

Public Company Virtual Annual Meetings: The 2020 Watershed and Path Forward

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Although “virtual-only meetings” of shareholders of public companies have been permissible since 2001, an explosion occurred in 2020 due to the COVID-19 pandemic when 80 percent of S&P 500 public companies held “virtual-only meetings” in April to May 2020 compared to only 12 percent in the first quarter of 2020. This article examines the legal landscape for virtual-only meetings, including various emergency orders and lawmaking implemented by certain state governors and legislatures, as well as the historical views of leading proxy advisory firms and institutional investors toward virtual-only meetings compared to the evolved views during the pandemic, and explores the pragmatic lessons learned and best practices for holding virtual-only and hybrid meetings going forward.

In recent years, significantly more public companies have chosen audio and video streaming of their annual shareholder meetings, whether as a supplement to a physical meeting, referred to as a “hybrid meeting,” or in lieu of a physical meeting, referred to as a “virtual-only meeting.” Driven by necessity during the 2020 pandemic, many more companies switched to virtual-only meetings, most for the first time. It remains to be seen as to whether hybrid and virtual-only meetings will continue at the same pace post-pandemic such that widespread use of virtual-only meetings will become the standard rather than the exception. This article discusses the 2021 legal landscape with a focus on 2020 proxy season developments and their potential impact on future shareholder meetings, potential benefits and detriments of hybrid and virtual-only meetings, guidelines for best practices for such meetings, and considerations regarding introduction and implementation of hybrid and virtual-only meetings.

VIRTUAL SHAREHOLDER MEETING EXPLOSION IN 2020

Prior to the pandemic in 2020, virtual shareholder meetings steadily grew in popularity since the first one held in 2001 following changes in the Delaware General Corporation Law expressly contemplating such meetings¹ as companies

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1. See 72 Del. Laws 619, 619–20 (2000); COMPUTERSHARE LTD., THE FUTURE OF SHAREHOLDER MEETINGS IS VIRTUALLY HERE 2 (2017), <https://www.computershare.com/News/Virtual-Meetings.pdf>.

increasingly elected to leverage new technology to communicate with shareholders. Between 2015 and 2019, the number of hybrid or virtual-only meetings hosted by the largest provider, Broadridge Financial Services, Inc., increased by approximately fifty meetings each year, with Broadridge hosting a total of fifty-three virtual-only meetings in 2014 and 326 hybrid or virtual-only meetings in 2019.² Until March 2020, the prevalence of virtual shareholder meetings appeared to be consistent with prior year trends. Between January 1, 2020, and March 31, 2020, 12 percent of the shareholder meetings hosted by S&P 500 companies were virtual.³

After the coronavirus was declared a pandemic by the World Health Organization on March 11, 2020,⁴ and most U.S. states imposed shelter-in-place orders,⁵ companies turned to virtual-only shareholder meetings.⁶ The percentage of shareholder meetings hosted in a virtual format by the S&P 500 jumped from 12 percent in the first quarter to 80 percent (including webcast meetings) between April 1, 2020, and mid-May 2020, the busiest period for annual shareholder meetings.⁷ The steady increase in hybrid and virtual-only shareholder meetings that Broadridge witnessed over the past five years exploded, with an increase of 1,168 meetings in 2020.⁸ By June 30, 2020, Broadridge had hosted a total of 1,494 hybrid or virtual-only meetings.⁹ Of those, 98 percent were virtual-only.¹⁰

The rising prevalence of virtual-only shareholder meetings in 2020 raises the question of whether such practice will continue in future years after social distancing and group event restrictions are no longer in effect. By May 2020, several large-cap companies, such as Cigna, Home Depot, ConocoPhillips, and Sempra Energy, announced plans to return to an in-person format for their annual shareholder meetings in 2021.¹¹ Without social distancing requirements, it seems unlikely that similar numbers of S&P 500 companies will continue to host virtual-only shareholder meetings after social distancing recommendations by U.S. health authorities lapse. However, a number of companies, having hosted their first virtual-only shareholder meetings in 2020 and now familiar with

2. See BROADRIDGE FIN. SOLUTIONS, INC., VIRTUAL SHAREHOLDER MEETINGS: 2020 MID-YEAR FACTS AND FIGURES 1 (2020), https://www.broadridge.com/_assets/pdf/broadridge-am_00315_br_20-203401-bfs-vsm_brochure_082520.pdf.

3. INTELLIGIZE, PROOF OF CONCEPT: AN INTELLIGIZE REPORT ON VIRTUAL ANNUAL SHAREHOLDER MEETINGS 4 (May 19, 2020), <https://www.intelligize.com/form-proof-of-concept-an-intelligize-report-on-virtual-annual-shareholder-meetings/>.

4. *Morbidity and Mortality Weekly Report (MMWR): Severe Outcomes Among Patients with Coronavirus Disease 2019 (COVID-19)—United States, February 12–March 16, 2020*, CTRS. DISEASE CONTROL & PREVENTION (Mar. 27, 2020), <https://www.cdc.gov/mmwr/volumes/69/wr/mm6912e2.htm>.

5. Jorge L. Ortiz & Grace Hauck, *Coronavirus in the US: How All 50 States Are Responding—and Why Eight Still Refuse to Issue Stay-at-Home Orders*, USA TODAY (May 30, 2020, 10:34 PM), <https://www.usatoday.com/story/news/nation/2020/03/30/coronavirus-stay-home-shelter-in-place-orders-by-state/5092413002/>.

6. INTELLIGIZE, *supra* note 3, at 2.

7. INTELLIGIZE, *supra* note 3, at 4.

8. BROADRIDGE, VIRTUAL SHAREHOLDER MEETINGS, *supra* note 2, at 1.

9. *Id.*

10. *Id.* at 2.

11. INTELLIGIZE, *supra* note 3, at 14.

the process and the advantages of virtual-only meetings, are likely to continue the practice in the future post-2021.¹²

LEGAL LANDSCAPE

Whether or not a corporation is permitted to conduct a virtual-only meeting depends on the relevant state corporation law. Until the 2020 pandemic, some states had not updated their corporation laws to reflect modern advances in communications. This article will examine the state corporation laws of the three leading jurisdictions of incorporation for public companies—Delaware, New York, and California—as applied to virtual-only shareholder meetings.

DELAWARE

Delaware has expressly permitted companies to hold virtual-only and hybrid shareholder meetings, subject to certain conditions, since 2000.¹³ Under Delaware law, companies may hold virtual-only shareholder meetings whether or not such meetings are explicitly permitted in the certificate of incorporation or bylaws.¹⁴ As long as the bylaws do not require the annual meeting to be held at a physical location, a bylaw provision allowing the board to choose the meeting location at its discretion is sufficient for the use of remote communications for a shareholder meeting.¹⁵ In practice, many companies amend their bylaws to specifically permit annual meetings held by remote communication to address any ambiguity or potential questions regarding the board's authority to make such a determination.¹⁶ A company that would like to amend its bylaws to specifically address virtual shareholder meetings should do so prior to the record date for the next annual meeting for which it contemplates a virtual meeting.¹⁷

Although Delaware law has long permitted virtual-only shareholder meetings, following the outbreak of the coronavirus in the United States, Delaware issued an emergency order addressing notice requirements for public companies seeking to change the date, time, or location of shareholder meetings to be held in the state, including changing to a virtual-only shareholder meeting, to assist companies that had already mailed notices for physical shareholder meetings.¹⁸ Under the emergency order, SEC reporting companies incorporated in Delaware that had provided notice in proxy materials for shareholder meetings to be held in

12. INTELLIGIZE, *supra* note 3, at 4.

13. See DEL. CODE ANN. tit. 8, § 211(a)(2) (2020); 72 Del. Laws 619, 619–20 (2000).

14. See DEL. CODE ANN. tit. 8, § 211 (2020).

15. See *id.*

16. Lisa A. Fontenot, *Public Company Virtual-Only Annual Meetings*, 73 BUS. LAW. 35, 40–41 (2017); see also Colin Diamond & Irina Yevmenenko, *Certain Considerations Relating to Virtual Shareholder Meetings*, WHITE & CASE ALERT (Mar. 28, 2018), <https://www.whitecase.com/publications/alert/certain-considerations-relating-virtual-shareholder-meetings>.

17. *Id.*

18. Tenth Modification of the Declaration of a State of Emergency for the State of Delaware Due to a Public Health Threat, State of Delaware: Executive Department: Dover (Apr. 6, 2020), <https://governor.delaware.gov/health-soe/tenth-state-of-emergency/>.

a physical location and subsequently sought to conduct a virtual-only meeting or change the date, time, or location of the meeting, could do so through a document publicly filed with the SEC and a press release, to be promptly posted on the corporation's website after release, rather than printing and mailing a new notice to shareholders.¹⁹

One unique logistics issue for Delaware companies holding a virtual-only shareholder meeting is the provision of a shareholder list. Delaware law requires corporations to prepare, at least ten days before a shareholder meeting, a complete list of the shareholders entitled to vote, including each shareholder's address and the number of shares registered in the shareholder's name.²⁰ The list must be open to the examination of any shareholder for purposes germane to the meeting for at least ten days prior to the meeting, either on a reasonably accessible electronic network or at the principal place of business of the corporation.²¹ For shareholder lists made available on electronic networks, corporations must take reasonable steps to ensure that such information is available only to shareholders.²² In the context of a virtual-only shareholder meeting, the shareholder list must also be open to the examination of any shareholder during the entirety of the meeting on a reasonably accessible electronic network, and the information required to access the list must be provided to shareholders with the notice of the meeting.²³ As a practical matter, Broadridge and Computershare provide companies with an option to post their shareholder lists on their virtual meeting platforms with access limited to attendees who have accessed the platform as shareholders and not as guests. Some virtual meeting platforms may require shareholders to submit a separate request to view the shareholder list, adding an extra layer of protection for shareholder data.

The ability to host virtual shareholder meetings proved invaluable to Delaware companies in 2020, with 70 percent of the S&P 500 companies incorporated in Delaware holding virtual-only shareholder meetings instead of in-person meetings.²⁴ Given Delaware's longstanding permissibility of virtual-only shareholder meetings, companies incorporated in that state have a greater level of certainty about feasibility of such meetings going forward than do companies domiciled in some other states.

NEW YORK

Until recently, New York did not permit virtual-only or even hybrid shareholder meetings until the New York Business Corporation Law was amended in October 2019 to permit hybrid meetings provided that:

19. *Id.*

20. DEL. CODE ANN. tit. 8, § 219 (2020).

21. *Id.*

22. *Id.*

23. *Id.*

24. INTELLIGIZE, *supra* note 3, at 7.

- (1) The corporation implements reasonable measures to verify that each person deemed present and permitted to vote at the meeting by means of electronic communication is a shareholder of record; and
- (2) A record is kept of any vote or other action taken by a shareholder participating and voting by means of electronic communications at a shareholders' meeting.²⁵

In response to the coronavirus, New York's governor issued Executive Order No. 202, which further relaxed restrictions on virtual shareholder meetings by suspending the application of certain subsections of the New York Business Corporation Law to the extent they require meetings of shareholders to be noticed and held at a physical location.²⁶ The New York Legislature later confirmed this action through a temporary amendment to section 602(a) of the New York Business Corporation Law, effective through December 31, 2021.²⁷ As a result of this temporary amendment, so long as Executive Order No. 202 remains in effect, New York companies are permitted to hold virtual-only shareholder meetings, regardless of whether the virtual meeting format is expressly permitted in their bylaws, and in the sole discretion of the board of directors.²⁸

After the expiration of Executive Order No. 202 or the temporary amendment, whichever comes first, virtual-only shareholder meetings are unlikely to be permitted in New York again following termination of social distancing measures; the New York City Comptroller has strongly opposed virtual shareholder meetings and is unlikely to express support for the recent statutory change on a permanent basis.²⁹ In its Corporate Governance Principles and Proxy Voting Guidelines, the New York City Comptroller has expressed its view that virtual shareholder meetings may disenfranchise shareholders or limit their participation.³⁰ The New York City Comptroller provides that companies should hold virtual shareholder meetings only as a supplement to physical meetings, and not as a substitute.³¹

CALIFORNIA

In California, virtual shareholder meetings are technically permitted under the law, but only with the consent of each shareholder participating remotely, which creates a standard too high to implement in practice.³² In response to the

25. N.Y. BUS. CORP. LAW § 602(b) (Consol. 2020).

26. See Exec. Order No. 202.8: Continuing Temporary Suspension and Modification of Laws Relating to the Disaster Emergency, Governor of the State of New York (Mar. 20, 2020), <https://www.governor.ny.gov/news/no-2028-continuing-temporary-suspension-and-modification-laws-relating-disaster-emergency>; INTELLIGIZE, *supra* note 3, at 6.

27. See *id.*; S.B. 8412, 243d Ann. Leg. Sess. (N.Y. 2020).

28. N.Y. BUS. CORP. LAW § 602(a) (Consol. 2020); INTELLIGIZE, *supra* note 3, at 6.

29. INTELLIGIZE, *supra* note 3, at 6.

30. See OFF. OF THE N.Y.C. COMPTROLLER, CORPORATE GOVERNANCE PRINCIPLES AND PROXY VOTING GUIDELINES 14, 20 (last amended Feb. 2019), https://comptroller.nyc.gov/wp-content/uploads/documents/NYCRS-Corporate-Governance-Principles-and-Proxy-Voting-Guidelines_2019-Revised-February-2019.pdf.

31. See *id.* at 20.

32. CAL. CORP. CODE §§ 20, 600(a), 600(e) (Deering 2020).

coronavirus, however, California's governor initially issued an executive order affecting shareholder meetings previously scheduled for or required to occur before June 30, 2020.³³ The executive order suspended the rule requiring shareholder consent, and stated that companies that had previously provided written notice of a physical meeting to their shareholders would be permitted to notify shareholders of the change to a virtual-only meeting by a press release, website posting, and other means reasonably designed to inform shareholders of the change.³⁴ In September 2020, the governor issued a new executive order relating to meetings held after June 30, 2020.³⁵ Again, the executive order suspended the rule requiring shareholder consent, but the relaxed notification requirements were replaced with a requirement for corporations to afford shareholders "a reasonable opportunity to participate in the meeting."³⁶ Specifically, the executive order requires a corporation to (1) not impose unreasonable obligations on shareholders seeking to participate in the shareholder meeting and (2) provide shareholders, as closely as reasonably possible, with an opportunity to participate equivalent to the ability of in-person attendees at the corporation's last-in person meeting, including any ability to vote, ask questions, be heard by other shareholders, or advance proposals.³⁷ If a significant business transaction, controversial proposal, counter-solicitation, or other matter of a sort not considered at the last in-person meeting is to be considered at the virtual meeting, the corporation must provide as closely as reasonably possible an equivalent ability to participate as in-person attendees at the last in-person meeting to consider such a matter.³⁸ The most recent California executive order did not mention an expiration date for the relaxed requirements for virtual shareholder meetings.³⁹

As in New York, restrictions surrounding virtual-only shareholder meetings are unlikely to be removed long term in California, as opposition against such practice is strong, with institutions such as CalPERS being vigorously opposed to virtual-only meetings and unlikely to approve of a change to relevant legislation.⁴⁰ Similar to the New York City Comptroller, CalPERS has expressed in its Governance and Sustainability Principles that virtual meetings may limit shareholder meeting participation, and that such meetings should only be held as a supplement to, and not a substitute for, physical meetings.⁴¹

33. See Exec. Order No. N-40-20, Executive Department: State of California (Mar. 30, 2020), <https://www.lwlegal.com/uploaded/3.30.20-N-40-20.pdf>.

34. See *id.*

35. See Exec. Order No. N-80-20, Executive Department: State of California (Sept. 23, 2020), <https://www.gov.ca.gov/wp-content/uploads/2020/09/9.23.20-EO-N-80-20-COVID-19-signed.pdf>.

36. See *id.*

37. See *id.*

38. See *id.*

39. See *id.*

40. INTELLIGIZE, *supra* note 3, at 6.

41. See CALPERS, CALPERS' GOVERNANCE & SUSTAINABILITY PRINCIPLES 32 (last rev. Sept. 2019), <https://www.calpers.ca.gov/docs/forms-publications/governance-and-sustainability-principles.pdf>.

OTHER STATES

Outside of the context of the pandemic, at least thirty-one states permit virtual-only shareholder meetings, and forty-three permit hybrid shareholder meetings.⁴² As in Delaware, New York, and California, several states responded to the coronavirus by temporarily permitting or further relaxing restrictions on such meetings.⁴³ Notably, at least eighteen states issued orders regarding virtual-only or hybrid shareholder meetings, eleven of which do not usually permit virtual-only shareholder meetings, and four of which also do not typically permit hybrid shareholder meetings.⁴⁴

FEDERAL LAW⁴⁵

As shareholder meetings are primarily governed by state law, federal law's impact on shareholder meetings is largely limited to the proxy solicitation and disclosure rules;⁴⁶ however, the U.S. Securities and Exchange Commission (the "SEC") has previously made statements advocating for use of technology to promote shareholder engagement, access, and transparency. In 2015, SEC Commissioner Luis Aguilar stated that technological advances, including virtual meetings, should be used to promote greater shareholder participation.⁴⁷ In 2017, SEC Commissioner Kara Stein also made a statement regarding the SEC's focus on technology's ability to improve shareholder engagement and the transmission of information to shareholders.⁴⁸

STOCK EXCHANGE LISTING RULES

Although stock exchanges require listed companies to hold annual meetings of shareholders, they do not require that the meetings be held in a physical

42. See PRAC. L. CORPORATE & SEC., VIRTUAL SHAREHOLDER MEETING STATE LAW COMPARISON CHART (May 12, 2020), <https://us.practicallaw.thomsonreuters.com/w-025-1400>.

43. *Id.*

44. *Id.*

45. In 2020, as companies shifted from in-person to virtual-only shareholder meetings in response to the coronavirus pandemic, the Division of Corporate Finance and the Division of Investment Management of the SEC issued guidance regarding notification requirements to shareholders. See *Staff Guidance for Conducting Shareholder Meetings in Light of COVID-19 Concerns*, U.S. SEC. & EXCHANGE COMMISSION (Apr. 7, 2020), <https://www.sec.gov/ocr/staff-guidance-conducting-annual-meetings-light-covid-19-concerns>. Companies conducting virtual-only or hybrid shareholder meetings were instructed to timely notify shareholders, intermediaries in the proxy process, and other market participants, and to provide clear directions on how shareholders could remotely access, participate in, and vote at virtual shareholder meetings. See *id.* With respect to communications to shareholders, the SEC instructed companies that had not yet filed proxy materials to include virtual meeting disclosures in their proxy statements. See *id.* Companies that had already filed proxy materials were instructed to announce a change to a virtual shareholder meeting in a press release and to file the announcement as definitive additional soliciting materials. See *id.*

46. Fontenot, *supra* note 16, at 38.

47. See Luis A. Aguilar, *Ensuring the Proxy Process Works for Shareholders*, U.S. SEC. & EXCHANGE COMMISSION (Feb. 19, 2015), <https://www.sec.gov/news/statement/021915-psclaa.html>.

48. See Kara M. Stein, *The Markets in 2017: What's at Stake?*, U.S. SEC. & EXCHANGE COMMISSION (Feb. 24, 2017), <https://www.sec.gov/news/speech/stein-sec-speaks-whats-at-stake.html>.

location. The New York Stock Exchange (the “NYSE”) Listing Rules are silent as to the permissibility of virtual-only shareholder meetings, but market practice indicates that the NYSE accepts the practice. Nasdaq, on the other hand, expressly states in its Listing Center Reference Library that companies listed on its exchange may hold virtual-only shareholder meetings, provided the relevant state law allows those meetings.⁴⁹ Nasdaq has also emphasized that it is important in the context of virtual-only shareholder meetings that shareholders have the opportunity to ask questions of management.⁵⁰

FORMAT FOR VIRTUAL SHAREHOLDER MEETINGS

Among the thousands of companies hosting virtual shareholder meetings in 2020, a consensus emerged as to certain aspects of the format of these meetings. The vast majority of meetings were hosted by providers such as Broadridge, Computershare, or Mediant. In the past, the audio-only format had generally been most popular among companies, with Broadridge reporting that 90 percent of the virtual-only shareholder meetings hosted on its platform were audio-only.⁵¹ The prevailing use of the audio-only format continued in 2020, as most companies opted for this format for their virtual-only shareholder meetings.⁵² The audio-only format is generally similar to an earnings call, with the added capabilities of shareholder authentication and voting. By contrast, the video format is more comparable to an in-person meeting experience, allowing shareholders to view the board chairperson, the secretary, and other presenters during the meeting, although participating shareholders are not physically present.⁵³

Virtual shareholder meetings share many features with physical meetings. For example, virtual shareholder meetings typically feature a question-and-answer session in which shareholders are permitted to ask questions.⁵⁴ As in physical meetings, companies may permit non-shareholder guests to attend. Shareholders may go through a verification process allowing them to attend the meeting as shareholders, which usually allows them to vote live during the meeting (instead

49. See *Can an Annual Shareholder Meeting Be Held via the Web?*, NASDAQ LISTING CTR., <https://listingcenter.nasdaq.com/MaterialHome.aspx?mcd=LQ> (follow “Advanced Search” hyperlink; then filter “Find” field for “Material with this Identification Number(s)” and search for “84”).

50. See *id.*

51. *Hold Your Annual Shareholder Meeting Online*, BROADRIDGE, https://www.broadridge.com/financial-services/corporate-issuer/issuer/simplify-the-annual-meeting-process/virtual-shareholder-meeting?id=ICSCIC20ma5e7b77f000ab8bef3d999be35c750ffd&so=se&po=&di=&ct=&ot=pp&mt=ma&yr=20&rg=gl&on=01&rep=pd&gclid=EAlaIqobChMIyNvRiMyQ7AIVmal3Ch2nGgB1EAAAYASAAEgKQSFd_BwE (last visited Sept. 30, 2020).

52. Douglas K. Chia, *Key Takeaways and Best Practices from Virtual Shareholder Meetings in 2020*, HARV. L. SCH. F. ON CORP. GOVERNANCE (July 2, 2020), <https://corpgov.law.harvard.edu/2020/07/02/key-takeaways-and-best-practices-from-virtual-shareholders-meetings-in-2020/>.

53. See *id.*

54. RUTGERS CTR. FOR CORPORATE LAW & GOVERNANCE COUNCIL OF INSTITUTIONAL INVER'S SOC'Y FOR CORPORATE GOVERNANCE, REPORT OF THE 2020 MULTI-STAKEHOLDER WORKING GROUP ON PRACTICES FOR VIRTUAL SHAREHOLDER MEETINGS 5 (2020), https://cclg.rutgers.edu/wp-content/uploads/VSM-Working-Group-Report-12_10_2020.pdf.

of via proxy beforehand) and ask questions during the question-and-answer session.⁵⁵ Alternatively, shareholders who do not wish to go through the verification process may attend as guests.⁵⁶ Most companies do not allow guests to submit questions, and guests do not count toward a quorum or have voting rights during the meeting.⁵⁷

Nearly all companies chose to allow live questions during their 2020 virtual shareholder meetings, with Broadridge reporting that 97 percent of the companies using its platform permitted live questions.⁵⁸ On Broadridge's platform, shareholders could submit questions live through a text box or a moderated question-and-answer phone line.⁵⁹ On average, companies allowing live questions during their virtual shareholder meetings received five questions from shareholders, although one company received 316 shareholder questions during its virtual-only shareholder meeting.⁶⁰ Another option for shareholder questions used by a minority of companies was to permit submission of questions in advance of the meeting to be answered during the meeting.⁶¹ This option could also be used in conjunction with the ability to answer shareholder questions live.⁶²

Companies hosting virtual-only shareholder meetings in 2020 also faced the question of how to handle shareholder proposals. SEC Rule 14a-8(h) provides that a shareholder proponent or its representative must attend the meeting to present the proposal.⁶³ Options for presenting shareholder proposals in the context of a virtual-only meeting include (i) providing the proponent with a dedicated dial-in phone number so that the proponent or its representative can present the proposal; (ii) allowing the proponent to provide a recording of the presentation of the proposal, which the company can play during the meeting; or (iii) the company designating a company representative to read the proposal on behalf of the proponent (which may incur shareholder criticism). In most virtual-only shareholder meetings involving a proposal hosted by Broadridge during 2020, the proposals were presented live by the shareholder during the meeting.⁶⁴ As compared with virtual-only shareholder meetings without shareholder proposals, virtual-only shareholder meetings with shareholder proposals saw greater participation among shareholders, with higher average attendance, more questions, and longer meetings.⁶⁵

55. *Id.*

56. *Id.*

57. *Id.* at 5–6.

58. BROADRIDGE, VIRTUAL SHAREHOLDER MEETINGS, *supra* note 2, at 3.

59. *Id.*

60. *Id.*

61. *Id.*

62. *See id.*

63. 17 C.F.R. § 14a-8(h) (2020).

64. Maryellen Andresen, *Broadridge Virtual Shareholder Meetings ("VSMs"): Preliminary Statistics*, HARV. L. SCH. F. ON CORP. GOVERNANCE (June 3, 2020), <https://corpgov.law.harvard.edu/2020/06/03/broadridge-virtual-shareholder-meetings-vsms-preliminary-statistics/>.

65. BROADRIDGE, VIRTUAL SHAREHOLDER MEETINGS, *supra* note 2, at 3.

ADVANTAGES AND DISADVANTAGES OF VIRTUAL SHAREHOLDER MEETINGS

Although the pandemic was the compelling force for most virtual-only shareholder meetings in 2020, the virtual meeting format provided benefits beyond protecting the health and safety of participants and preventing the spread of the coronavirus. Commentators reported that virtual shareholder meetings generally strengthen shareholder engagement and reduce costs of shareholder meetings.⁶⁶ A virtual shareholder meeting makes it easier for a greater number of participants to attend due to a reduction in travel expenses and travel-related scheduling conflicts.⁶⁷ These benefits facilitate increased attendance by directors serving on multiple boards and by retail and institutional investors alike.⁶⁸ In 2020, average meeting attendance for virtual shareholder meetings proved to be higher than for typical in-person meetings.⁶⁹ On an individual level, one investor who held shares in about 150 U.S. companies reported that he was able to attend more than thirty shareholder meetings in 2020, as compared to about ten in 2019.⁷⁰ Virtual shareholder meetings may be particularly advantageous to retail investors who may not otherwise be able to attend or to engage with the company year-round, providing a convenient and affordable platform for such investors to interact with management and the board directly.⁷¹

The virtual format may also encourage shareholder participation during the meeting.⁷² Shareholders may be more inclined to ask questions through a virtual question-and-answer forum than live during an in-person meeting.⁷³ The virtual platform also permits management to thoughtfully review questions as they are submitted and to organize the questions topically to facilitate a more orderly question-and-answer session, permitting more shareholder questions and responses.⁷⁴

In addition, holding shareholder meetings virtually results in increased efficiency and may achieve cost savings for companies.⁷⁵ Virtual meeting platforms may include features such as attendance tracking, identity verification, automatic post-meeting summaries, and an audio or webcast record that a company can make accessible after the meeting.⁷⁶ In the context of a physical shareholder

66. Fontenot, *supra* note 16, at 42.

67. Dorothy Flynn, *Opinion: Virtual AGMs Bringing Increased Engagement*, CORPORATE SEC'Y (Sept. 24, 2020), https://www.corporatesecretary.com/articles/technology-social-media/32270/opinion-virtual-agms-bringing-increased-engagement?utm_source=CS250920&utm_medium=email&utm_campaign=op_agms.

68. Fontenot, *supra* note 16, at 42.

69. See BROADRIDGE, *VIRTUAL SHAREHOLDER MEETINGS*, *supra* note 2, at 3.

70. Nina Trentmann, *Shareholders Feel Muted as Companies Switch to Virtual Annual Meetings*, WALL ST. J. (Aug. 23, 2020), <https://www.wsj.com/articles/shareholders-feel-muted-as-companies-switch-to-virtual-annual-meetings-11598187600>.

71. Fontenot, *supra* note 16, at 42–43.

72. *Id.* at 43.

73. *Id.*

74. *Id.*

75. *Id.*

76. *Id.*

meeting, a company may expend resources on planning logistics such as the venue, refreshments, decorations, attendee materials, security, and even medical personnel.⁷⁷ The time, effort, and expense of planning such details is spared in the context of a virtual meeting.⁷⁸ Companies holding virtual-only meetings have also highlighted that such meetings are environmentally friendly.⁷⁹

Finally, virtual shareholder meetings provide increased security for attendees, in an environment in which physical safety can be a significant concern.⁸⁰ The need for on-site security is obviated in the context of a virtual shareholder meeting.⁸¹ On-site protests, which may occur at a physical meeting, are not an issue where meetings are held virtually, and the ability of shareholders to disrupt a meeting is limited on a virtual platform.⁸²

While virtual shareholder meetings offer several benefits to companies and shareholders, the prevalence of virtual shareholder meetings in 2020 also revealed certain disadvantages inherent to the format. Skeptics of virtual-only meetings point out that just as technology can improve shareholder engagement, it can also impede it, insulating management from the level of shareholder dialogue achievable at in-person meetings.⁸³ The virtual format permits management to select which questions to answer, which in 2020, as in years prior to the widespread adoption of virtual-only meetings, resulted in shareholder accusations that companies were leveraging the opportunity to avoid difficult questions.⁸⁴ In some cases, shareholders were even suspicious that companies generated the questions that were asked and answered during the question-and-answer sessions themselves, as opposed to accepting questions from verified shareholders, in order to avoid difficult questions and fill the allotted time for questions.⁸⁵ Certain activists that were focused on environmental, social, and governance issues asserted that they found the virtual format to present an additional challenge in holding management accountable.⁸⁶ Shareholders also noted that audio-only virtual meetings eliminated the ability of shareholders to interact with eye contact, both formally and informally, with board members and executives.⁸⁷ In addition, shareholders stated that by its nature, the virtual format eliminated the ability of shareholders to interact with each other, because

77. *Id.*

78. *Id.*

79. RUTGERS, *supra* note 54, at 8.

80. Fontenot, *supra* note 16, at 43.

81. *Id.*

82. *Id.*

83. Rosemary Lally, *Shareholders Face Obstacles to Participation in Virtual Annual Meetings*, COUNCIL INSTITUTIONAL INVS. (Apr. 30, 2020), <https://www.cii.org/files/April%2030,%202020%20-%20Shareholders%20Face%20Obstacles%20to%20Participation%20in%20Virtual%20Annual%20Meetings.pdf>.

84. Jessica DiNapoli & Ross Kerber, *U.S. Activists Complain that Virtual Shareholder Meetings Let Companies Silence Them*, REUTERS (Aug. 18, 2020), <https://www.reuters.com/article/us-health-corona-virus-shareholdermeeting/u-s-activists-complain-that-virtual-shareholder-meetings-let-companies-silence-them-idUSKCN25E1FD>.

85. RUTGERS, *supra* note 54, at 7.

86. DiNapoli & Kerber, *supra* note 84.

87. RUTGERS, *supra* note 54, at 7.

the primary virtual shareholder meeting platforms do not include functionality for sidebar conversations among shareholders.⁸⁸

While some shareholders complained in 2020 that management ignored shareholder questions, in some cases, the root of the problem may have been technological issues caused by companies adjusting to the virtual format on short notice.⁸⁹ In fact, shareholders and companies alike appear to have encountered various difficulties in transitioning to virtual-only meetings. In a publicly available letter to the Investor Advisory Committee of the Securities and Exchange Commission, the Council of Institutional Investors noted that shareholders had reported several problems, including difficulty logging into meetings, inability to ask questions in some cases if the shareholder had voted in advance by proxy (on one virtual meeting platform in particular), inability to ask questions during the meeting rather than in advance, lack of transparency as to which questions had been submitted by shareholders, restrictions on the presentation of shareholder proposals, and conflicting channels for shareholder participation with shareholder resolution proponents required to participate from a line separate from that used for general questions and answers.⁹⁰ The unanticipated rapid change to virtual-only meetings required for companies in 2020 may have exacerbated technology-related issues, but with additional time to gain familiarity with the platform and to plan for ways to address shareholder concerns, companies may be better equipped to resolve issues like those described above in the future. A working group of public companies and investors hosted by the Rutgers Center for Corporate Law and Governance found that even though companies were concerned about technological issues during their first virtual meetings in 2020, for the most part, glitches were minimal.⁹¹

PRACTICAL PERSPECTIVE ON VIRTUAL SHAREHOLDER MEETINGS

The authors of this article engaged in conversations with corporate counsel for a small number of public companies to gain a practical perspective on virtual shareholder meetings. Nearly all of the attorneys that the authors spoke with said that they would prefer to hold virtual meetings instead of physical meetings going forward, with the caveat that their future plans would depend in part on how Institutional Shareholder Services (“ISS”) and Glass Lewis respond to the virtual meeting trend. Corporate counsel emphasized the convenience of the virtual meeting format, noting that directors and other meeting participants could go about their day-to-day activities before and after the meeting rather than losing a day to travel to a physical meeting location. Eliminating travel to a physical location also provided cost benefits, and some corporate counsel remarked that

88. Lally, *supra* note 83.

89. DiNapoli & Kerber, *supra* note 84.

90. Letter from Kenneth A. Bertsch, Exec. Dir. & Jeffrey P. Mahoney, Gen. Counsel, Council of Institutional Invs., to Anne Sheehan, Chair, Inv'r Advisory Comm., U.S. Sec. & Exch. Comm'n (May 3, 2020), https://www.cii.org/files/issues_and_advocacy/correspondence/2020/2020%2005%2003%20IAC%20letter.pdf.

91. RUTGERS, *supra* note 54, at 8.

their companies were able to eliminate expenses associated with items like hotels and flights.

In such corporate counsels' experience, shareholder attendance was generally consistent with prior years, although this year's meetings were marked by increased attendance from non-shareholder guests, including analysts, employees, clients, competitors, and business counterparties. Corporate counsel for larger companies were more likely to report increased guest attendance.

The attorneys were pleased that they were able to rehearse the virtual meeting format ahead of time. Representatives from the virtual meeting platforms conducted "dry runs" to allow meeting participants to practice dialing in, using and muting their microphones, and responding to shareholder questions. None of the attorneys with whom the authors spoke experienced any technical issues themselves, although one noted that a shareholder reported difficulties gaining access to the meeting as a shareholder. Overall, corporate counsel who spoke with the authors viewed their experience with virtual shareholder meetings positively and felt that the advantages outweighed the disadvantages.

BEST PRACTICES FOR VIRTUAL SHAREHOLDER MEETINGS

Prominent and vocal players in the corporate community have issued views, guidance, and recommendations on virtual-only meetings that companies can use to maximize shareholder participation in virtual-only meetings and minimize any chilling effect produced by the format.⁹² Though enthusiasm for virtual-only meetings ranges broadly, the guidelines are thematically aligned as to the importance of clearly communicating the rationale for conducting a virtual-only meeting and organizing open yet efficient question-and-answer sessions.

Entering the 2020 annual meeting season, the primary set of guidelines for virtual shareholder meetings was the *Principles and Best Practices for Virtual Annual Shareowner Meetings* published by Broadridge.⁹³ These guidelines were authored by a "committee of interested constituents, comprised of retail and institutional investors, public company representatives, and proxy and legal service providers."⁹⁴ The committee also included representatives from CalSTRS, the Society for Corporate Governance, the Council of Institutional Investors, and the AFL-CIO, among others, many of whom were involved in the creation of the prior iteration of guidelines in 2012.⁹⁵ The core purpose of the committee was to ensure "that when companies do opt for virtual participation in shareowner

92. See, e.g., BROADRIDGE FIN. SOLUTIONS, INC., PRINCIPLES AND BEST PRACTICES FOR VIRTUAL ANNUAL SHAREOWNER MEETINGS (2018), https://www.broadridge.com/_assets/pdf/broadridge-vasm-guide.pdf; INSTITUTIONAL S'HOLDER SERVS., IMPACTS OF THE COVID-19 PANDEMIC: ISS POLICY GUIDANCE (2020), <https://www.issgovernance.com/file/policy/active/americas/ISS-Policy-Guidance-for-Impacts-of-the-Corona-virus-Pandemic.pdf>; Pallavi Sharma, *Immediate Glass Lewis Guidelines Update on Virtual-Only Meetings Due to COVID-19 (Coronavirus)*, GLASS LEWIS (Mar. 19, 2020), <https://www.glasslewis.com/immediate-glass-lewis-guidelines-update-on-virtual-only-meetings-due-to-covid-19-coronavirus/>.

93. See BROADRIDGE, PRINCIPLES AND BEST PRACTICES, *supra* note 92.

94. *Id.* at 3.

95. *Id.*

meetings, they are accessible, transparent, and efficiently and cost-effectively managed, while meeting the important business and corporate governance needs of shareowners, boards, and management.”⁹⁶ Of the twelve best practices the committee identified to achieve this purpose, the longest and most detailed one concerns creating formal rules of conduct governing the meeting.⁹⁷ The committee emphasized that the rules should “allow sufficient opportunities” to ask questions “while being respectful” of others’ time.⁹⁸ It also stressed that the rules should be made available in advance and during the meeting and should “promote both the reality and perception” of fairness.⁹⁹ Concrete examples of such rules include establishing mechanisms for shareholders to “present questions in advance of the meeting, e.g., via their investor relations website or a shareowner discussion group or bulletin board,” and to “submit questions over the internet during the live meeting.”¹⁰⁰ Companies may also consider creating a toll-free number for shareholders to call during meeting, where their questions are answered on a first-come, first-served basis.¹⁰¹ To avoid time-consuming questions, companies may establish time limits for each question that are communicated upfront to shareholders.¹⁰² The committee recommended that companies be transparent with their question-and-answer sessions by establishing rules about how questions will be recognized and answered and strongly considering posting all appropriate questions and their answers online after the meeting.¹⁰³ The guidelines also recommended that the meeting be archived on a publicly available website for future viewing for a specific and reasonable time (ideally at least a year) after the meeting.¹⁰⁴

One salient departure from the 2012 guidelines was the 2018 report’s emphasis on the threshold decision of whether a company should hold virtual-only meetings and the clear communication of that decision. The report suggested that companies should “be fully aware of prospective investor reactions before deciding” their format and the decision and “participation instructions should be clearly disclosed in the proxy statement.”¹⁰⁵ The committee suggested several factors that companies may consider in their decision, such as whether they have the required technological capabilities to successfully achieve such a virtual-only meeting, whether their investor bases are informed and in support of virtual-only meetings, what items are up for voting at the meeting, and whether a plan is in place to successfully hold the virtual-only meeting.¹⁰⁶ The 2018 guidelines also stressed the importance of having technical support available throughout the

96. *Id.*

97. *Id.* at 5–6.

98. *Id.* at 5.

99. *Id.*

100. *Id.*

101. *Id.* at 6.

102. *Id.*

103. *Id.*

104. *Id.*

105. *Id.* at 5.

106. *Id.* at 4–5.

meeting to address any glitches in real time, a need perhaps unforeseen by the authors in 2012.¹⁰⁷ In a similar vein, the guidelines suggested that video, web lines, and telephone lines should be open before the meeting begins to allow shareholders to test their access and ensure their ability to participate in the meeting.¹⁰⁸

In response to the “tidal wave” of virtual shareholder meetings in 2020, the Rutgers Center for Corporate Law and Governance convened a working group of public companies and investors in August 2020 to review and update the 2018 guidelines based on the experiences and learnings of 2020.¹⁰⁹ The working group found that a number of the best practices outlined in the 2018 report became standard practices in 2020.¹¹⁰ In addition, the 2020 working group found that certain emerging practices should be more strongly encouraged or viewed as standard practice going forward.¹¹¹ Among other best practices, the 2020 working group emphasized the importance of providing clear instructions to shareholders, both with respect to how to attend and participate, and how to submit questions.¹¹² To the extent a virtual shareholder meeting is not a company’s standard practice, the company should disclose the reasons for the virtual format instead of a traditional in-person format.¹¹³ In preparation for the virtual meeting, companies should train meeting participants and rehearse the meeting.¹¹⁴ The 2020 working group also noted the importance of communicating with any shareholders who have proposals to be voted on at the meeting during the course of preparations for the meeting.¹¹⁵ With respect to the format of the meeting, the working group expressed its hope that companies would increasingly use a video, rather than an audio-only, format.¹¹⁶ Noting the importance of shareholders’ ability to vote and ask questions, the 2020 working group directed companies to provide prominently visible and simple mechanisms for voting and submitting questions on the main page of the virtual shareholder meeting platform.¹¹⁷ The working group also recommended that companies post all relevant materials for the meeting, including the meeting agenda, rules of order, proxy materials, and, if required by state law, a registered shareholder list.¹¹⁸

With respect to the proceedings of the meeting, the 2020 working group expressed its view that a virtual meeting should replicate the experience of an in-person shareholder meeting as closely as possible.¹¹⁹ At a high level, a virtual

107. *Id.* at 6.

108. *Id.* at 5.

109. RUTGERS, *supra* note 54, at 2.

110. *Id.* at 9.

111. *Id.* at 9–10.

112. *See id.* at 10–11.

113. *Id.* at 11.

114. *Id.* at 11–12.

115. *See id.* at 12.

116. *See id.* at 13.

117. *See id.* at 13–14.

118. *See id.* at 14.

119. *See id.* at 15–17.

shareholder meeting should include the typical components of a physical meeting, such as announcements, shareholder proposals, and a question-and-answer session.¹²⁰ In its report, the 2020 working group provided specific guidelines as to how each of these components of the meeting (announcements, shareholder proposals, and a question-and-answer session) should be structured so as to most closely replicate the in-person meeting experience.¹²¹ Employing practices such as those enumerated in the guidelines would address many of the common concerns relating to the virtual meeting format that investors raised following the 2020 annual shareholder meetings.¹²²

Reactions from proxy advisory firms and other institutional investors underscore the importance for companies holding virtual-only meetings to communicate their reasons for doing so.¹²³ The *Immediate Glass Lewis Guidelines Update on Virtual-Only Meetings Due to COVID-19 (Coronavirus)*, published on March 19, 2020, indicates that Glass Lewis intends to “generally refrain from recommending to vote against members of the governance committee on the basis of holding a virtual-only meeting, *provided that the company discloses, at minimum, its rationale for doing so.*”¹²⁴ Glass Lewis also states it would “note whether companies state their intention to resume holding in-person or hybrid meetings under normal circumstances.”¹²⁵ Similarly, the proxy advisory firm ISS published guidance on April 8, 2020, encouraging companies opting to hold virtual-only meetings to “disclose clearly the reason for their decision (i.e., that it is related to the COVID-19 pandemic) and to strive to provide shareholders with a meaningful opportunity” to participate.¹²⁶ Echoing Glass Lewis, ISS also suggests boards “commit to return to in-person or ‘hybrid’ meetings (or to put that matter to shareholders to decide) as soon as practicable.”¹²⁷ Other institutional investors, such as the New York City Comptroller, indicated that the fund “will not take action against boards holding virtual-only annual meetings due to the coronavirus that disclose their rationale and affirm their commitment to holding in-person meetings in the future.”¹²⁸ Whether proxy advisory firms and institutional investment managers continue to support virtual-only meetings post-2021 proxy season after the pandemic subsides remains to be seen.

While the prevalence of virtual shareholder meetings in 2020 revealed several areas for improvement for companies holding such meetings, the implementation of the guidelines enumerated above may assist companies in addressing

120. *See id.* at 15–17.

121. *See id.* at 15–17.

122. For further discussion of the recommendations set forth by the 2020 working group, see RUTGERS, *supra* note 54.

123. *See* INSTITUTIONAL S’HOLDER SERVS., *supra* note 93; Sharma, *supra* note 92.

124. *See* Sharma, *supra* note 92 (emphasis added).

125. *Id.*

126. *See* INSTITUTIONAL S’HOLDER SERVS., *supra* note 92.

127. *Id.*

128. *After the Market’s Worst Day in Decades, Where Do We Go from Here?*, N.Y. TIMES (Mar. 13, 2020), <https://www.nytimes.com/2020/03/13/business/dealbook/coronavirus-markets-stocks.html>.

the concerns of institutional investment managers and shareholders, which may lead to an improved shareholder response in the future.

CONCLUSION

Prior to 2020, the trend toward virtual-only meetings increased as companies made greater use of technology to engage with shareholders and facilitate access to annual meetings, while managing the costs of hosting an annual meeting by eschewing a physical component. As technology evolves to permit a more enhanced user experience, companies increasingly rely on it for shareholder participation. The year 2020 presented circumstances mandating adoption of the virtual-only annual meeting during pandemic-driven restrictions on in-person events. The experience of many companies may lead to a jump in continued adoption, and in parallel, continued institutional investor challenges to practices that do not appear to maximize similarity of the experience to in-person attendance.

