

2021 ANNUAL SHAREHOLDER MEETINGS - AVOIDING A SUPER SPREADER EVENT

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As COVID-19 rages on, companies are again flocking to virtual annual meetings for the 2021 proxy season, but with one important difference: the luxury of time. Many companies are already exploring retention of virtual annual meeting providers and alternatives for video and real-time Q&A, as well as drafting fulsome disclosure about meeting logistics in their proxy materials to address concerns raised by investors, the SEC and others with respect to some pitfalls during the 2020 proxy season.

Service Providers and Technology. For 2021, an issuer will have additional time to select an appropriate provider of a virtual meeting platform. The most widely used vendor for hosting virtual meetings is Broadridge Financial Solutions, Inc., which reported that it hosted 1,494 virtual shareholder meetings during the first six months of 2020. Other service providers, such as stock transfer agents, also provide such services. A few companies have even arranged to facilitate the virtual component of an annual meeting via Zoom.

In 2020, some companies were caught off-guard by technology glitches. For 2021, issuers should be in a position to anticipate technology issues and to put contingency plans in place to address them. Issuers can follow best practices for virtual meetings by, for example, putting in place technical support lines for the duration of their meetings.

Format and Rules of Conduct (including Q&A). Companies need to decide whether a meeting will be virtual-only, physical-only or a hybrid. For any virtual component, they need to decide whether the access will be audio-only or audio plus video. While a majority of virtual meetings during the 2020 proxy season appeared to be in audio-only format, we expect that in 2021 companies will increasingly use video for their meetings, as video conferencing has evolved during the pandemic.

Clear rules of conduct are imperative. As more companies transitioned to virtual meetings in 2020, one area of focus was on how and when shareholders could submit questions. Investors and others questioned whether companies might be “cherry-picking” the questions they answered and requested that all shareholders have access to the questions submitted. Companies in 2021 will need to put in place and clearly address the Q&A process. For example, issuers need to decide

whether questions may be asked live during the meeting via a chat function and/or over the phone, and/or prior to the meeting by submitting online or through email.

State Law. Entering 2020, a number of states permitted companies to hold virtual meetings. Delaware law permitted meetings to be held solely in electronic format, provided certain conditions were met. Other states, including California and New York, authorized virtual meetings subject to certain conditions that made the format impractical in the 2020 proxy season. California permitted virtual meetings provided all shareholders consented to the format. New York permitted such meetings provided there was also a physical component. To address these impracticalities, the governors of California and New York issued executive orders temporarily suspending the requirements. For 2021, companies will need to monitor state laws and executive orders to confirm that virtual meetings are permitted under applicable law and to comply with any applicable legal requirements.

Bylaws; Governing Documents. Companies holding virtual-only shareholder meetings in 2020 generally reviewed their bylaws and other governing documents and made any changes necessary to hold virtual shareholder meetings in compliance with state law and governing documents. For 2021, companies should continue to monitor their corporate governance documents to identify any changes relating to virtual shareholder meetings that may need to be reflected therein.

Federal Securities Laws; Proxy Statement Disclosure. During the 2020 proxy season, as the pandemic set in, companies rushed to modify their proxy materials to provide for virtual meetings. For companies that had already sent out their proxy materials without providing for a virtual meeting, the SEC issued [guidance](#) that provided them with some relief. The guidance permitted these companies to announce a change to a virtual meeting format via a press release, provided certain disclosure conditions were met, and without amending and re-filing proxy materials. In the guidance, the SEC reminded companies to “disclose clear directions as to the logistical details of the meeting, including how shareholders could remotely access, participate in, and vote at the meeting.” Issuers should watch for any SEC rule-making or guidance for companies planning to hold virtual meetings in 2021.

Proxy Advisory Firm Developments. Entering 2020, Institutional Shareholder Services (“ISS”) did not have a policy pertaining to virtual meetings. In March 2020, ISS published guidance acknowledging that while ISS had historically favored a physical or hybrid meeting format, a virtual-only meeting might be necessary due to COVID-19. ISS recommended, however, that issuers holding virtual-only meetings publicly commit to returning to in-person or hybrid meetings in the post-pandemic world. As part of its recently completed annual survey, ISS sought feedback on whether to maintain the guidance for 2021.

Entering 2020, Glass, Lewis & Co. (“Glass Lewis”) had in place a policy requiring that issuers include detailed information in their proxy materials for virtual meetings; if the disclosure requirement was not met, Glass Lewis could recommend a vote against or a withhold vote for director nominees

serving on the issuer's governance committee. In light of COVID-19, in March 2020, Glass Lewis suspended the policy through June 30, 2020, noting if a company needed to hold a virtual meeting and disclosed its reasons for doing so (e.g., due to COVID-19), then Glass Lewis would generally refrain from making adverse voting recommendations.

Companies should watch for and take into account updates to proxy advisory firm policies and guidance pertaining to 2021 virtual meetings.

2020 Second-Half Trends. During the second half of 2020, companies continue to hold virtual meetings. As public health requirements have become clearer, some companies have provided for physical or hybrid meetings with appropriate safeguards and caveats. These companies typically disclose that they will be sensitive to public health concerns, will monitor any requirements imposed by federal, state or local law, and will publicly announce any necessary change to the meeting format. They disclose health protocols for in-person meetings such as temperature checks, social distancing requirements, the submission of health questionnaires and pre-screening questions at the door.

Investors of course still generally prefer to have the option to attend physical meetings. They remain concerned about a lack of transparency with respect to and limited participation rights in virtual meetings. In [ISS's 2020 Global Benchmark Policy Survey Summary of Results](#), as published on September 25, 2020, ISS reported that almost 80% of investor respondents preferred hybrid to virtual-only meetings absent continuing COVID-19 health and social restrictions. Given current uncertainty regarding the pandemic, it remains to be seen whether the 2021 proxy season will allow for more hybrid and physical meetings. In any event, we expect that issuers will increasingly utilize the virtual format – whether alone or in conjunction with a physical meeting – in future proxy seasons.

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