



Vinson & Elkins

Taking the Meeting Out of Annual Meetings:

Exploring Virtual Meeting Options in the Age of Coronavirus

Introduction

Before switching to a virtual or hybrid meeting, make sure it is permitted by:

- Your state of incorporation. Some states (including Delaware and Texas) allow virtual-only annual meetings; others (including New York) permit virtual only in combination with physical annual meetings; other states do not permit any form of virtual participation
- Your corporate governing documents (articles of incorporation or association, bylaws and board resolutions may require physical annual meetings)
- Any stock exchange on which your stock is listed (NYSE and Nasdaq permit VSMs)

As proxy season and the coronavirus pandemic collide over the next few months, travel restrictions, quarantines and health concerns are complicating many public companies' plans for their annual stockholder meetings. Many public companies that typically host annual meetings at a physical location are considering their options for switching to a virtual-only stockholder meeting ("VSM") or for adding a virtual component to the physical meeting. Other companies are planning a traditional physical annual meeting, while retaining the flexibility in their proxy statements and notices of meeting to switch to a VSM or hybrid meeting or to adjourn the meeting until a later date, if necessary. Some companies are postponing their annual meetings or considering postponement if circumstances do not improve before their scheduled meeting date. On March 13, 2020, the SEC released a statement encouraging companies to provide alternative means for stockholders to participate in the

annual meeting and granted relief from the SEC's physical mailing requirement for companies changing the date or location of the annual meeting due to COVID-19, although physical mailing may still be required under state law or company bylaws.

This article outlines the benefits and challenges of each of these options, summarizes some technical details regarding the VSM, hybrid and flex options, and offers some answers to frequently asked questions about VSMs.

We note that — much like the supply of toilet paper at your local grocery store — it is possible that the service providers that host virtual meetings may run out of capacity at some point. For that reason, for companies that are considering whether to hold a VSM or hybrid meeting or wish to have the option to switch at a later date, we recommend making a decision as soon as possible and, at a minimum, a month before the meeting is scheduled to take place.

Benefits

Challenges

Holding a VSM: *all parties and presenters participate remotely*

- No need to reassess or change venue last minute
- No additional filing or notice needed
- No travel required

- Less tech savvy stockholders, directors or others may have difficulty participating and voting; training may be required
- Traditionally a less-favored approach among investors, although this year appears to be an exception if stockholders have the same rights and opportunities to participate as they would in a physical meeting
- Additional logistical considerations and technology costs
- May not be permitted by state law or bylaws

Holding a hybrid meeting: *company hosts physical annual meeting with virtual feed; stockholders can attend, and presenters may present remotely or in person*

- More flexibility to make last minute decisions regarding location of presenters
- No additional filing or notice needed if virtual component is included in original notice
- Stockholders can participate via preferred medium

- Somebody must be present at physical meeting
- Cost and logistics of setting up both physical meeting and VSM
- May not be permitted by state law or bylaws

Holding a traditional meeting at a physical location: *plan for physical meeting and maintain flexibility for contingencies listed below; this may be the only option for companies that have already filed their proxy*

- Standard meeting preparations
- No extra costs or complications if COVID-19 subsides before meeting date
- Familiar for stockholders, directors and company

- Need to continually monitor situation and make a decision at a later date
- If the company decides to change to a VSM or hybrid meeting, second notice and supplemental proxy filing (and potentially physical mailing) may be required
- Coordination of multiple vendors may increase cost and require additional mailing

• **Planning to hold a physical meeting and retaining flexibility to switch to a VSM**

- Ability for all parties (including presenters) to participate remotely

- All of the challenges of holding a VSM, plus:
 - Potentially higher cost to switch to VSM last minute
 - Second notice and supplemental proxy filing required; physical mailing may be required

• **Planning to hold a physical meeting and retaining flexibility to switch to a hybrid meeting**

- Ability for parties to participate in preferred medium

- All of the challenges of holding a hybrid meeting, plus:
 - Potentially higher cost to add a virtual option last minute
 - May require second notice and supplemental proxy filing

• **Commencing the meeting at a physical location only to adjourn it to a later time/location**

- No need to set up virtual meeting (unless the adjourned meeting is held as a VSM)
- Can make a last minute decision and may be able to delay until COVID-19 subsides

- Costs and logistics of hosting annual meeting twice
- Additional filing and notice may be required for adjourned meeting
- Additional timing considerations for adjourned meeting

Key Practical and Legal Considerations of VSM, Hybrid and Flex Options

	Fully Virtual (VSM)	Hybrid VSM / Physical Meeting	Physical Meeting with Flexibility to Switch to VSM / Hybrid
Proxy Statement / Supplement	<ul style="list-style-type: none"> Initial proxy includes registration and participation details No supplement required 	<ul style="list-style-type: none"> Initial proxy includes registration and participation details for VSM and location of physical meeting Includes disclosure that some or all presenters may attend remotely No supplement required unless physical meeting cancelled (if company is considering canceling physical meeting, mention this in initial proxy) 	<ul style="list-style-type: none"> Initial proxy announces physical meeting and indicates potential to switch to VSM or hybrid meeting State when and how the switch to VSM or hybrid meeting would be announced If switched to VSM, proxy supplement to be filed by notice deadline (customarily, at least 10 days before the meeting, but check relevant state law and bylaws)
Voting Options	<ul style="list-style-type: none"> In advance by mail, by phone (if offered) or online During the meeting, online only 	<ul style="list-style-type: none"> In advance by mail, by phone (if offered) or online During the meeting, in person or online 	<ul style="list-style-type: none"> In advance by mail, by phone (if offered) or online (if offered) During the meeting, in person (unless switched to VSM) or online (if switched to VSM or hybrid)
Cost	<ul style="list-style-type: none"> No travel or venue costs Cost of VSM hosting Potential extra cost for investor education 	<ul style="list-style-type: none"> Travel and venue costs (may be reduced if directors, auditors or others participate remotely or fewer investors attend in person) Cost of VSM hosting Potential extra cost for investor education Proxy supplement prep and distribution (if the option to meet at a physical location is cancelled) 	<ul style="list-style-type: none"> Travel and venue costs for physical meeting Non-refundable costs for initial VSM set up <p>If switch to VSM or hybrid meeting:</p> <ul style="list-style-type: none"> Cost of VSM hosting; extra cost for last minute decision Proxy supplement and/or notice preparation and distribution (physical mailing may be required) Potential extra cost for investor education
Timeline	<ul style="list-style-type: none"> File and distribute proxy Work with VSM provider to set up virtual meeting, coordinate and train presenters, etc. Hold VSM 	<ul style="list-style-type: none"> File and distribute proxy Prepare for physical meeting / work with VSM provider to set up virtual meeting DECIDE whether to cancel the option to meet at a physical location before notice deadline IF THE OPTION TO MEET AT A PHYSICAL LOCATION IS CANCELLED, notify stockholders and file and distribute proxy supplement by notice deadline (See FAQ) DECIDE which presenters will be presenting remotely and set up lines with VSM provider Hold hybrid meeting 	<ul style="list-style-type: none"> File and distribute proxy Prepare for physical meeting / preliminary preparations for VSM with VSM provider DECIDE whether to switch to VSM or hybrid meeting at least 4-5 weeks prior to meeting (depending on VSM provider, state law and company's bylaws) NOTIFY stockholders of decision in a timely manner and provide new access numbers if necessary IF PHYSICAL MEETING IS CANCELLED, file and distribute proxy supplement by notice deadline (See FAQ) DECIDE which presenters will be presenting remotely and set up lines with VSM provider Hold physical, virtual or hybrid meeting
Presenters	<ul style="list-style-type: none"> All presenters remote Company presenters could present from one location if preferred Consider reducing number of presenters from traditional annual meeting scripts 	<ul style="list-style-type: none"> Options for some or all presenters to present remotely Flexibility to make last minute changes 	<ul style="list-style-type: none"> All presenters plan to present in person Option to present remotely if switched to VSM or hybrid May need ability for certain parties to participate remotely (e.g., auditors, tabulation agent, directors)

Frequently Asked Questions about Virtual Stockholder Meetings (VSMs):

What is the public perception of VSMs?

Public perception of VSMs is mixed. While the use of VSMs has increased significantly over the past ten years, they are still the exception rather than the rule. Critics are concerned that VSMs may limit stockholders' ability to participate in meetings and confront management and directors. Technology may also be a barrier for certain stockholders who are accustomed to attending stockholder meetings in person. Supporters highlight the benefits of greater accessibility and lower meeting costs. In light of the COVID-19 outbreak and the SEC's encouragement for companies to offer remote participation options, stockholders are likely to be more amenable to switching to a VSM or hybrid meeting this year, particularly if the proxy statement contains disclosure assuring stockholders that they will be afforded the same rights and opportunities to participate as they would at an in-person meeting and indicating the company's intent to resume physical annual meetings in the future.


How can stockholders participate in a VSM or online during a hybrid meeting?

State laws that permit virtual or hybrid annual meetings generally require companies to implement reasonable measures to provide stockholders the opportunity to participate in the meeting. In some cases, participation must include the ability for stockholders to communicate with other participants. VSM providers offer various options to enable stockholder participation during the meeting. These options may include submitting questions online prior to and during the meeting or providing dedicated phone lines for stockholders to call in and ask questions verbally. Talk to your VSM provider for available options based on your investor base and local state law for VSMs.

How can stockholders vote during a VSM or online during a hybrid meeting?

VSM providers offer simple ways for stockholders to submit their votes online using their control number. Votes can usually be submitted prior to or during the VSM. Talk to your VSM provider to review the voting platform stockholders will see when they log in to the VSM.





How are votes tabulated in a VSM or hybrid format?

If your VSM provider is also providing your distribution and tabulation services and acting as your inspector of elections, all votes can be consolidated and reported together in real time. Consolidating services with a single vendor, if feasible, will simplify the switch to VSM. However, if you are using a separate tabulation agent or proxy service, work with your VSM provider and your tabulation agent to coordinate consolidation of votes before and during the annual meeting. If your VSM provider is not acting as inspector of elections, coordinate with your VSM provider to set up appropriate access for your inspector of elections to observe online voting and review the final vote reconciliation before certification.

Do stockholders need to be tech geniuses to participate in a VSM?

VSM software varies among providers but is designed to be very user friendly. Typically, the only requirements are an internet connection and a standard media player. VSM providers may also offer an option for stockholders to dial in to the meeting from their phones. Investors who have participated in quarterly earnings calls may find the experience to be quite familiar other than the more robust registration process. In order for participants in a VSM to be able to vote or to be considered present at the meeting for quorum purposes, the VSM provider must verify their identity. Stockholders can register for a VSM online by providing their control number and certain personal information to verify their identity. Some VSM providers require stockholders to register several days in advance to participate in the VSM. Check with your VSM provider for more details regarding required technology and the registration process.

Do directors need to be tech geniuses to participate in a virtual annual meeting?

No. Depending on the anticipated level of director participation in the annual meeting, directors may be given a standard stockholder login to access the meeting or a dedicated dial in to present or respond to questions. Talk to your VSM provider about your needs and how you wish the dedicated lines to be moderated.

Can stockholder proponents present at a VSM? Can their access be limited?

If a stockholder proponent will be presenting at the annual meeting, the VSM provider can set up a dedicated phone line and open the line only when the stockholder proponent is speaking. Talk to your VSM provider about any specific requirements or restrictions.

Can non-stockholders access the VSM?

VSM providers may offer options for guests to register for the meeting without a control number. Guests would not be considered present at the meeting or permitted to vote in the proceedings. Talk to your VSM provider about including or blocking this option.

What information about the VSM do we need to include in our proxy and notice to stockholders?

Besides including detailed instructions on how to access the VSM platform, companies should describe procedures for stockholder participation and voting during the VSM to assure stockholders that they will have the same participation rights as they would in a physical meeting. Providing rules of conduct for the VSM in advance of the meeting is also considered a best practice and can help stockholders participate in the meeting. Check state law for any additional disclosure requirements for notice of a VSM. Your VSM provider may have language you can adapt for your proxy statement and notice.

When do we need to decide whether to switch to a VSM?

If you have not already filed your proxy statement, deciding to switch to a VSM or hybrid meeting prior to filing your proxy could result in lower costs and less disruption than deciding to switch later in the process.

However, if you have already filed your proxy statement announcing a physical meeting or if you prefer to keep your options open without switching to a VSM or hybrid meeting now, the timing of your decision will be governed by relevant notice provisions and the deadlines set by your VSM provider. Check state laws and company bylaws to

identify the deadline to provide notice of the date, time and location of the annual stockholder meeting. In most cases this will be at least 10 days prior to the meeting, but it may be longer. Keep in mind that if you are switching from a physical meeting to a virtual-only meeting, stockholders may appreciate additional notice to adjust travel plans and register for the VSM if necessary. In addition to any notice requirements set by state law or bylaws, if your VSM provider did not provide distribution and tabulation services for all shareholders in the initial distribution, an additional mailing with new control numbers may be required for a VSM or hybrid meeting. Your VSM provider will also need sufficient time to set up the meeting. Talk to your VSM provider to determine the exact time required, but providers will likely require up to 4 – 5 weeks to set up the meeting. If you are considering this option, talk to your VSM provider early to reserve your date and discuss options and deadlines. Even if you wish to plan for a physical meeting with the flexibility to later transition to a VSM or hybrid meeting, setting up your VSM vendor and other proxy services providers prior to filing your proxy is strongly recommended to avoid multiple mailings or trying to switch or coordinate service providers at the last minute.

If you have already passed these deadlines and a physical meeting has become impracticable, you may be able to adjourn the meeting and hold a physical meeting or VSM or hybrid meeting on a later date. Check state law and bylaws to determine applicable adjournment rules. If possible, provide notice to stockholders in advance of your plan to adjourn the meeting and the new date for the physical meeting or VSM or hybrid meeting. Also comply with SEC requirements if you advance or delay your annual meeting, including those in Rule 14a-5(f) (substituting Item 8.01 for the reference to Item 5 in that rule).

Under what circumstances would we need to file a proxy supplement?

The proxy statement for a meeting of stockholders must identify the date, time and location of the meeting. If one of these changes, a proxy supplement would need to be filed and distributed to stockholders within the relevant notice period. Adding a virtual component to a previously announced physical meeting would not necessarily trigger the requirement to file a proxy supplement as long as the original date, time and location have not changed. However, state law or company governing documents may include additional notice requirements if a virtual option is added, even if the physical venue is not changed.

If we change from a physical meeting to a virtual or hybrid meeting, do we need to redistribute proxy materials by mail?

On March 13, 2020, the SEC provided relief for companies changing the date and/or location of a previously announced physical meeting, including switching to a VSM or adding a virtual component to the physical meeting. The SEC announced that companies may change the date or location or the use of virtual technology by making the appropriate filings with the SEC but would not be required to physically mail revised proxy materials to stockholders. For more information, see the SEC's full release [here](#).

Note that the SEC relief applies only to SEC requirements for notice and mailing. It did not change notice deadlines or procedures under state law or company bylaws, so physical mailing of a supplement or notice may still be required.

Furthermore, if your VSM provider was not involved with the distribution of your initial proxy materials, a subsequent mailing may be required to provide shareholders with the appropriate control number to access and vote at the virtual meeting.

Do we need to set up a formal virtual meeting with a VSM provider? Can't we just webcast the physical meeting to stockholders?

Providing a video or audio feed of the annual meeting to stockholders is certainly an option to allow stockholders who are unable to attend in person to view or listen to the meeting remotely. This solution may be sufficient to allow directors, auditors and other third parties to participate in the meeting remotely or to allow stockholders to listen in if a quorum will be met by the individuals attending the meeting in person. However, for stockholders to be considered legally present at the meeting for quorum purposes or to be able to vote remotely during the meeting, their identity must be verified and there must be a way for them to participate in the meeting in keeping with state law. VSM providers offer the technology to verify the identity of stockholders attending remotely and to allow them to participate in and to vote during the meeting.

For Any Coronavirus-Related Legal Questions

Please contact a member of **V&E's Coronavirus Taskforce** or visit our **Coronavirus: Preparation & Response** site for a list of contacts and additional resources we hope will be helpful.

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