeting;
- Establishing guidelines around the process for questions;
- Ensuring that shareholders are aware of the procedures with which they must comply to access any information and participate fully in such meetings;
- Providing a technical support line for shareholders who experience technical difficulties prior to or during the meeting;
- Confirming that the technology used will accommodate the number of anticipated participating shareholders; and
- Ensuring that shareholders can access board members virtually, by either seeing or hearing them.

### **Questioning Attendees at a Physical Annual Meeting**

Additionally, companies opting for a physical or hybrid format may also want to restrict in-person access to their annual shareholder meeting to exclude people who have travelled from areas severely impacted by COVID-19. For example, shortly before Qualcomm's recent annual meeting this March, the company announced that it would exclude shareholders who had been to areas struck by COVID-19 from in-person participation. It provided remote communication in addition to physical meeting. Companies wishing to restrict in-person participation at their annual shareholder

meeting should determine how such measures comply with state law in light of the practical concerns surrounding the COVID-19 pandemic.

For additional information please contact any member of Haynes Boone's Capital Markets and Securities Practice Group.

---

[1] In a recent [no-action request](#) from HP Inc., the SEC allowed the company to exclude a shareholder proposal requesting that the board adopt a policy to restore in-person annual meetings on the grounds that decisions regarding the format of an annual meeting are considered the company's ordinary business.