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Certain Considerations Relating to Virtual Shareholder Meetings

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Virtual annual shareholder meetings are gradually increasing year-over-year, but the absolute number is still small and investor resistance to the "virtual-only" format persists. Nevertheless, additional companies continue to switch to the virtual-only format every year, and many more are incorporating virtual components to supplement their in-person meetings.

General Overview of Recent Trends

Technology facilitating virtual meetings was initially introduced to supplement traditional in-person meetings. As a result, many companies that chose to implement virtual shareholder meetings in recent years still retain a hybrid format, with both an in-person and a virtual participation component. However, the number of companies choosing to hold virtual-only meetings continues to grow. Broadridge Financial Solutions, Inc. ("Broadridge") hosted 90 virtual-only meetings in 2015[1] and 154 virtual-only meetings in 2016[2], with most virtual-only meetings set up to enable audio or telephonic, rather than live video, participation.[3]

While the number of virtual and hybrid meetings has grown, only a minority of companies have chosen to either offer a virtual component or to switch to a virtual-only format. Nevertheless, recent additions to the virtual meeting camp include a number of large, well-known corporations. "Household names" that held virtual-only meetings in 2016 include HP Inc., Comcast Corporation, GoPro, Inc., PayPal Holdings, Inc., SeaWorld Entertainment, Inc., FitBit, Inc., Yelp Inc., Vonage Holdings Corp., SB Financial Group, Inc. and Lululemon Athletica, among others. Companies that held hybrid meetings in 2016 include Microsoft Corporation, TD Ameritrade Holding Corp., Berkshire Hathaway Inc., Symantec Corp. and Johnson & Johnson.

The decision as to the format of an annual shareholder meeting can be difficult. A look at historic patterns helps to illustrate the sensitivities involved. Several years ago, Procter & Gamble Co. halted its exploration of a virtual-only meeting format after objections from shareholders. Similarly, after complaints about its virtual-only meeting in 2010, Symantec Corporation subsequently switched to a hybrid format. Many companies have amended their bylaws to expressly permit virtual annual meetings, but have thus far chosen not to hold a virtual meeting. For example, in 2013, both PNC Financial Services Group, Inc. and The Bank of New York Mellon Corp. made such bylaw amendments, but following shareholder resistance, neither has held a virtual meeting.

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1 Braithwaite, Tom. "US companies embrace virtual annual meetings," FT.com, March 11, 2016, https://www.ft.com/content/874879c0-e664-11e5-bc31-138df2ae9ee6.

2 Kennedy, Patrick. "More companies embrace virtual annual shareholder meetings," Star Tribune (Minneapolis), March 9, 2017, *available at* https://phys.org/news/2017-03-companies-embrace-virtual-annual-shareholder.html. *See also*, "Virtual Only Annual Meetings: Nuts & Bolts," webcast on thecorporatecounsel.net, October 18, 2016, audio file and transcript *available at* https://www.thecorporatecounsel.net/member/Webcast/2016/10_18/transcript.htm.

3 As of October 2015, Broadridge reported that 85% of virtual shareholder meetings it hosted were audio or telephonic only participation, while 15% also provided live video to participants. *See* Broadridge Steering Committee Newsletter, November 2015, *available at* http://go.broadridge1.com/steering committee-newsletter-november-2015.

While individual companies assert that there is increased attendance at virtual meetings compared to traditional in-person shareholder meetings, comprehensive statistics on whether virtual meetings actually increase shareholder attendance are not readily available.[4]

Shareholder Meeting Locations under Federal and State Law

The location of an annual shareholder meeting is a matter of state law. Currently, meetings by means of remote communication are expressly allowed under the corporate law of 24 US states. Under Section 211 of the Delaware General Corporation Law ("DGCL") (as amended in 2000), as long as a company's bylaws authorize the board to determine the location of an annual meeting, the board has sole discretion to determine whether to hold a virtual meeting in lieu of an in-person meeting. While an explicit bylaw provision is not required, many companies have chosen to amend their bylaws to specifically provide for meetings by means of remote communication pursuant to DGCL Section 211(a)(2), rather than relying on a broader formulation giving the board general discretion in establishing the meeting location. Including an explicit bylaw reference to a meeting by means of remote communication can preclude exploratory shareholder challenges to the board's authority to approve a virtual-only shareholder meeting. The DGCL also requires that meetings by means of remote communication provide shareholders with "a reasonable opportunity" to participate, which is usually addressed by establishing a means to transmit written messages and ask questions during the meeting. To date, there has not been any case law in Delaware on this point.

Because this is fundamentally a matter of state law, there is little Securities and Exchange Commission ("SEC") guidance on the matter. However, the SEC Staff has publicly stated in a variety of contexts that it encourages the use of technology as a means to promote shareholder engagement, access and transparency. For example, in a February 2015 public statement,[5] then-SEC Commissioner Aguilar stated that technological advances, including virtual meetings, should be utilized to promote greater shareholder participation, and in speeches in May 2016[6] and February 2017,[7] SEC Commissioner Stein highlighted the SEC's focus on using new technologies to enhance information provided to investors. These statements give credence to the presumption that the SEC would be supportive of virtual meetings if appropriately implemented to enhance and ease shareholder engagement and corporate transparency. In its recent action on this issue, the SEC granted a no-action request from HP Inc., allowing the company to exclude a proposal from a well-known activist shareholder, John Chevedden, requesting that the board adopt a corporate governance policy to initiate or restore in-person annual meetings. The SEC Staff concluded that the proposal could be excluded under Rule 14a-8(i)(7) of the Securities Exchange Act of 1934, on the grounds that the decision whether to hold in-person annual meetings is related to the company's ordinary business operations. While not an action on the substance of virtual meetings, this decision signals that the SEC Staff views the determination as to whether to hold a virtual-only annual meeting as being clearly within the purview of a company's board of directors.[8]

Both Nasdaq and the NYSE require that listed issuers hold annual shareholder meetings, but neither specifies a particular format for such meetings.

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4 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. Richard Daly, "Unless You're Warren Buffet, Your Next Shareholder Meeting Should be Online", Forbes.com, April 28, 2016, https://www.forbes.com/sites/richdaly/2016/04/28/unless-youre-warren-buffett-your-next-shareholder-meeting-should-be-online/#31da6ff41a11. Given that thousands of annual shareholder meetings are held within a few weeks of each other, shareholders would likely be able to participate in more virtual meetings than physical meetings.

5 *Available at* https://www.sec.gov/node/76011.

6 *Available at* https://www.sec.gov/node/78966.

7 *Available at* https://www.sec.gov/news/speech/stein-sec-speaks-whats-at-stake.html.

8 Several local regulatory institutions around the world have developed their own local systems for shareholder e-voting and virtual meetings. For example, in June 2015, the Israel Securities Authority launched an electronic voting system designed to promote investors' interests by enabling securities holders to vote electronically in various meetings, making it unnecessary for them to physically attend such meetings in order to vote. *See* http://www.isa.gov.il/sites/ISAEng/1489/1511/Pages/The-Israel-Securities-Authority-Launches-an-Electronic-Voting-System.aspx.

Common Critiques of Virtual-Only Shareholder Meetings

While hybrid meetings are generally perceived favorably from a corporate governance perspective, there has been investor resistance to virtual-only meetings, rooted largely in concerns regarding the ability of shareholders to participate meaningfully in such a meeting. In particular, there is concern that the currently predominant format in which shareholders submit written questions (either typed in real-time during the meeting or submitted in advance, rather than spoken live during the meeting) which are then potentially filtered by management and responded to at management's discretion, does not truly promote shareholder participation. An inability to see other shareholders' questions, difficulties relating to asking follow-up questions, lack of "back and forth" with management, eliminating the only opportunity most shareholders have for a face-to-face meeting with management and alleged "muting" of the tone of questions by management when responding are cited as primary concerns with virtual-only forums. Opponents of virtual meetings frequently argue that this forum favors management by enabling the company to manage "troublesome" shareholders and avoid uncomfortable questions.

For these reasons, some investor groups, such as The Council of Institutional Investors (CII) and the California Public Employees' Retirement System, do not support virtual-only meetings. CII's corporate governance policies provide for virtual meetings only as a supplement to, not a substitute for, traditional meetings, and only if the virtual component allows remote attendees to participate in the meeting to the same degree as in-person attendees. While neither Institutional Shareholder Services (ISS) nor Glass Lewis directly oppose virtual meetings in their guidelines, ISS has indicated that it may make adverse recommendations if a company is using a virtual meeting format to thwart shareholder discussions or proposals. It is not clear how ISS would assess whether this is in fact the case.

On the other hand, in addition to potentially increased overall shareholder participation without the added cost or planning involved in attending in-person shareholder meetings, the ability to ask questions anonymously may encourage otherwise hesitant shareholders to contribute. In addition, because the question-and-answer session during regular meetings is often limited, virtual meetings could actually expand the number of questions that get asked and answered by streamlining the Q&A process. Further, allowing management to group shareholder questions and combine responses could result in the provision of more thorough, well-considered responses. Finally, the audio or webcast of the meeting generally remains available on the company's website after the conclusion of the meeting, creating a record for later review.

Best Practices and Governance Considerations

While virtual meetings still appear to be perceived with skepticism by some investors, that sentiment may decrease as the practice becomes more prevalent and the technology behind it improves. As Ed Durkin, the director of corporate affairs at the United Brotherhood of Carpenters Pension Fund, a major institutional investor, stated, as long as standards are met, technology could largely replicate the experience of a shareholder meeting.[9]

Companies considering a virtual meeting may want to take into account the agenda items and any major issues the company may be facing. For companies that will have controversial items on the ballot or that are experiencing business or other challenges, a virtual-only meeting has the potential to give the appearance that management is "hiding" from shareholders. Alternatively, for companies with only routine matters to be addressed, particularly those companies with mainly large institutional investor shareholders, a virtual meeting could offer significant time and cost savings to both the company and its investors. It is also worth noting that, should attendance be significantly increased by the use of a virtual format, this could give activist investors a platform for communicating their views to a much wider audience.

In 2012, a group of interested constituencies, including institutional investors, governance groups and Broadridge, issued a white paper entitled "Guidelines for Protecting and Enhancing Online Shareholder Participation in Annual Meetings".[10] The group recommended a set of best practices for companies conducting virtual-only and hybrid shareholder meetings, including adoption of principles for online

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9 McGregor, Jena. "More Companies are Going Virtual for Their Annual Meetings", The Washington Post. March 17, 2015, *available at* https://www.washingtonpost.com/news/on-leadership/wp/2015/03/17/more-companies-are-going-virtual-for-their-annual-shareholder-meetings/?utm_term=.773f1f8621d8.

10 *Available at* http://www.broadridge.com/broadridge-insights/Guidelines-for-Protecting-and-Enhancing-Online-Shareholder-Participation-in-Annual-Meetings.html.

participation and practical safeguards that are generally intended to ensure virtual shareholder meetings are accessible, increase shareholder participation and engagement, and protect the interests of shareholders, which remains the most comprehensive summary of practical considerations in this context to date. There are several steps that could help facilitate the process for those companies choosing to proceed with a virtual format:

- Investor outreach efforts should be made to help explain the process and allay shareholder concerns. This could include sharing the motivation behind management's decision to hold a virtual meeting, to address any potential concerns that the company is trying to insulate itself from shareholders.
- Policies and procedures that provide assurances that the virtual-only meeting will offer a similar level of transparency to the traditional meeting format should be instituted.
- The agenda and the rules governing the meeting, particularly with respect to the means of shareholder participation, should be published in advance of the meeting.
- From a logistical standpoint, the technological platform being used should be thoroughly tested before the meeting to ensure that the process will run smoothly. Management may want to do a test run to make sure everyone is comfortable with the technology.
- Proxy materials should include instructions for shareholders to test the platform in advance of the meeting to confirm that they can access the system in order to participate.

As virtual meetings become more prevalent, certain best practices are also beginning to emerge. For example, to promote transparency, HP Inc. posted to its website all of the (unedited and unfiltered) questions it received prior to or during its meeting, along with the company's responses, even relating to questions not addressed at the meeting. In addition, rather than the predominant audio-only format, HP Inc. chose to broadcast a video of its CEO and management participants. To further facilitate participation, HP Inc. and Microsoft Corporation, among others, allowed for pre-meeting submission of shareholder questions, which is intended to enable more carefully-considered management responses. To promote a physical meeting-like interactive experience, Broadridge offers companies a "Shareholder Forum" to supplement a virtual meeting by allowing shareholders to submit questions, cast votes, and answer surveys in an interactive online format before the meeting. Other features that could improve the perception of transparency at a virtual meeting include the ability for all participants to see a running list of incoming questions, establishing procedures for questions received, but not answered, during the meeting, offering telephone access so that shareholders can call in to ask questions during the meeting, and offering videoconferencing access as technological advances are made and costs decline.

Ultimately, a virtual-only or a hybrid meeting, if structured to ensure transparency, and promote shareholder access and participation, particularly with respect to the manner in which questions are asked, answered and shared, could serve to allow for a meaningful extension of a meeting forum to a significantly broader shareholder base.

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