HUNTON& WILLIAMS

Client Alert

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Virtual-Only Shareholder Meetings Now Permitted in Virginia

On July 1, 2017, Virginia joined Delaware and numerous other states in allowing virtual-only shareholder meetings. Virginia law previously required corporations to hold shareholder meetings at an actual location, even if shareholders also had the option to participate remotely. The number of public companies holding virtual-only shareholder meetings has increased dramatically over the past few years, and we expect to see that same trend develop among both privately- and publicly-held Virginia corporations now that virtual-only shareholder meetings are permissible under Virginia law.

The New Statute

Section 13.1-660.2 of the Virginia Stock Corporation Act, as amended, states that "[s]hareholders of any class or series may participate in any meeting of shareholders by means of remote communication to the extent the board of directors authorizes such participation for such class or series." And "[u]nless the articles of incorporation or bylaws require the meeting of shareholders to be held at a place, the board of directors may determine that any meeting of shareholders shall not be held at any place and shall instead be held solely by means of remote communication."

To allow shareholders to participate in a shareholder meeting by remote communication, the corporation must take the following "reasonable measures":

1. <u>Verification</u>. The corporation must verify that each shareholder participating remotely is in fact a shareholder or a shareholder's proxy; and

2. <u>Participation</u>. Each shareholder must have a reasonable opportunity to participate in the meeting and vote on matters submitted to the shareholders, including an opportunity to read or hear the proceedings of the meeting substantially concurrently with the proceedings.

The verification procedures a corporation uses will depend on the corporation's stockholder base. For public companies, an access code to an online platform can be distributed to each shareholder with the corporation's proxy card. Privately-held companies, in contrast, might have more informal procedures. For example, a privately-held company might hold its meeting via conference call and circulate the dial-in number to each shareholder, who can confirm his or her identify when joining the call.

A shareholder can participate in the meeting and be deemed present for quorum and voting purposes so long as the shareholder has an opportunity to listen to, or read a transcript of, the meeting substantially concurrently with the proceedings. Shareholders are *not* required to be able to communicate with the board or other shareholders in order to have participated in a meeting.

Importantly, the verification and participation requirements only apply if shareholders are to be counted for quorum purposes and allowed to vote remotely. They do not apply if an audio or video outlet is being provided as a courtesy.

Background

Delaware amended its statute in 2000 to permit virtual-only shareholder meetings. The first virtual-only shareholder meeting was held in 2001, but according to Broadridge Financial Solutions, Inc., the number of virtual-only shareholder meetings increased to just 27 in 2012. In 2016, however, the number of virtual-only shareholder meetings grew to 155. Six of the virtual-only meetings held in 2016 were conducted with live video, while the remaining 149 used only live audio (but sometimes accompanied by slides on a website).[1]

Potential Advantages of Virtual-Only Meetings

When compared to a physical or hybrid shareholder meeting, virtual-only shareholder meetings may present benefits to both the corporation and its shareholders, including:

- **Reduced Cost**: By not hosting a physical shareholder meeting, the corporation can avoid renting a meeting venue and incurring other related costs (e.g., staffing, security, catering, parking expenses, and travel and lodging for the corporation's officers and directors). Although a corporation will incur other costs to hold a virtual meeting that would not be required for a physical meeting (e.g., obtaining the technology to allow shareholders to participate in the meeting), corporations should expect to spend less money to hold a virtual-only meeting than a physical meeting.

- **Broader Accessibility to Shareholders and Other Constituencies**: Unlike virtual meetings, physical-only meetings require shareholders to incur the time and expense of traveling to the meeting location to participate. For that reason, shareholder meetings of most public companies are sparsely attended. Virtual meetings allow any shareholder to participate remotely, which may increase overall shareholder participation. Remote attendance can also be extended to analysts, the media, and other constituencies.

- **Shareholder Engagement**: Virtual-only shareholder meetings allow corporations to use different approaches to accept and respond to shareholder questions. At a physical meeting, management must respond immediately to shareholder questions, which may be unexpected, off-topic, or hostile. Corporations holding virtual-only meetings, in contrast, can require shareholders to submit written questions in advance of the meeting, which are then read and answered by an officer or director of the corporation at or after the meeting. This allows the corporation to preview the questions and prepare substantive, complete, and thoughtful responses. It also permits the corporation to prioritize important questions, ignore inappropriate or non-substantive questions, eliminate duplicative requests, and avoid unnecessarily hostile confrontations.

- **Convenience to the Corporation**: A virtual-only meeting may be less disruptive to a corporation's management and personnel. Unlike a physical meeting, the corporation's officers and directors are not required to spend time and energy traveling to attend the meeting or opening the corporation's headquarters to shareholders. Instead, they, like shareholders, can participate from wherever they may be located.

Criticism of Virtual-Only Meetings

Not everyone believes the aforementioned benefits outweigh the challenges and perceived short-comings of virtual-only meetings. Certain large, influential institutional investors, such as the California Public

[1] *See* Broadridge Financial Solutions, Inc., Virtual Shareholder Meetings: Recent Facts and Figures (2017), available at http://media.broadridge.com/documents/MKT-1956-17-VSM-Article4.pdf.

Employees' Retirement System ("CalPERS") and the New York City Comptroller have stated their opposition to virtual-only meetings. Likewise, the Council of Institutional Investors ("CII") has expressed concerns regarding virtual-only meetings.

Some prominent individual shareholder activists have also opposed virtual-only meetings. For example, John Chevedden has submitted shareholder proposals at several companies to require or restore physical annual meetings, but the corporations were able to exclude Mr. Chevedden's proposals under the SEC's "ordinary business" exemption. Similarly, James McRitchie has argued that shareholders should pursue the "nuclear option" of voting "against every director on board committees recommending virtual-only meetings."

These critics believe corporations should elect not to host virtual-only meetings because, among other reasons:

- **Lack of Personal Connection**: Critics contend that shareholders cannot "look management in the eye" and convey their messages as strongly at a virtual-only meeting. In one shareholder proposal, Mr. Chevedden argued that virtual-only meetings are "a harmful way to insulate management from shareholder interaction or to portray any opposition as trivia."[2]

- **Potential Manipulation of Shareholder Questions**: As noted above, virtual-only meetings permit corporations to select questions ahead of time and prepare and present scripted answers to the selected questions. Critics contend that corporations holding virtual-only meetings may manipulate shareholder questions by "cherry picking" favorable questions and downplaying, rephrasing or even ignoring negative questions altogether. They also argue that shareholders may receive more candid responses to critical questions if such questions are addressed directly to management in front of a "live" audience of shareholders.

Instead of virtual-only meetings, CalPERS, CII and others believe corporations should use virtual meetings only as a supplement to traditional, physical shareholder meetings. They believe this allows for greater shareholder participation while still preserving the benefits of face-to-face interaction with corporate management. Of course, their views may change over time if companies continue to switch to virtual-only meetings. In particular, activists may find that virtual meetings permit them to speak directly to a much larger audience than would be present at a physical meeting. Corporations should also recognize that the anonymity of the internet may lead certain shareholders to ask inappropriate questions or otherwise attempt to disrupt proceedings. Thus, it will be important for corporations to determine in advance how they would deal with disruptive shareholders.

Looking Forward

The 2018 proxy season could be a pivotal year for virtual-only meetings. Following the lead of several large, well-known corporations, we expect to see even more virtual-only meetings in 2018 (including by Virginia corporations now that Virginia law permits virtual-only meetings). If, however, companies that held virtual-only meetings last year face significant investor backlash in 2018—whether in the form of votes against incumbent directors or shareholder proposals to require physical meetings—the pace of adoption of virtual-only meetings could slow.

While many activists have been critical of virtual-only meetings, many institutional investors appear to be indifferent. They presumably recognize the costs associated with holding physical meetings; that physical meetings are often poorly attended; and that, unlike earnings calls or industry conference presentations, annual meetings are procedural and rarely substantive. Thus, despite the rhetoric from some activists, it

[2] Shareholder Proposal from John Chevedden to Hewlett Packard Enterprise Company (Oct. 11, 2016), *available at* https://www.sec.gov/divisions/corpfin/cf-noaction/14a-8/2016/cheveddennaylor120916-14a8.pdf.

is not clear that a large population of institutional investors have a strong preference for physical meetings for uncontested annual meetings.

Corporations considering the switch to a virtual-only meeting should review their governing documents to determine whether any amendments are necessary. A corporation's bylaws, for example, may need to be revised so that a physical meeting location is not required. Publicly-held corporations may also wish to discuss this topic with their larger institutional investors as they consider the advantages and disadvantages of a virtual-only meeting with respect to their particular situation.

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