

Client Alert

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Coronavirus/COVID-19: Director and Management Attendance at Shareholder Meetings

In light of the outbreak of COVID-19 and the related public health concerns, companies should be concerned with the health and safety of their personnel and the public. Many companies have already taken various steps to protect their personnel and the public, including closing offices, mandating or strongly encouraging working from home, limiting large gatherings of employees, and restricting work-related travel. A question that many public companies are now considering is whether directors, officers, and other employees should attend in person the company's annual meeting of shareholders, assuming that the company's annual meeting is not virtual-only.

Under SEC rules, a company must describe in its proxy statement the company's policy, if any, regarding director attendance at annual meetings of shareholders.¹ In addition, a company must state in its proxy statement the number of directors who attended the prior year's annual meeting.

The SEC's rules do not define what constitutes "attendance" for purposes of its rules. However, by analogy, under most state laws, a director participating remotely (e.g., by telephone) at a board meeting is considered present at that meeting provided the director has the ability to hear and speak to the other directors. Similarly, many states now permit shareholders to be deemed present and vote at shareholder meetings if a company's board of directors authorizes participation by means of remote communication.

For a company that has a director attendance policy and is holding an in-person or hybrid shareholder meeting, the company should review the applicable policy to determine if it expressly requires "in-person" or "physical" attendance. If the applicable policy simply requires "attendance," a company should be comfortable relying on state law to take the position that a director who attends the annual meeting remotely (e.g., by means of remote communication through which the director can hear and speak at the meeting) will be considered to have attended such meeting for purposes of the SEC's rules.² In addition, the extraordinary situation arising from COVID-19 provides further justification for companies to take the position that remote attendance should be treated equivalently to in-person attendance at the annual meeting of shareholders.³

A company holding an in-person meeting, however, should be aware of potential criticism from shareholders if directors or senior officers participate remotely while shareholders are required to attend in person to participate. Many factors may influence shareholders' views on this situation, including:

¹ See Item 7(b) of Schedule 14A and Item 407(b)(2) of Regulation S-K.

² Companies may consider clarifying in their 2021 proxy statements that some directors attended and participated through remote communications (e.g., "All of the Company's directors attended last year's annual meeting of shareholders (with [X] participating via remote communications).").

³ For virtual-only meetings, it should be clear that a director's remote participation constitutes being "present" for the annual meeting since there is no physical location.

- the number of directors or senior officers attending in person versus remotely;
- whether governmental authorities have imposed restrictions on the number of people permitted to gather;
- whether the directors or senior officers who participate remotely reside in or recently traveled to high-risk areas, are of an age that makes them at higher risk of contracting the virus, or have health concerns that would put them at greater risk if they were to suffer from COVID-19, thus making their attendance at the meeting an above-average risk;
- whether COVID-19 has continued to spread or there are broader travel restrictions imposed within the United States or at the location of the meeting; and
- whether it is a contested election.

In contrast, a hybrid meeting would seem to avoid most potential criticism since shareholders would not be required to travel and attend in person. In any event, we hope that, in light of the numerous challenges facing companies as a result of COVID-19, shareholders and proxy advisory firms will be understanding of remote participation by directors and officers.

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