

Public Company Virtual-Only Annual Meetings

By Lisa A. Fontenot*

Public companies traditionally hold annual shareholder meetings using a formal in-person format. Some companies have more recently supplemented the meeting with audio or video streaming and are now adding an electronic component to a physical meeting to allow for remote participation, commonly referred to as a “hybrid meeting.” A relatively small but fast-growing number of companies are holding their annual shareholder meetings on an electronic-only basis with no physical meeting, known as a “virtual-only meeting.” This article discusses the legal landscape for virtual-only meetings, briefly reviews the history of the practice, and explores the controversy they present with certain institutional investors and activists. Its objective is to provide an initial roadmap of legal and practical considerations for companies considering virtual-only shareholders meetings.

INTRODUCTION

Companies have widely embraced use of technological advances to communicate with their shareholders. Many companies now regularly use social media to communicate corporate news and deliver annual meeting materials to shareholders by notice and access systems, with “electronic delivery” in lieu of mailing printed hard copies. In recent years, an increasing number of companies have chosen to hold a “virtual-only” annual shareholder meeting—that is, a meeting solely with remote participation without a corresponding in-person meeting. 2001 witnessed the first virtual-only shareholder meeting held by Inforte Corporation, following Delaware’s 2000 amendment to its General Corporation Law permitting such meetings.¹ Though virtual meetings represent a small minority of total annual shareholder meetings, one provider of online shareholder meeting technology, Broadridge Financial Solutions, Inc. (“Broadridge”), has reported a dramatic increase in the prevalence of virtual-only meetings, going from hosting just one virtual-only meeting in 2009, to 53 meetings in 2014, and then in-

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1. Act of June 23, 2000, ch. 343, § 7, 72 Del. Laws 619, 619–20 (to be codified at DEL. CODE ANN. tit. 8, § 211(a)(2)); see also *Virtual Shareholder Meetings*, THECORPORATECOUNSEL.NET, <http://www.thecorporatecounsel.net/member/LawFaq/ElectronicStockholder.htm> (last visited Sept. 26, 2017) (subscription required) [hereinafter *Virtual Shareholder Meetings*].

creasing to 90 and 155 meetings in 2015 and 2016, respectively.² This electronic format has been particularly popular with recently publicly listed companies and technology companies.³ That said, companies holding virtual meetings in 2016 and 2017 reflected diversity in their size, market capitalization, historical shareholder meeting attendance, and longevity as a public company, and included companies such as Intel Corp., HP Inc., Hewlett Packard Enterprise Co., Fitbit Inc., Yelp Inc., NVIDIA Corp., Sprint Corp., Lululemon Athletica Inc., Graco Inc., GoPro Inc., Rambus Inc., El Pollo Loco Inc., and Herman Miller Inc., with several other established, large companies joining these ranks in 2017, including Ford Motor Co., Alaska Airlines, Duke Energy Corp., and ConocoPhillips Corp.⁴

Virtual meetings may offer meaningful benefits to companies and shareholders, chief amongst them broader accessibility in an increasingly globalized corporate world, as well as potentially lower execution costs compared to a physical meeting. They can increase shareholder participation at an annual event that can often be a sparsely attended, *pro forma* exercise for many companies. Electronic meetings also eliminate travel time and avoid the expense of participant travel and the need to locate and provide a secure physical venue. But the practice is not without its detractors. Critics of virtual-only shareholder meetings argue that meetings involving solely remote participation—which may be conducted by telephone conference call, an online website, or a combination of both—fail to provide a quality of interaction comparable to that the face-to-face experience provided by a physical meeting. They claim that this additional degree of separation can create a barrier that makes it more difficult for shareholders to meaningfully interact with and pose questions to management.⁵

This article provides an overview of benefits and challenges of virtual-only shareholder meetings to explain the recent trend of adoption, which has accelerated despite some shareholder backlash, and to assist companies in evaluating whether the practice is right for them. Part I discusses the legal landscape, including surveying state and federal laws and stock exchange provisions relevant

2. See BROADRIDGE FIN. SOLUTIONS, INC., VIRTUAL SHAREHOLDER MEETINGS: RECENT FACTS AND FIGURES (2017), <https://custom.cvent.com/61EC11F6570E419198885A3C94061ADF/files/event/1C403FD9314146F7A42C8A35FE9D3207/021119ad0c6b4f238da03f21a8d937c0.pdf> [hereinafter BROADRIDGE, VIRTUAL SHAREHOLDER MEETINGS]; see also Tom Braithwaite, *US Companies Embrace Virtual Annual Meetings*, FIN. TIMES (Mar. 11, 2016), <https://www.ft.com/content/874879c0-e664-11e5-bc31-138df2ae9ee6> (subscription required); Patrick Kennedy, *More Companies Embrace Virtual Annual Shareholder Meetings*, STAR TRIB. (Mar. 9, 2017), <https://phys.org/news/2017-03-companies-embrace-virtual-annual-shareholder.html>; Robert Steyer, *NYC Comptroller Petitions Against Corporate "Virtual-Only" Annual Meetings*, PENSIONS & INVS. (Apr. 3, 2017, 4:00 PM), <http://www.pionline.com/article/20170403/ONLINE/170409980/nyc-comptroller-petitions-against-corporate-virtual-only-annual-meetings>.

3. Lisa Fontenot & Linda Dang, *The Pros and Cons of Virtual-Only Shareholder Meetings*, LAW360 (Nov. 29, 2016, 12:56 PM EST), <https://www.law360.com/articles/866760/the-pros-and-cons-of-virtual-only-shareholder-meetings>.

4. *Id.*; Gretchen Morgenson, *Meet the Shareholders? Not at These Shareholder Meetings*, N.Y. TIMES (Mar. 31, 2017), <https://nyti.ms/2nlGDi8>; see also Keith Naughton, *Ford's Annual Meeting Is Virtual, But Its Troubles Are Real*, BLOOMBERG TECH. (May 10, 2017), <https://www.bloomberg.com/news/articles/2017-05-11/ford-s-annual-meeting-is-virtual-but-its-troubles-are-real>.

5. See Steyer, *supra* note 2.

to virtual meetings. Part II sets out a brief history of virtual platform adoption, from early concerns to recent technological developments. Part III discusses potential benefits and detriments of virtual meetings, presents institutional investor-developed guidelines for best practices for such meetings, and addresses considerations regarding initial introduction and implementation of virtual meetings in companies' shareholder engagement activities.

I. LEGAL LANDSCAPE

A. STATE LAW

Approximately half of the U.S. states, including Delaware—the state in which most U.S. public companies are incorporated—have laws allowing for virtual-only meetings.⁶ However, some of these states mandate stringent conditions that make holding a virtual meeting impracticable. For example, California permits virtual meetings but only with the consent of each shareholder participating remotely—a standard that is too high a bar to implementation in practice.⁷ Sixteen states and the District of Columbia expressly prohibit virtual meetings, while ten states allow only “hybrid meetings” that still require a physical location for the shareholder meeting, even if remote participation is also permitted.⁸

In 2000, the Delaware legislature amended section 211 of the Delaware General Corporation Law to expressly allow companies to hold virtual-only and hybrid shareholder meetings.⁹ Under section 211, unless limited by the company's certificate of incorporation or bylaws, a board of directors may determine the place of a shareholder meeting or, in its sole discretion, determine that the meeting will be held virtually, meaning solely by means of remote communication.¹⁰ Section 211 provides that, with board authorization and subject to applicable procedures, shareholders can use the Internet or another form of “remote communication” to participate, be deemed present, and vote at an annual meeting contingent upon three conditions being satisfied:

- (1) the company implements reasonable measures to verify that each person deemed present and permitted to vote at the meeting by means of remote communication is a shareholder or proxyholder;
- (2) the company implements reasonable measures to provide shareholders and proxyholders a reasonable opportunity to participate and to vote in the meeting, in-

6. See, e.g., DEL. CODE ANN. tit. 8, § 211(a)(2) (West, Westlaw through ch. 160 of 81 Del. Laws); see also BROADRIDGE, VIRTUAL SHAREHOLDER MEETINGS, *supra* note 2, at 2.

7. CAL. CORP. CODE §§ 20, 600(a), 600(e) (West, Westlaw through ch. 309 of 2017–2018 Leg. Sess.). Similarly, Maryland law provides that a place for an in-person meeting of the shareholders is mandatory if so requested by any shareholder, meaning any virtual-only shareholder meeting can be vetoed by any shareholder. See MD. CODE ANN., CORPS. & ASS'NS § 2-503(b)(2) (West, Westlaw through 2017 Leg. Sess.).

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

9. Act of June 23, 2000, ch. 343, § 7, 72 Del. Laws 619, 619–20 (to be codified at DEL. CODE ANN. tit. 8, § 211(a)(2)).

10. DEL. CODE ANN. tit. 8, § 211 (West, Westlaw through ch. 160 of 81 Del. Laws); see also *infra* text accompanying note 11 for further discussion of Delaware's legal requirements.

cluding the ability to read or hear the meeting proceedings on a substantially concurrent basis; and

(3) the corporation maintains a record of any votes or other action taken remotely.¹¹

By contrast, as of June 2017, the laws of New York, among other states, do not allow companies incorporated in that state to hold either virtual-only or hybrid meetings.¹² On the whole, however, many states are moving toward acceptance of the use of some form of virtual technology at shareholder meetings in lieu of traditional in-person communications.¹³ For instance, in 2017, the state of Virginia adopted amendments in 2017 clarifying its laws to allow hybrid or virtual meetings of shareholders.¹⁴

After confirming that a virtual meeting is permitted under the laws of the state in which it is incorporated, a company should note any specific statutory requirements for virtual meetings. For example, most states generally require companies holding virtual-only meetings to meet certain requirements, including permitting participating shareholders to vote and ask questions during the meeting, to see and hear the proceedings as they occur, to be able to have their commentary heard by other participants, and to make its shareholder list electronically available for examination during the meeting.¹⁵

B. FEDERAL LAW

Federal securities laws largely do not speak to the conduct of annual shareholder meetings themselves (outside of the proxy solicitation and disclosure rules), because the mechanics of shareholder meetings are generally regulated by state law. The U.S. Securities and Exchange Commission (“SEC”) does, however, have the authority to determine whether a company may or may not exclude shareholder proposals from presentation in the company’s proxy materials and consideration at the company’s shareholder meeting.¹⁶ There have been a small number of shareholder proposals regarding the question of the annual shareholder meeting location. In October 2016, well-known shareholder activist John Chevedden and financial policy advocate Barlett Naylor submitted one such proposal to HP Inc., in which they sought a shareholder vote on the adoption of a corporate governance policy that would have restored in-person annual

11. DEL. CODE ANN. tit. 8, § 211.

12. N.Y. BUS. CORP. LAW §§ 602(a), 609 (McKinney, Westlaw through ch. 331 of 2017 Leg. Sess.); see also BEST PRACTICES WORKING GRP. FOR ONLINE S'HOLDER PARTICIPATION IN ANNUAL MEETINGS, GUIDELINES FOR PROTECTING AND ENHANCING ONLINE SHAREHOLDER PARTICIPATION IN ANNUAL MEETINGS 4 (June 2012) [hereinafter BEST PRACTICES], http://www.calstrs.com/CorporateGovernance/shareholder_participation_annual_meetings.pdf.

13. See BEST PRACTICES, *supra* note 12, at 4 (noting that thirty-three states now permit virtual-only or hybrid meetings of shareholders as of its publication).

14. VA. CODE ANN. §§ 13.1-655(A)(D), 13.1-660.2(C), 13.1-661 (West, Westlaw through 2017 Leg. Sess.).

15. See BEST PRACTICES, *supra* note 12, at 4–5.

16. See 17 C.F.R. § 240.14a-8 (2017).

meetings and required publicizing this policy to investors.¹⁷ In December 2016, the SEC granted no-action relief to HP Inc., stating that the SEC would not recommend enforcement action if the company omitted the shareholder proposal.¹⁸ The SEC allowed exclusion of the proposal under Rule 14a-8(i)(7) on the ground that the decision whether to hold in-person annual meetings is related to the company's "ordinary business operations."¹⁹ This reaffirms the SEC's position set forth on March 7, 2002, in a letter regarding EMC Corp., wherein the SEC concurred in the exclusion of a shareholder proposal requesting adoption of a policy affirming the continuation of in-person annual meetings on the ground that the proposal "relat[ed] to EMC's ordinary business operations (i.e., the determination whether to continue to hold annual meetings in-person)."²⁰ The SEC's actions reflect its view that the decision of whether to go virtual rests with a company's board of directors applying its business judgment. For companies considering holding virtual-only annual meetings, this SEC position provides relief from the concern that a company may be required to put such decisions to its shareholders for consideration. Although companies are well served to understand the views of key shareholders as to the virtual meeting format, they are not obligated under Rule 14a-8 to submit a proposal for a shareholder vote on the issue.

C. STOCK EXCHANGES

While stock exchanges like the New York Stock Exchange and NASDAQ require publicly listed companies to hold annual meetings of shareholders, they do not proscribe the location of the meetings or whether they may be held virtually. Notably, in its 2012 Frequently Asked Questions (FAQ) database, NASDAQ stated that it "[permits] the use of webcasts instead of, or in addition to, a physical meeting," provided that such webcasts are "permissible under the relevant state law" and that "shareholders have the opportunity to ask questions of management."²¹

D. CORPORATE GOVERNING INSTRUMENTS

In addition to the relevant state corporation laws, a company interested in implementing a virtual-only or hybrid meeting should also confirm whether its own governing documents permit such meetings, and if so, whether there are

17. Letter from John Chevedden, S'holder, to Kim Rivera, Corporate Sec'y, HP Inc. (Oct. 17, 2016), <https://www.sec.gov/Archives/edgar/vpr/2016/20160025.pdf>.

18. HP Inc., SEC No-Action Letter, 2016 WL 6819133, at *1 (Dec. 28, 2016).

19. *Id.*; see also Lori Zyskowski et al., *SEC Staff Grants No-Action Request Concurring with Exclusion of Shareholder Proposal on Virtual-Only Annual Meetings*, SEC. REG. & CORP. GOVERNANCE MONITOR (Jan. 4, 2017), <http://securitiesregulationmonitor.com/Lists/Posts/Post.aspx?ID=283>.

20. EMC Corp., SEC No-Action Letter, 2002 WL 523421, at *1 (Mar. 7, 2002); see also Zyskowski et al., *supra* note 19.

21. *Virtual Shareholder Meetings*, *supra* note 1; see also *Reference Library, FAQ Identification No. 84*, NASDAQ LISTING CTR. (July 31, 2012), https://listingcenter.nasdaq.com/Material_Search.aspx?materials=84&mc=LQ&criteria=2.

any special conditions applicable to such meetings. For example, company bylaws may state a physical location where annual meetings are to be held and, thus, would need to be amended to allow for virtual meetings.

It is worth noting that Delaware's General Corporation Law does not require a certificate of incorporation or bylaw provision that expressly permits virtual annual shareholder meetings.²² Rather, in the absence of specific language about remote meetings, a bylaw provision that simply allows boards to choose the meeting location at their discretion is sufficient to permit a company to use remote communication for shareholder meetings, provided the bylaws do not require that the annual meeting be held at a physical location.²³ However, many companies have nonetheless chosen to amend their bylaws to specifically contemplate annual meetings held via remote communication, because the bylaws may be ambiguous and having specific authorizing language makes it easier to address any questions as to the board's authority to make this determination.²⁴ A company considering this action should complete the amendment prior to the record date of the next annual meeting.

II. GROWTH IN THE FACE OF CHALLENGES

Since Delaware law was amended to permit virtual meetings, companies attempting to implement virtual meetings have nonetheless confronted a variety of challenges, from shareholder criticism to electronic communications technology failures. Many early adopters of virtual-only and hybrid meetings were technology companies. As early as 2003, Siebel Systems initiated plans to implement a virtual meeting, but changed course in the face of criticism from both shareholders and advocacy groups.²⁵ The meeting involved contentious issues, and shareholders expressed their concern that the remote meeting served as an attempt to prevent shareholders from airing their opinions in full.²⁶ Similarly, Intel also explored the possibility of going virtual-only following its first hybrid meeting in 2009, but eventually opted to use a supplemental webcast of its physical meeting.²⁷ In the last couple of years, however, Intel has successfully implemented virtual-only meetings.²⁸ Symantec Corp. also held its first virtual-only shareholder meeting in 2010, but moved to a hybrid format the following

22. See generally DEL. CODE ANN. tit. 8, § 211 (West, Westlaw through ch. 160 of 81 Del. Laws).

23. See *supra* text accompanying note 10.

24. See *infra* text accompanying note 31.

25. Broc Romanek, *The Return of Virtual-Only Shareholder Meetings? Herman Miller's Third Year in a Row*, THECORPORATECOUNSEL.NET (Sept. 10, 2009), <https://www.thecorporatecounsel.net/blog/2009/09/in-fact-the-string-of.html>; Lisa M. Fairfax, *Virtual Shareholder Meeting Reconsidered*, 40 SETON HALL L. REV. 1367, 1393 (2010).

26. Fairfax, *supra* note 25, at 1393.

27. *Virtual Shareholder Meetings*, *supra* note 1; Fairfax, *supra* note 25, at 1393.

28. Compare Intel Corp., Proxy Statement—Notice of 2016 Annual Stockholders' Meeting 3 (May 19, 2016), https://s21.q4cdn.com/600692695/files/doc_financials/2015/annual/Final_2016_Proxy_Statement_web.pdf, with Intel Corp., Proxy Statement—Notice of 2017 Annual Virtual Stockholders' Meeting 3 (May 18, 2017), https://s21.q4cdn.com/600692695/files/doc_financials/2017/2017-Proxy-Statement.pdf.

year after garnering negative feedback.²⁹ Specifically, Symantec was unable to identify all of the attending directors present in real time as its webcast platform did not provide it with a list of participants, and an additional technical error kept the company from receiving all of the questions submitted during the meeting.³⁰ Some companies, such as PNC Financial Services Group, Inc. and The Bank of New York Mellon Corp., have amended their governing documents to permit a virtual meeting, but so far refrained from actually holding a virtual meeting in the wake of shareholder resistance.³¹

Despite such challenges, the number of virtual-only and hybrid meetings continues to grow at an accelerated pace. As discussed above, several major public companies held virtual-only meetings in 2016, including Comcast Corporation, GoPro, Inc., PayPal Holdings, Inc., Vonage Holdings Corp., and SB Financial Group, Inc.,³² and more major companies joined these ranks in 2017.³³ More and more companies are considering future adoption.

At least part of the increase in adoption of virtual shareholder meetings can be attributed to ongoing improvements in webcasting and other virtual meeting technology. Since the early 2000s, online communication has evolved to more closely resemble physical interaction, while also providing additional benefits in real time. There is no single option for using technology to hold a virtual meeting. A company could opt to use an audio link or video streaming. Some meeting platform providers provide supplemental services in addition to their virtual meeting platforms, such as Broadridge's "Shareholder Forum" feature, which complements a virtual meeting by allowing shareholders to cast votes, submit questions, and answer surveys in an interactive online forum before the meeting.³⁴ During the meeting, the "Virtual Shareholder Meeting" service provides dashboard tools displaying key statistics to meeting administrators, including votes, shares, and attendance totals.³⁵ The system also allows meeting organizers to control the broadcasts and voting times, as well as automatically create pre- and post-meeting reports that summarize attendees and their votes.³⁶ Some companies have also chosen to broadcast full video of their meetings, rather than the predom-

29. Jena McGregor, *More Companies Are Going Virtual for Their Annual Shareholder Meetings*, WASH. POST (Mar. 17, 2015), <https://www.washingtonpost.com/news/on-leadership/wp/2015/03/17/more-companies-are-going-virtual-for-their-annual-shareholder-meetings/>.

30. Gary Lutin, *Syantec Chairman's Report of Pioneering Experience*, SHAREHOLDER F. (Oct. 28, 2010), http://www.shareholderforum.com/e-mtg/Program/20101028_report.htm; Letter from John W. Thompson, Chairman of the Bd., Symantec Corp., to Gary Lutin, S'holder Forum (Oct. 27, 2010), http://www.shareholderforum.com/e-mtg/Program/20101027_Syantec-letter.pdf.

31. Colin Diamond & Irina Yevmenenko, *Certain Considerations Relating to Virtual Shareholder Meetings*, WHITE & CASE ALERT (Mar. 28, 2017), <https://www.whitecase.com/publications/alert/certain-considerations-relating-virtual-shareholder-meetings>.

32. *Id.*

33. These companies include Ford Motor Co., Alaska Airlines, and ConocoPhillips Corp., among others. See *supra* text accompanying note 4.

34. *Hold Annual Shareholder Meetings Online*, BROADRIDGE, <http://www.broadridge.com/corporate-issuer-solutions/annual-meeting/annual-meeting/virtual-shareholder-meeting> (last visited Sept. 25, 2017) [hereinafter *Hold Annual Shareholder Meetings Online*].

35. *Id.*

36. *Id.*

inantly used audio-only format in another effort to bridge the virtual–physical divide.³⁷ These and other options illustrate how the potential of virtual shareholder meetings alternatives has broadened over the course of the last decade. Though electronic communications technology has yet to perfectly mimic the full array of physical interaction, it continues to move closer to this result.

III. CONSIDERATIONS FOR A VIRTUAL-ONLY MEETING

A. BENEFITS OF A VIRTUAL-ONLY MEETING

Virtual meeting technology usage also continues to increase due to the unique advantages it offers companies and their shareholders. Perhaps most importantly, virtual-only meetings may increase shareholder participation compared to physical-only meetings because of improved access. Shareholders who cannot attend in person can attend virtually without incurring the costs in time and expense of travel to a physical location. For example, though Symantec faced shareholder backlash when it initiated a virtual-only meeting in 2010, the company also reported an increase in attendance to thirty-one shareholders, which was an increase from an average of only a “handful of people” over the prior decade.³⁸ Similarly, whereas just three shareholders attended Broadridge’s 2008 physical shareholder meeting, that number increased to 186 shareholders when it held its first virtual meeting the following year.³⁹ With more than a thousand annual shareholder meetings held within a few weeks of each other during the spring proxy season, removing the physical attendance requirement frees shareholders to participate in more virtual meetings than they would be able to attend in person. This benefit is particularly marked for directors and investors who participate in multiple companies, whose meetings may be staged many hundreds of miles from one another. It is also significant for retail investors, who own in aggregate approximately 33 percent of all shares of public companies,⁴⁰ but whose attendance at shareholder meetings generally represents only approximately 28 percent of total retail shares held.⁴¹ While institutional investors may have other opportunities throughout the year to speak to company management as a result of corporate shareholder engagement activities directed at institutional investors, the annual meeting is often the only meaningful opportunity for retail investors to address management directly. By making the annual meeting more accessible for retail investors, management could increase participation in the annual

37. Diamond & Yevmenenko, *supra* note 31. Broadridge reports hosting six live video virtual-only meetings in 2016. See BROADRIDGE, VIRTUAL SHAREHOLDER MEETINGS, *supra* note 2, at 1.

38. Thompson, *supra* note 30; see also Broc Romanek, *Virtual Annual Meetings: On the Rise?*, THECORPORATECOUNSEL.NET (Apr. 18, 2016), <https://www.thecorporatecounsel.net/member/blogs/proxy/2016/04/virtual-annual-meetings-on-the-rise.html> (subscription required).

39. Richard Daly, *Unless You're Warren Buffett, Your Next Shareholder Meeting Should Be Online*, FORBES (Apr. 28, 2016, 7:00 AM), <http://www.forbes.com/sites/richdaly/2016/04/28/unless-youre-warren-buffett-your-next-shareholder-meeting-should-be-online/>.

40. *Id.*

41. *Id.*

meeting and voting during proxy season, further democratizing corporate shareholder engagement.

Virtual meetings can also encourage participation during the meeting itself. Some shareholders may feel empowered by the ability to ask questions through a virtual platform. Virtual meetings may also streamline the overall question and answer process, for example, by giving management advance notice of questions so that they can formulate thoughtful responses and better organize questions by topic, which could potentially free time for more questions and responses. Companies can choose among different approaches to handling shareholder questions, and virtual meeting platforms allow the companies to then control the determination of those participants who may submit questions.

Webcast meetings may arguably even work to increase corporate transparency on the whole. Pfizer Inc., S&T Bancorp Inc., AmeriServ Financial Inc., and Johnson & Johnson, for example, have hosted live webcasts of their annual shareholder meetings that are open to both shareholders as well as interested members of the public.⁴² A substantial majority of companies holding a virtual meeting in 2016 also allowed non-shareholder attendees.⁴³ Just as virtual meetings are easier, practically and logistically, for shareholders to attend, so do they also facilitate greater public awareness—should the company so choose.

Then there are the technological benefits of virtual meetings, which include increased efficiency and cost savings. Technological improvements and the expanded service offerings of virtual meeting platform providers can provide enhanced features such as attendance tracking, identity verification, automatic post-meeting summaries, and an audio or webcast record that the company can make accessible even after the conclusion of the meeting. Further, a virtual meeting avoids the time, effort, and expense of organizing a physical meeting, including reserving a meeting venue and arranging for beverages and food, décor, materials or branded “give aways,” security, and possibly even medical personnel. Virtual meetings can also trim travel time and costs for management and directors and be easier to schedule amidst competing time demands. A virtual meeting may be less disruptive to the company’s routine and thus its overall productivity, allowing management and employees involved in the production of the meeting to return to work more quickly.

42. See Press Release, S&T Bancorp, Inc., S&T Bancorp, Inc. to Webcast 2017 Annual Shareholder Meeting (May 5, 2017), <http://www.prnewswire.com/news-releases/st-bancorp-inc-to-webcast-2017-annual-shareholder-meeting-300452396.html>; Press Release, AmeriServe Fin., Inc., AmeriServ Financial, Inc. 2017 Annual Shareholder Meeting: Live Webcast Today (Apr. 25, 2017), <http://www.prnewswire.com/news-releases/ameriserv-financial-inc-2017-annual-shareholder-meeting-live-webcast-today-300443615.html>; Press Release, Pfizer Inc., Pfizer Invites Public to Listen to Webcast of April 27 Annual Meeting of Shareholders (Apr. 20, 2017), <http://press.pfizer.com/press-release/pfizer-invites-public-listen-webcast-april-27-annual-meeting-shareholders>; Press Release, Johnson & Johnson, Johnson & Johnson to Webcast Annual Meeting of Shareholders (Mar. 27, 2015), <https://www.jnj.com/media-center/press-releases/johnson-johnson-to-webcast-annual-meeting-of-shareholders-2015>.

43. BROADRIDGE, VIRTUAL SHAREHOLDER MEETINGS, *supra* note 2, at 2.

For some companies, the use of technology for the conduct of its shareholder meetings would also promote the technology business or brand of the company by projecting a tech-savvy image. Finally, holding the annual meeting virtually can be consistent with corporate efforts to reduce environmental impact, by cutting transport and related carbon emissions, paper materials, and other physical impact necessarily a part of a physical meeting.

The security advantages that virtual communications bring also are considerable. In the current atmosphere where physical safety can be a significant concern, the virtual-only nature of the meeting avoids the need for on-site security as compared to a live meeting. Additionally, participants can be credentialed and verified as eligible to attend upon logging in to the meeting. Meeting disruption may also be a consideration. A virtual meeting may invite additional—and potentially more challenging—questioning from participants empowered by relative anonymity provided by not being physically visible but may also allow for a smoother meeting process. Some physical shareholder meetings have been beset by protests both within and outside the premises.⁴⁴ Companies should consider the relative impact on shareholder activity that is likely when a meeting is held virtually versus in person.

B. CHALLENGES POSED BY VIRTUAL MEETINGS

Challenges Posed by Institutional Investors and Governance Groups

Despite these potential advantages, some institutional investors and corporate governance groups have voiced their reluctance to move to virtual-only shareholder meetings, citing perceived adverse effects on accountability and transparency of the company's management. The Council of Institutional Investors ("CII") and California Public Employees' Retirement System ("CalPERS"), for example, have been two vocal opponents to virtual meetings.⁴⁵ Both CalPERS and CII have stated that companies "should hold shareowner meetings by remote communication (so-called "virtual" meetings) only as a supplement to traditional in-person shareowner meetings, not as a substitute" and that "a virtual option, if used, should facilitate the opportunity for remote attendees to participate in the meeting to the same degree as in-person attendees."⁴⁶ California State Teachers' Retirement System ("CalSTRS") has also expressed a preference for a hybrid

44. See, e.g., Samantha Bomkamp, *McDonald's Shareholder Meeting Brings Roar of Protests but Few Surprises*, CHI. TRIB. (May 24, 2017), <http://www.chicagotribune.com/business/ct-mcdonalds-annual-meeting-0525-biz-20170524-story.html>; Ken Sweet, *Wells Fargo Faces Shareholders, Protesters at Annual Meeting*, U.S. NEWS & WORLD REP. (Apr. 25, 2017, 3:50 PM), <https://www.usnews.com/news/best-states/florida/articles/2017-04-25/wells-fargo-to-face-irritated-shareholders-at-annual-meeting>.

45. Braithwaite, *supra* note 2.

46. See COUNCIL OF INSTITUTIONAL INVESTORS, CORPORATE GOVERNANCE POLICIES 11 (Apr. 1, 2015), http://www.cii.org/files/committees/policies/2015/04_01_15_corp_gov_policies.pdf; CALPERS, GLOBAL GOVERNANCE PRINCIPLES 63 (Mar. 16, 2015), <https://www.calpers.ca.gov/docs/forms-publications/global-principles-corporate-governance.pdf>.

meeting format, though it acknowledged that “the technology is moving.”⁴⁷ Many other major institutional investors have yet to take a public stance in support of or in opposition to virtual meetings.

One central criticism raised against virtual meetings by institutional investors is that the elimination of shareholders’ abilities to meet with directors and express their concerns face-to-face reduces the effectiveness of their participation. The move online, they argue, lacks the personal connection that in-person meetings possess, including physical interaction, spontaneity, and other intangible variables.⁴⁸ As Professor Steven Davidoff Solomon stated, “The in-person shareholders’ meeting is the sole opportunity all shareholders have to meet and talk with management. . . . They also have the opportunity to ask questions that put management on the spot. These questions can directly influence what management thinks and says” and “forc[e] management to confront its entrenched biases.”⁴⁹

Not all shareholders view virtual-only meetings with such skepticism, however. Ed Durkin, director of corporate affairs at the United Brotherhood of Carpenters Pension Fund, has acknowledged that previously, “the annual meeting was critically important because it was the only time you really put your eyes on an executive, or certainly the board,” but now “there’s a lot more engagement” throughout the year.⁵⁰ As long as appropriate standards are fully adhered to, current technology can largely replicate the shareholder meeting experience.⁵¹

Another commonly cited concern relating to shareholder-management communications is that the virtual-only model gives company management excessive control over the means through which shareholders ask questions inviting manipulation. Several institutional investors have expressed concern of possible manipulation through filtering, grouping, rephrasing, or ignoring questions to reduce any adverse stance or to redirect focus.⁵² By selecting questions ahead of time, companies could also choose not to answer hard questions that would be more difficult to avoid in person. In effect, critics argue that virtual meetings could allow companies to limit the influence of outspoken shareholders and corporate governance activists. Under the leadership of Scott Stringer, comptroller of New York City overseeing its \$170 billion in city pension funds, the Office of the New York City Comptroller sent letters to numerous S&P 500 companies in 2017 to express concern that shareholder proposals opposed by management would not be sufficiently addressed, and to inform those companies of Stringer’s proposal to change New York City Pension Funds’ proxy voting guidelines to vote against the election of incumbent members of compa-

47. Ross Kerber, *HP Moves Annual Meeting Online-Only as CEO Face Time Fades*, REUTERS (Feb. 12, 2015, 2:11 PM), <http://www.reuters.com/article/hp-meeting-internet-idUSL1NOVM1XM20150212>.

48. Fairfax, *supra* note 25, at 1392.

49. Steven Davidoff Solomon, *Online Shareholders Meetings Lower Costs, But Also Interaction*, N.Y. TIMES DEALBOOK (May 31, 2016), <http://nyti.ms/1WX2FJL>.

50. McGregor, *supra* note 29.

51. Diamond & Yevmenenko, *supra* note 31.

52. See Morgenson, *supra* note 4.

nies' corporate governance committees if the subject company holds a virtual-only meeting.⁵³ The concerns included the use of virtual meetings to filter company exchanges, "cherry-pick" questions and insulate directors and management from investor frustrations over CEO pay and corporate issues impacting shareholder value, among others.⁵⁴ And the April 2017 Corporate Governance Principles and Proxy Voting Guidelines of the New York City comptroller's office state that

[i]n-person annual meetings provide shareowners the opportunity to communicate to senior management and directors, and to fellow shareowners, in a face-to-face, unfiltered and real-time way at least once per year. . . . Companies should hold shareowner meetings by remote communication (so-called virtual meetings) only as a supplement to traditional in-person shareowner meetings, not as a substitute.⁵⁵

It further provides that the New York Retirement Systems "may oppose all incumbent directors of a nominating committee subject to election at a 'virtual only' annual meeting."⁵⁶ The validity of concerns over question screening is difficult to measure, not least because it is difficult to determine whether and how management behavior changes when the veil of technology is added.

Companies should therefore be cognizant of the potentially negative public reaction to their switch to virtual-only shareholder meetings. Some companies have faced criticism ranging from calls and correspondence to investor relations departments to physical protests that the company was hiding from its critics by going to a virtual-only meeting. Concern that management is hiding behind technology to side-step public engagement remains a common theme amongst virtual meeting detractors.

It is worth noting that, consistent with recommendations discussed further below, shareholder practices are being developed or adopted by some companies as virtual meetings become more and more popular, which address some of the common aforementioned concerns. Some companies, including HP Inc. and Microsoft Corporation, allowed shareholders to submit questions prior to their meetings.⁵⁷ HP Inc. also published the questions asked prior to and during the meeting as well as the company responses to its website, following the meeting. In a similar vein, numerous companies have made the recordings of their meetings available online, for shareholder and public access, for a period of

53. *Id.*; see Press Release, N.Y. City Comptroller, Comptroller Stringer: Virtual Only Meetings Deprive Shareowners of Important Rights, Stifle Criticism (Apr. 2, 2017), <https://comptroller.nyc.gov/newsroom/comptroller-stringer-virtual-only-meetings-deprive-shareowners-of-important-rights-stifle-criticism/>.

54. See Morgenson, *supra* note 4.

55. THE OFFICE OF THE N.Y. CITY COMPTROLLER, CORPORATE GOVERNANCE PRINCIPLES AND PROXY VOTING GUIDELINES 20 (Apr. 2017), http://comptroller.nyc.gov/wp-content/uploads/documents/NYCRS-Corporate-Governance-Principles-and-Proxy-Voting-Guidelines_April-2016-Revised-April-2017.pdf.

56. *Id.*

57. Diamond & Yevmenenko, *supra* note 31.

time following the meeting.⁵⁸ Some of these practices are also being adopted by companies that do in-person meetings, which supports the proposition that broader access improves transparency. This year, Berkshire Hathaway's in-person annual meeting not only featured audio accessibility, but was live-streamed online—recognizing the value of increased accessibility and transparency.⁵⁹ The experiences and practices of these and other companies may serve to ease some of the fears over the distancing effect of virtual proceedings.

Neither of the proxy advisory firms Institutional Shareholder Services (“ISS”) nor Glass Lewis have adopted guidelines opposing virtual meetings, but ISS has indicated in a company report available to subscribers, without specificity as to what criteria it would apply, that it may make adverse recommendations where virtual-meeting technology is used to impede shareholder discussions or shareholder proposals.⁶⁰

Other Challenges Triggering Company Concerns

Shareholders are not the only ones to have voiced concerns over virtual-only meetings. Companies may also worry that, by their nature, virtual meetings could lead to less certainty in shareholder voting outcomes because shareholders can more easily attend electronic meetings, delay voting, and change their votes at the last moment. Particularly in contested elections, the certainty of proxies received in advance of physical meetings may provide greater comfort about the projected outcome of votes. But because shareholders who can attend a meeting virtually may be less inclined to vote by proxy in advance, or could even change their vote at any time, voting results can be less predictable, which may make it harder for companies to gauge whether their solicitation methods are effective or need to be adjusted. In proxy contests, parties could continue solicitation efforts up to the time of the virtual meeting, though a company could also try to sway votes by delivering its own last-minute statements.

Additionally, the flip side of the potential benefit of increased shareholder participation in virtual meetings is the concern that a shareholder activist (or “corporate gadfly”⁶¹) could more easily attend the meeting and pose unconstructive or challenging questions to management, which some may view as more difficult

58. See, e.g., Myles Udland, *Yahoo Finance Will Live-Stream Warren Buffett's Epic Annual Meeting This Year*, BUS. INSIDER (Feb. 16, 2016, 8:24 AM), <http://www.businessinsider.com/yahoo-finance-live-stream-berkshire-hathaway-annual-meeting-2016-2>; *NVIDIA Corporation's Annual Meeting of Stockholders*, NVIDIA (May 23, 2017), <https://east.virtualshareholdermeeting.com/vsm/web?pvskey=NVIDIA2017>; *Shareholder Meetings: 2017 AGM*, RBS (May 11, 2017), <http://investors.rbs.com/shareholder-centre/shareholder-meetings.aspx>.

59. Jen Wiczner, *How to Watch Warren Buffett's Berkshire Hathaway Annual Meeting Live Stream*, FORTUNE (May 5, 2017, 7:42 PM EST), <http://fortune.com/2017/05/05/warren-buffett-berkshire-hathaway-annual-meeting-live-stream/>.

60. Lisa Fontenot & Linda Dang, *Planning for Your Annual Shareholder Meeting: Selected Considerations for a Virtual-Only Meeting*, GIBSON DUNN CLIENT ALERT (Nov. 16, 2016), <http://www.gibsondunn.com/publications/Pages/Planning-for-Annual-Shareholder-Meeting-Selected-Considerations-Virtual-Only-Meeting.aspx>.

61. See generally Frank D. Emerson & Franklin C. Latham, *The SEC Proxy Proposal Rule: The Corporate Gadfly*, 19 U. CHI. L. REV. 807 (1952).

to effectively address in a purely online setting than in person. Similarly, a company may feel it more difficult to manage disruption arising from such hostility or challenges when presented via a medium involving real-time, Internet-wide broadcast. Further, if a company indicates it will post questions and answers, it may effectively be taking on the effort to respond to more questions than may be the case at an in-person meeting. Finally, although technology has improved, technical glitches or cybersecurity risks (which are not an issue for in-person meetings) could adversely impact the success of a virtual-only meeting, including lag time in question submissions, garbled audio, and dead air time.⁶² In addition, virtual-only meetings may be at risk of disruption from activist hackers.

BEST PRACTICES WORKING GROUP FOR ONLINE SHAREHOLDER PARTICIPATION IN ANNUAL MEETINGS

Driven by concerns over virtual meeting implementation, a group of “interested constituencies, comprised of retail and institutional investors, public company representatives, as well as proxy and legal service providers,” published a set of guidelines in 2012 for virtual meetings.⁶³ This group, chaired by a representative of CalSTRS, also included representatives of NASDAQ, the National Association of Corporate Directors, the Society for Corporate Governance,⁶⁴ AFL-CIO, and other interested groups.⁶⁵ Their publication, *Guidelines for Protecting and Enhancing Online Shareholder Participation in Annual Meetings*, sets forth recommendations for virtual meetings, including that companies should “employ safeguards and mechanisms to protect [shareholder interests] and to ensure that they are not using technology to avoid opportunities for dialogue that would otherwise be available at an in-person shareholder meeting.”⁶⁶ In addition, the report recommends that companies adopt safeguards for shareholders’ online participation by adopting policies and procedures that offer a similar level of transparency and interaction as a physical meeting.⁶⁷ Specific practices to maintain these standards include implementing procedures to validate attendees (to confirm that they are shareholders and proxyholders) and to enable remote voting, publishing principles for online participation a reasonable time in advance of, and during, the meeting, and establishing “reasonable guidelines” for questions from the shareholders participating online.⁶⁸ To the last point, companies are advised to post all questions received before the meeting and allow investors to indicate before the meeting if they wish to ask a question or make a

62. See, e.g., Ross Kerber, *HP Moves Annual Meeting Online-Only as CEO Face Time Fades*, REUTERS (Feb. 12, 2015, 2:20 PM), <http://www.reuters.com/article/us-hp-meeting-internet/hp-moves-annual-meeting-online-only-as-ceo-face-time-fades-idUSKBN0LG2QI20150212> (mentioning “glitch-filled” virtual event held by Symantec in 2010).

63. See BEST PRACTICES, *supra* note 12, at 3.

64. Formerly known as the Society of Corporate Secretaries & Governance Professionals.

65. BEST PRACTICES, *supra* note 12, at 3.

66. *Id.* at 7.

67. *Id.*

68. *Id.*

statement.⁶⁹ Furthermore, companies may want to consider setting reasonable and specific time limits for questions, as well as for the presentation of questions and actions.⁷⁰

To alleviate concerns of the manipulation of questions by companies, the guidelines suggest that companies consider displaying questions asked during the meeting (with some discretion for omitting malicious or frivolous inquiries), establishing reasonable procedures for shareholders to ask questions by either telephone or videoconference, and establishing protocol for handling questions received but not answered during the meeting.⁷¹ They also suggest that companies might offer to arrange for in-person, telephonic, or video presentation of shareholder proposals, so long as the shareholder makes the request a reasonable time in advance.⁷² Another possibility—and another advantage to virtual meetings that is not offered by traditional in-person meetings—is to archive the meeting recording and make it available online for a reasonable period of time.

Finally, the guidelines underscore that companies ensure that the annual meeting remains accessible to all shareholders. Steps to be considered include offering telephone or videoconferencing access “so that shareholders can call in to ask questions during the meeting,” ensuring accessible technology “by utilizing a platform that accommodates most, if not all, shareholders,” “providing a technical support line for shareholders,” and “opening web lines and telephone lines in advance” for pre-meeting testing access.⁷³ Increasingly, there has been a focus of members of this group and other commentators on opting for the use of webcasting for meetings rather than audio-only access, as live audio is used by the vast majority of companies holding virtual-only meetings. Some virtual meeting providers here also offered technical guidance for secure, effective shareholder meetings.⁷⁴

Many critics of virtual-only meetings, particularly institutional investors such as the New York City Comptroller,⁷⁵ tout the hybrid meeting model (in which physical meetings are supplemented by webcast services) as a practical alternative, acknowledging certain benefits to the additional technology while maintaining the physical status quo. However, it is worth noting that utilizing the hybrid model undercuts certain benefits of the virtual format, including the cost savings, logistical streamlining, and increased security that come with virtual meetings. But by hosting the event both physically and online, the hybrid model provides the broadest accessibility to address investor concerns, even though the hybrid format demands more in costs and planning than either format alone. Even using a hybrid model, there are views as to how best to enhance

69. *Id.*

70. *Id.*

71. *Id.* at 8.

72. *Id.*

73. *Id.* at 7.

74. COMPUTERSHARE, THE FUTURE OF SHAREHOLDER MEETINGS IS VIRTUALLY HERE (undated), <https://www.computershare.com/News/Virtual-Meetings.pdf>.

75. See *supra* text accompanying notes 53–54.

the quality of the meeting, such as the CII's iteration of specific items a company having virtual attendees should provide in a shareholder dashboard.⁷⁶

Supporters of the virtual-only model, on the other hand, argue that criticisms directed against the platform do not address the typical public company meeting experience, particularly for companies not among the largest public companies: a largely *pro forma* event drawing only a handful of non-management shareholders.⁷⁷ For these companies, the virtual platform allows the meeting to achieve its true objectives of increasing shareholder participation and saving company costs. Just as companies have embraced technology in virtually all aspects of their businesses, including paperless communications and reports, online document management, and social media presence, the virtual shareholder meeting—if thoughtfully implemented—may offer a new and engaging tool for company shareholders and management.

CONCLUSION

As virtual-only or hybrid meetings become increasingly common—and one day may be ubiquitous in the corporate landscape as technology's adoption has been accepted outside of the shareholder meeting context—companies should look to their own practices to determine the best approach to shareholder meetings, including whether the move to virtual-only is in the company's best interest. This decision should rest on each company's particular situation, taking into account not only state law, but also the benefits and detriments as applied to their circumstances. For example, companies might consider whether a virtual-only offering matches their company's image and is feasible given its capabilities and resources. They should also take note if key shareholders have expressed substantial reluctance, as an abrupt change in practice is likely to engender criticism even if the company believes itself to be increasing accessibility of the meetings in general. Proactive engagement by a company with key shareholders can help answer these questions and provide the company with the opportunity to articulate its rationale to address concerns.

Companies encountering reluctance from investors might consider employing the hybrid model, though they should keep in mind its relative concessions to efficiency and savings. As an alternative, a company introducing a virtual-only platform would be well served to do so with careful adherence to the Best Practices, including its principles for online participants and practical safeguards.

76. See Letter from Kenneth A. Bertsch, Exec. Dir. & Glenn Davis, Dir. of Research, Council of Institutional Investors, to Broadridge Committee for Best Practices for Annual Shareholder Meetings (June 8, 2017), http://www.cii.org/files/issues_and_advocacy/correspondence/2017/06_08_17_letter_best_practices_shareholder_meetings.pdf.

77. Anders Melin, *John Malone's Formula for Successful Shareholder Meetings: 15 Minutes or Less*, BLOOMBERG (May 23, 2017, 9:49 AM EST), <https://www.bloomberg.com/news/articles/2017-05-23/billionaire-malone-packs-four-shareholder-meetings-in-one-hour>; see also Cydney Posner, *Will the Virtual-Only Shareholders' Annual Meeting, Once Disparaged, Be Rejuvenated?*, COOLEY PUBCO (June 7, 2016), <https://cooleypubco.com/2016/06/07/once-disparaged-will-the-virtual-only-shareholders-annual-meeting-be-rejuvenated/>; Kennedy, *supra* note 2.

The company could tailor its virtual policies and procedures with an emphasis on continued transparency and accessibility. As a practical matter, it is important for companies to adequately test the technology before implementation to ensure reliability and ease of use. Lastly, publishing meeting rules and agendas and circulating proxy materials that include instructions for testing the virtual platform as well as involving features intended to replicate an in-person experience more closely could go a long way toward allaying reluctant shareholders' concerns.

While the decision must ultimately be made on a company-by-company basis, the trend toward virtual-only meetings may represent the beginning of a turning tide in corporate practices. The evidence that virtual-only formats may present much of the same experience as physical meetings, while offering additional benefits in the form of increased accessibility, decreased costs, and streamlined user experience, are strong arguments for considering use of a virtual platform, while negative shareholder reaction may be more disadvantageous to a company than an in-person meeting, such as resulting in verbal opposition or "withhold vote" action or campaign. Changing corporate circumstances may also make the correct choice a different mechanism in certain years, as could continued enhancements in technology.

