

## Updates

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### A New Virtual (Meeting) Reality for Washington Corporations

Amendments to the Washington Business Corporation Act (WBCA) that allow Washington corporations to hold "virtual" shareholder meetings [became effective in June 2018](#). Prior to these amendments, Washington corporations could hold either physical meetings or "hybrid" meetings, in which the meeting is convened in a physical location and some shareholders participate through a live audio or video feed or other remote communication technology. With a virtual meeting, there is no assembly of shareholders at a physical location; instead, all attendees participate via remote communication technology. Virtual meetings can increase shareholder participation and reduce the costs of shareholder meetings, but some public company investors have expressed concerns that moving away from physical or hybrid meetings will result in less meaningful engagement between management and shareholders.

#### Background and Growth

Virtual meetings have been a part of the corporate landscape since 2000, when Delaware amended its General Corporation Law to allow them. Since that time, more than 30 states have followed Delaware in amending their corporate statutes to allow virtual meetings. State authorization of virtual meetings has not been uniform, though. A few of the states that allow virtual meetings have provisions in their corporate statutes that make it difficult or impossible for public companies to hold virtual meetings. For example, California allows virtual meetings only with prior consent from each shareholder, which is practically impossible for a public company. Massachusetts allows private companies to hold virtual meetings but does not allow public companies to do so.

Virtual meetings represent a growing proportion of total annual shareholder meetings for public companies. In the first five months of 2018, the number of companies opting to hold virtual meetings outpaced the number in the same period of 2017. Broadridge Financial Solutions, Inc. estimates that over 300 companies will hold a virtual meeting on its platform in 2018, an increase from the 236 companies that held virtual meetings in 2017. Virtual meetings have historically been more popular with small cap companies and technology companies because they cost less than a traditional physical meeting, but large, established companies have increasingly turned to virtual meetings, in part to increase shareholder participation. For example, in 2017, several large cap companies, including Alaska Airlines and Ford Motor Co., held virtual meetings in lieu of physical meetings.

#### What Are the Benefits of Virtual Meeting?

Virtual meetings offer many potential benefits, including the following:

- Reducing venue and travel costs associated with shareholder meetings.
- Making annual meetings more accessible for retail investors, who tend to be underrepresented at physical meetings.
- Further democratizing corporate decision-making by increasing the number of shareholders who participate and vote at meetings.
- Increasing transparency to the financial or industry press and other constituencies, whose participation in physical meetings may otherwise be limited by space or other constraints.
- Encouraging more shareholders to engage before and during the meeting through an online shareholder forum.
- Eliminating the security concerns that some companies face with physical meetings.

Despite the potential upsides, many investors, including prominent institutional investors and organizations like the California Public Employees' Retirement System and the Council of Institutional Investors, oppose virtual

meetings. Virtual meeting opponents cite a number of concerns about companies not having physical shareholder meetings, including the following:

- Reduced ability for shareholders to ask managers difficult questions face-to-face.
- Increased managerial control over the questions addressed at meetings.
- Reduced opportunity for informal contact between managers and shareholders.

Some institutional investors consider virtual meetings on a case-by-case basis. If the meeting agenda includes controversial proposals, these investors may be opposed to conducting the meeting virtually because of concerns that management may be using the virtual format to control the discussion.

Hybrid meetings offer many of the same benefits as virtual meetings, with an additional benefit that they provide an opportunity for shareholders who can attend the physical meeting to interact in person with the board and senior management. However, hybrid meetings do not offer all the benefits of virtual meetings, as they do not eliminate travel and venue costs for the company, nor do they alleviate security concerns encountered in physical meetings.

What Are the Specifics of the Washington State Statute?

Sections 23B.07.010 (annual meetings) and 23B.07.020 (special meetings) of the WBCA have been amended to expressly allow virtual meetings. Washington's amended shareholder meeting statutes do not require the company to obtain shareholder approval before replacing physical shareholder meetings with virtual meetings. Instead, so long as a company's bylaws authorize the board of directors or another person to determine the place of shareholder meetings, the board or such other person may determine that a shareholder meeting will be held solely by means of remote communication. Like many other corporate statutes, the WBCA allows corporations to "opt out" of the right to hold virtual meetings by amending their articles of incorporation or bylaws.

In addition to the amendments to Sections 23B.07.010 and 07.020, Section 23B.07.080 was amended to update the requirements for shareholder participation by remote communication. The changes are relevant to both virtual meetings and hybrid meetings.

First, if a company opts to hold a virtual meeting or hybrid meeting, the notice of meeting must specify how shareholders may participate through remote communication (e.g., identify the URL for a webcast of the meeting and provide instructions for how to access the meeting).

Second, the amendment to Section 23B.07.080 made a number of changes relating to how a company may allow shareholders to participate through remote communications. It removed the requirement that shareholders participating remotely in meetings be able to "hear each other during the meeting." This change allows companies to consider a broader range of platforms to host their virtual meetings. Regardless of the platform used, however, shareholders (and proxy holders) attending remotely must be given a reasonable opportunity to participate in the meeting—including the ability to hear or read the proceedings of the meeting as they unfold—and vote on any matters submitted to shareholders. In all other respects, though, participation by means of remote communication—whether in a virtual meeting or a hybrid meeting—may be subject to any guidelines or procedures adopted by or pursuant to the authority of a company's board of directors.

Finally, a company must take reasonable measures to verify that persons participating in the meeting as shareholders or proxy holders are in fact shareholders or proxy holders.

What Should Companies Do Now?

Companies interested in holding virtual meetings first need to review their articles of incorporation and bylaws to verify how the place of annual and special shareholder meetings is determined and ensure that virtual meetings are not prohibited. For example, if a company's bylaws provide that the annual shareholder meeting is to take place at a specific physical location, such as the company's headquarters, it would not be able to hold a virtual meeting without amending the company's bylaws. On the other hand, if the bylaws empower the board or another person (e.g., the corporate secretary) to fix the place of shareholder meetings, then the company may hold a virtual meeting.

Companies should also review their bylaw provisions dealing with shareholder participation by remote communication. It is possible that these provisions track the prior language of the WBCA and require that shareholders participating remotely be able to hear each other. That requirement could limit the range of communication platforms that the company could use to facilitate remote participation, whether in a virtual meeting or hybrid meeting. A company with such a bylaw should consider amending its bylaws to track the new statutory language.

Companies contemplating a virtual meeting should consider many factors, including the following:

- Whether to consult with significant investors first, given antipathy toward virtual meetings among some institutional investors.
- Whether increased shareholder participation introduces any uncertainty in the outcomes of proxy votes.
- Whether the meeting agenda will include a contentious topic. Investors generally have more concerns about use of a virtual meeting when they think that company management is using the format to avoid confrontation with shareholders or tightly manage shareholder discussion.
- Past level of retail shareholder attendance at physical annual meetings and whether a change in meeting type will impact investor relations with such shareholders.

Companies should also consider logistical issues, including the following:

- What type of remote communication will best facilitate the shareholder meeting.
- How they will facilitate voting by remote participants and verify that votes are cast by actual shareholders or proxy holders.
- How shareholder proposals will be presented.
- How they will handle any technical issues that arise during the meeting.
- How they will make a reasonable assessment of the cybersecurity risks of holding a virtual meeting and guard against those risks.
- Whether non-shareholders will be allowed to view/listen to the meeting.
- How they will manage and organize questions submitted by shareholders and what limitations they may place on shareholder questions.
- What format (phone, live via text, email, etc.) the company will use for shareholders to submit questions.
- How typical annual meeting attendees, such as directors, management and representatives of the company's independent auditor, will attend the meeting and whether special arrangements will be needed for such participants to make statements or respond to questions.

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