

PLANNING FOR YOUR ANNUAL SHAREHOLDER MEETING: SELECTED CONSIDERATIONS FOR A VIRTUAL-ONLY MEETING

To Our Clients and Friends:

In recent years, an increasing number of companies have opted to hold annual shareholder meetings exclusively online--i.e., a virtual meeting without a corresponding physical meeting--rather than a virtual meeting in tandem with a physical meeting (the so-called "hybrid" approach). While hybrid approaches are generally welcome or not opposed by investors and activist shareholders, some have criticized companies holding virtual-only annual meetings, asserting that virtual meetings limit the opportunity for shareholder participation in the meeting as well as engagement with management and the board. In spite of these criticisms, just as corporate use of the internet and social media to communicate with stakeholders is growing, virtual meetings are on the rise.

In 2001, Inforte Corporation was the first company to hold a virtual-only meeting, following Delaware's 2000 amendment to its General Corporation Law permitting such meetings.[1] Though virtual meetings are still very much a minority of total annual shareholder meetings, more and more companies have been holding virtual meetings over the last few years: 27 virtual meetings in 2012, 35 in 2013, 53 in 2014 and 90 in 2015.[2] Broadridge Financial Solutions, an investor communications firm and a provider of a virtual meeting platform, reported 136 virtual meetings held in 2016 to date,[3] with particular popularity with recently-publicly listed companies and technology companies. These include companies, large and small, such as Intel, HP Inc., Hewlett Packard Enterprise, Fitbit, Yelp, NVIDIA, Sprint, Lululemon, Graco, GoPro, Rambus, El Pollo Loco and Herman Miller.

Considerations for a Virtual Meeting

Benefits of Virtual Meetings

Virtual meetings present many potential advantages for companies and their shareholders. Advocates suggest that virtual meetings will increase shareholder participation as compared to physical-only meetings because of improved access--shareholders who cannot attend in person due to location or other reasons can attend virtually and do not have to incur the time and costs of travel to a physical meeting. As an example, one company had only three shareholders attend its last physical meeting in 2008, while 186 shareholders attended its virtual meeting in 2009.[4] In addition, considering that thousands of annual shareholder meetings are held within a few weeks of each other, shareholders can participate in more virtual meetings than physical meetings.[5]

Similarly, companies may find virtual meetings appealing in their potential to reach as many shareholders as possible. Companies can also choose among different approaches to handling

shareholder questions,[6] some of which allow companies to preview and prioritize important questions, eliminate duplicative items and prepare more substantive or complete responses. Moreover, for some companies, the use of technology for the conduct of a shareholder meeting may be consistent with promoting the technology business of the company or enable a company to project a tech-savvy image.

A benefit to both shareholders and companies is the reduced cost of the annual meeting--a virtual meeting avoids the time, effort and expense of organizing a physical meeting, including reserving a large venue and arranging for appropriate personnel and materials. With companies and investors becoming increasingly global, virtual meetings can trim travel time and costs for shareholders, avoid traffic and other logistical delays and be easier to schedule amidst competing time demands. A virtual meeting may also be less disruptive to the company's daily routine, allowing management and other employees to return to their work more quickly. In the current atmosphere where physical safety is always a concern, it is relatively easy to maintain security and control for a virtual meeting as compared to a live one. Lastly, holding the annual meeting virtually can reduce environmental impact, because there would be less travel and fewer printed materials regardless of the number of participants.

Challenges Presented by Virtual Meetings

Despite the potential advantages, some perceived challenges raised by virtual meetings cause certain institutional investors, such as the California Public Employees' Retirement System (CalPERS), the largest U.S. public pension fund, and shareholder groups, such as the Council of Institutional Investors (CII), to oppose virtual meetings.[7] These investors assert that virtual meetings reduce the effectiveness of shareholder participation by eliminating shareholders' ability to meet with directors and express their concerns face-to-face. There is also concern that companies will manipulate shareholder questions to reduce any negative impact or redirect focus, by filtering, grouping, rephrasing or even ignoring questions so that companies can manage questions and their responses to advance the company viewpoints. By selecting questions ahead of time, companies could choose not to answer hard questions that would be more difficult to avoid in person. In effect, virtual meetings could potentially allow companies to limit the influence of corporate governance activists.

Companies may fear that virtual meetings lack the personal connection with shareholders and communities that in-person meetings can convey. Virtual meetings may create more uncertainty in shareholder votes because shareholders can more easily attend virtual meetings than physical meetings and thus electronically vote or change votes at the last moment while attending a virtual meeting. Especially in contested elections, the certainty of proxies received in advance of physical meetings provides more comfort for companies about the projected outcome of votes. Shareholders who can attend a meeting virtually may be less inclined to vote by proxy in advance, making voting results less predictable and making it harder for companies to gauge whether their solicitation methods are effective or need to be adjusted. In proxy contests, parties could continue solicitation efforts via e-mail up to the time of the virtual meeting, though a company's last-minute announcements or statements may similarly be more likely to affect votes. Some companies may avoid virtual meetings because of their reluctance to make their shareholder lists available online, as required by many states for virtual meetings. Moreover, without the personal touch present when face-to-face, virtual meetings may diminish companies' ability to resolve hostile or otherwise challenging questions as effectively as in

physical meetings. Finally, to the extent that a virtual meeting broadcasts shareholder questions on a real-time basis, it could be more difficult for companies to manage disruptive participants than in a physical meeting.

Some prominent activist shareholders also oppose virtual meetings. For the 2017 proxy season, John Chevedden has submitted shareholder proposals to various companies requesting that the companies' board of directors adopt a governance policy to initiate or restore in-person annual meetings and publicize this policy to investors.[8] Mr. Chevedden has argued that in-person meetings serve an important function by enabling shareholders to better judge management's performance and plans.[9] Similarly, James McRitchie has written on his website about the negative impact of holding virtual annual meetings and advocated for shareholder proposals requiring physical meetings.[10]

Both CalPERS and CII believe that companies "should hold shareowner meetings by remote communication (so-called 'virtual' meetings) only as a supplement to traditional in-person shareowner meetings, not as a substitute" and that "a virtual option, if used, should facilitate the opportunity for remote attendees to participate in the meeting to the same degree as in-person attendees." [11] California State Teachers' Retirement System (CalSTRS) has also expressed a preference for a hybrid meeting, though it acknowledged that "the technology is moving." [12] At this time, most other major institutional investors have not taken a public stance regarding virtual meetings.

Neither Institutional Shareholder Services (ISS) nor Glass Lewis have directly opposed virtual meetings in their guidelines, although ISS has indicated that it may make adverse recommendations where a company is using virtual-meeting technology to impede shareholder discussions or proposals.

Best practices for virtual meetings are continuing to evolve as more companies hold virtual meetings, so it may be difficult to predict investor response to specific practices.

Initial Considerations in Deciding Whether to Hold a Virtual Meeting

Governing Law and Documents

If a company desires to hold its meeting virtually, it first must confirm that the law of its state of incorporation permits virtual annual meetings and the requirements applicable to such meetings. Almost half of the U.S. states, including Delaware, permit virtual meetings.[13] However, some of these 22 states include conditions that, practically speaking, mean that virtual meetings likely would not be used—for example, California permits virtual meetings but only with the consent of each shareholder participating remotely.[14] Seventeen states and the District of Columbia do not permit virtual meetings but do permit hybrid meetings, and 11 states require a physical location for the shareholders' meeting while permitting remote participation.[15]

A Delaware corporation can hold its annual meeting virtually if it complies with certain statutory requirements. The company must "implement reasonable measures" to confirm that each person voting is a shareholder or proxyholder and to provide such persons with "a reasonable opportunity to participate in the meeting and to vote," including the ability to read or hear the meeting proceedings on a

substantially concurrent basis.[16] The company must also maintain records of votes or other actions taken by the shareholder or proxyholder.[17]

After confirming that virtual meetings are allowed under the state law applicable to the company, the company should make note of any statutory conditions, such as disclosure or shareholder consent requirements or objection rights. For example, as noted above, a company may also be required to make its shareholder list electronically available during the meeting.[18] A company must also confirm that its governing documents permit virtual meetings; for example, a company's bylaws often state where annual meetings are to be held and may need amendment to provide for virtual meetings. Notably, federal securities laws do not impose restrictions on how shareholder meetings are held. Similarly, while stock exchanges like the NYSE and NASDAQ require listed companies to hold shareholder meetings, they also do not prohibit nor impose restrictions on virtual meetings.

Factors Influencing the Decision to Hold a Virtual Meeting

A company should assess typical shareholder attendance at its annual meeting and the interest of senior management and directors in holding the annual meeting virtually who may have concerns about investor reaction to a virtual meeting announcement or who may want the company to demonstrate its embrace of current technology. A company should also compare the costs and logistical efforts necessary for a physical meeting against those needed for a virtual meeting, which will include fees for the virtual meeting platform and may still include travel expenses for certain directors and management team members. Other factors include whether any shareholder proposals are pending and the level of shareholder dissent, such as with respect to the company's performance or governance. The company should evaluate the risk of triggering shareholder activism if it announces an intent to hold its annual meeting virtually. There may be reasons why a physical meeting may be preferable, such as where director elections are contested or a significant business transaction or controversial proposal will be put to a shareholder vote. To date, no virtual meetings involving proxy contests have been held.

Planning for a Virtual Meeting

In 2012, a group of "interested constituencies, comprised of retail and institutional investors, public company representatives, as well as proxy and legal service providers" published guidelines for virtual meetings.[19] Chaired by a representative of CalSTRS and including members from the National Association of Corporate Directors, the Society for Corporate Governance (formerly known as the Society of Corporate Secretaries & Governance Professionals), AFL-CIO and NASDAQ and others, this "Best Practices Working Group for Online Shareholder Participation in Annual Meetings" set forth the following principles for online shareholder participation in annual meetings:[20]

- Companies should "employ safeguards and mechanisms to protect [shareholder interests] and to ensure that companies are not using technology to avoid opportunities for dialogue that would otherwise be available at an in-person shareholder meeting." [21] Companies should adopt safeguards for shareholders' online participation by adopting policies and procedures that offer a similar level of transparency and interaction as a physical meeting. The policies and procedures

should also address validation of attendees (to confirm that they are shareholders and proxyholders) and enable online voting.

- Companies should "maximize the use of technology" to make the meeting accessible to all shareholders. Steps to be considered include offering telephone or videoconferencing access "so that shareholders can call in to ask questions during the meeting," ensuring accessible technology "by utilizing a platform that accommodates most, if not all, shareholders," "providing a technical support line for shareholders," and "opening web lines and telephone lines in advance" for pre-meeting testing access.[22]

If a company decides to hold its annual meeting virtually, it may wish to proactively discuss the proposed change with key shareholders and explain the rationale for it. The company must also determine how it would handle shareholder questions--for example, whether all questions would be posted and establishing what happens to questions received during the meeting that are not answered during the meeting.

A company has several options for hosting a virtual meeting (audio, video, telephone, web, etc.), and a company's choice among those options will be guided by state legal requirements. Providers offer virtual meeting platforms on which companies can host their annual meetings and shareholders can attend and vote online. These commercial platforms can help companies comply with statutory requirements, such as Delaware's requirement to maintain records of votes and other shareholder actions. If possible, the company should leverage technology to allow attendees with different levels of technological savvy or resources to attend.

Conclusion

Though some originally thought that only small companies would use virtual meetings because larger, more well-known companies would want to use the annual meeting as a public relations opportunity and to avoid backlash from shareholder groups, large companies have now started holding virtual meetings. In deciding whether to hold a virtual meeting, companies should weigh the relative advantages and disadvantages applicable to their situations, which may include potential negative sentiment from investors. With technological advances that enable the meetings to be more similar to physical meetings, the potential cost and time savings of virtual meetings may appeal to more companies.

[1] See Eric Bomkamp, *Virtual-Only Shareholder Meetings: Inevitable Advance or Unwelcome Development?*, BNA's Corporate Counsel Weekly (February 23, 2011); *Virtual Shareholder Meetings*, TheCorporateCounsel.net, <http://www.thecorporatecounsel.net/member/LawFaqs/ElectronicStockholder.htm#a> (last visited Oct. 11, 2016).

[2] See TheCorporateCounsel.net, *supra* note 1; Broadridge Financial Services, Inc., *2016 Proxy Season Key Statistics & Performance Rating* (based on shareholder meetings (*i.e.*, proxy "jobs") mailed between March 1, 2016 and June 17, 2016), <http://media.broadridge.com/documents/Key-Statistics-and-Performance-Ratings-for-the-2016-Proxy-Season-new.pdf> (last visited October 20, 2016); Richard

Daly, *Unless You're Warren Buffet, Your Next Shareholder Meeting Should be Online*, Forbes.com (Apr. 28, 2016) <http://www.forbes.com/sites/richdaly/2016/04/28/unless-youre-warren-buffett-your-next-shareholder-meeting-should-be-online/#75ebdf7d42d2>; Tom Braithwaite, *US companies embrace virtual annual meetings*, FT.com (Mar. 11, 2016), <https://www.ft.com/content/874879c0-e664-11e5-bc31-138df2ae9ee6>.

[3] See Broadridge, *supra* note 2.

[4] See Daly, *supra* note 2.

[5] See *id.*

[6] For example, Broadridge offers companies three primary options for handling the question & answer segment of a virtual meeting: live questions submitted from shareholders via online text box, with only the company able to view incoming questions; telephone questions from shareholders during the meeting; pre-meeting questions submitted by shareholders via a separate online portal. See TheCorporateCounsel.net, *Virtual Only Meetings: Nuts and Bolts* (Oct. 18, 2016), available at https://www.thecorporatecounsel.net/Webcast/2016/10_18/.

[7] See Braithwaite, *supra* note 2.

[8] At least one shareholder proposal prohibiting virtual-only meetings was excluded under Rule 14a-8(i)(7) as relating to a company's ordinary business operations. See *EMC Corp.*, SEC Staff No-Action Letter (Mar. 7, 2002), available at <https://www.sec.gov/Archives/edgar/vpr/0202/02029901.pdf>.

[9] See Ross Kerber, *HP Moves Annual Meeting Online-Only as CEO Face Time Fades*, Reuters (Feb. 12, 2015), available at <http://www.reuters.com/article/hp-meeting-internet-idUSL1N0VM1XM20150212>.

[10] See James McRitchie, *Virtual Meetings: Can Shareholder Proposals Stem the Tide?*, Corporate Governance (May 11, 2016), available at <http://www.corpgov.net/2016/05/virtual-meetings-can-shareholder-proposals-stem-tide/>.

[11] See Council of Institutional Investors, Corporate Governance Policies 11 (updated Apr. 1, 2015), available at http://www.cii.org/files/committees/policies/2015/04_01_15_corp_gov_policies.pdf; CalPERS, Global Governance Principals 63 (Mar. 16, 2015), available at <https://www.calpers.ca.gov/docs/forms-publications/global-principles-corporate-governance.pdf>.

[12] See Kerber, *supra* note 8.

[13] See The Best Practices Working Group for Online Shareholder Participation in Annual Meetings, *Guidelines for Protecting and Enhancing Online Shareholder Participation in Annual Meetings* (June 2012), http://www.calstrs.com/CorporateGovernance/shareholder_participation_annual_meetings.pdf; see also Del. Code. Ann. tit. 8, § 211.

[14] See The Best Practices Working Group for Online Shareholder Participation in Annual Meetings, *supra* note 13; Cal. Corp. Code §§ 20(b), 600(a).

[15] See The Best Practices Working Group for Online Shareholder Participation in Annual Meetings, *supra* note 13.

[16] See Del. Code. Ann. tit. 8, § 211(a)(2).

[17] See *id.*

[18] See The Best Practices Working Group for Online Shareholder Participation in Annual Meetings, *supra* note 13.

[19] See *id.*.

[20] See *id.*

[21] *Id.*

[22] *Id.*



The following Gibson Dunn lawyers assisted in the preparation of this client alert: Lisa Fontenot and Linda Dang.

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