CORPORATE ANNUAL MEETINGS OF SHAREHOLDERS
IN THE COVID-19 WORLD¹

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A number of states are reacting to the CoVid-19 pandemic by adopting emergency legislation or executive orders to authorize shareholder meetings that are not held “at a place” but only by telecommunication – referred to as “virtual-only” meetings. As corporate practitioners know, Colorado corporations are required to hold annual meetings of shareholders (C.R.S. § 7-107-101(1)), and those meetings involve certain formalities (which can be made more restrictive in the articles of incorporation or bylaws) such as:

1. Preparation of a shareholders’ list as of the record date (C.R.S. § 7-107-107) that is available for review by shareholders (C.R.S. § 7-107-201);

2. Sending notice of the meeting place, date, and time to shareholders (C.R.S. § 7-107-105); and

3. Counting of votes from properly registered and voting shareholders entitled to vote (C.R.S. § 7-107-202 through -205).

These requirements apply to Colorado corporations that are public companies subject to the rules of the Securities Exchange Act of 1934 (the “1934 Act”) as well as to private companies with one to one hundred or more shareholders. Of course, Colorado corporations which are subject to the 1934 Act’s proxy and reporting rules have a number of requirements to meet in addition to the requirements of Colorado law.

Alternatives To Holding An In-Person Shareholders’ Meeting. The first half of the year is frequently a time that many corporations hold their shareholder meetings. 2020 has thrown a wrench into the shareholder meeting requirements given the “social-distancing” requirements and crowd-size regulations in the response to our CoVid-19 pandemic. Many Colorado corporations, and corporations elsewhere, will be looking to hold a shareholders’ meeting without an in-person meeting – by telecommunications as permitted in Colorado by C.R.S. § 7-107-108 but naming a

¹ An updated version is available at https://ssrn.com/abstract=3570989.
“place” for the meeting at which only one or two people (the chair or the secretary, for example) are expected to be present.

A number of states’ corporate laws have recently been modified by gubernatorial order to eliminate the “place” requirement permitting virtual-only meetings to be held. For example, recently:

- Governor Cuomo of New York adopted an executive order on Friday, March 20, 2019, amending Sections 602 and 605 of the NY Business Corporation Law to the extent that they require meetings of shareholders to be noticed and held at a physical location.\(^2\)
- New Jersey adopted legislation on Friday night amending N.J.S. 14A:5-1 regarding the place of shareholder meetings.\(^3\)
- Governor Lamont of Connecticut adopted an executive order on Saturday, March 21, 2019, authorizing virtual shareholders’ meetings on a temporary basis during the health emergency.\(^4\)
- On April 6, 2020, the governor of Delaware issued a Tenth Modification of his “Declaration Of A State Of Emergency For The State Of Delaware Due To A Public Health Threat” addressing shareholders meetings of Delaware corporations.\(^5\)

The order recognizes that many publicly-held Delaware corporations have already scheduled and sent notice to stockholders of their annual meetings to be held at a specific place as required by stock exchange rules and Securities and Exchange Commission (“SEC”) Regulation 14A. Recognizing that physical meetings of stockholders may violate the social-distancing and crowd-size regulations of the CoVid-19 crisis, the Governor’s Tenth Modification allows Delaware publicly-held corporations to reschedule the meeting to a different date, time and place, or change it to a virtual meeting simply by publicly filing notice of the action with the Securities and Exchange Commission on a Form 8-K or other report and by issuing a press release “which shall be promptly posted on the corporation’s website after release.”

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\(^3\) See [https://legiscan.com/NJ/text/A3861/2020](https://legiscan.com/NJ/text/A3861/2020)

\(^4\) See Section 11 of Executive Order 7I available at [https://portal.ct.gov/-/media/Office-of-the-Governor/Executive-Orders/Lamont-Executive-Orders/Executive-Order-No-7I.pdf](https://portal.ct.gov/-/media/Office-of-the-Governor/Executive-Orders/Lamont-Executive-Orders/Executive-Order-No-7I.pdf)

Colorado Law Permits Hybrid Meetings – Not Virtual Meetings. Today, the Colorado Business Corporation Act (in C.R.S. § 7-107-108) permits that shareholders’ meetings may be held by telecommunication “unless otherwise provided in the bylaws” and provided that “all persons participating may hear each other during the meeting.”\(^6\)

Although not tested in the courts, there appears to be no reason why the notice given by a Colorado corporation of a shareholders’ meeting to be held at a particular physical location/address, cannot require that shareholders attend only by telecommunication (a “hybrid meeting” that is held “at a place” but which requires participation by electronic means). The shareholders’ list may be made available to shareholders through a number of electronic means, meeting the requirement in C.R.S. § 7-107-201 that the list be available to shareholders. There are also means by which shareholders can be identified online and voting can be limited to shareholders and proxyholders entitled to vote, meeting the Colorado Business Corporation Act’s requirements.

Of course, Colorado corporations with provisions in their bylaws or articles that restrict or eliminate the ability to hold meetings with participation by telecommunication (that is “hybrid meetings”) have to be considered and may prohibit Colorado corporations from going forward with a hybrid meeting even though permitted under Colorado law.

2021 Amendments Contemplated To Permit Virtual Meetings Under Colorado Law. Colorado law currently provides the means for holding a hybrid shareholders’ meeting. While the CBCA provisions are usable, they are not crystal clear in this Covid-19 environment. A committee of Colorado lawyers is working to update these requirements to make them more adaptable in our electronic world. These changes (being developed for presentation to the Colorado General Assembly in 2021) follow amendments to the 2016 Model Business Corporation Act (“MBCA”) proposed by the ABA Business Law Section’s Corporate Laws Committee.\(^7\) For example:

- The “at a place” requirement is being changed in our proposed 2021 amendments to be more like 2016 MBCA 7.01(b). One of the new provisions of § 7-107-108 as proposed for our 2021 amendments will be:

  Unless the bylaws require the meeting of shareholders to be held at a place, the board of directors may determine that any meeting of shareholders shall not be held at any place and shall instead be held solely by means of remote communication, but only if the

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\(^6\) C.R.S. § 7-108-201(2) provides similarly for directors’ meetings which may also be held by telecommunication.

\(^7\) These provisions were published in 74 The Business Lawyer 151 (Winter 2018-2019).
corporation implements the measures specified in subsection (2) [for verification of shareholder status of attendees and voting].

- Section 7-101-402(2) contemplates electronic notice, which definition is expanded effective July 1, 2020, and is to be further expanded in our proposed 2021 amendments.

The ABA Business Law Section is working on an update to the electronic provisions which we will review when published to determine their applicability to Colorado.

Once again, however, a Colorado corporation’s articles of incorporation or bylaws may limit or prohibit a Colorado corporation from taking advantage of these proposed statutory amendments which will more clearly permit Colorado corporations to hold a hybrid or virtual meeting. All Colorado corporations should review their articles and bylaws to ensure that the governing documents accurately meet the shareholders’ and directors’ requirements – not only to hold meetings by telecommunications, but to update the corporation’s governing documents based on the amendments to the CBCA adopted in 2019 and previously.8

**SEC Staff Guidance For 2020 Shareholders’ Meetings.** On March 13, 2020, the Securities and Exchange Commission staff of Corporation Finance and Investment Management divisions issued an announcement entitled “Staff Guidance for Conducting Annual Meetings in Light of CoVid-19 Concerns”9 in which the staff notes (as discussed above) that a corporation’s ability to conduct a “virtual” meeting is governed by state law, where permitted, and the issuer’s governing documents. The announcement suggests that “Robust disclosures that facilitate informed shareholder voting are just as important for a ‘virtual’ meeting or ‘hybrid’ meeting (i.e., as they are for an in-person meeting).”

As the staff notes, to the extent an issuer plans to conduct a “virtual” or “hybrid” meeting, the corporation (and also applicable in part to private companies) must notify its shareholders, intermediaries in the proxy process, and other market participants of its plans to hold a virtual-only or hybrid meeting sufficiently in advance of the meeting, and they must disclose to the shareholders “clear directions as to the logistical details of the ‘virtual’ or ‘hybrid’ meeting, including how shareholders can remotely access, participate in, and vote at such meeting.”

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8 For forms of articles and bylaws for a Colorado corporation updated through December 2019, see [https://www.bfwlaw.com/downloadable-forms-for-colorado-businesses/](https://www.bfwlaw.com/downloadable-forms-for-colorado-businesses/).

9 The SEC staff announcement is available at: [https://www.sec.gov/ocr/staff-guidance-conducting-annual-meetings-light-covid-19-concerns?auHash=zrsDVFen7QmUL6Xou7ElHYov4Y6ifrRTjW3KPSVukQs](https://www.sec.gov/ocr/staff-guidance-conducting-annual-meetings-light-covid-19-concerns?auHash=zrsDVFen7QmUL6Xou7ElHYov4Y6ifrRTjW3KPSVukQs)
Since companies subject to the SEC guidance are generally public companies with shares held in street name and institutional investors who take advice from proxy advisory firms such as Glass-Lewis & Co., it is important to note that these firms have historically opposed virtual shareholder meetings because of their belief “that virtual-only meetings have the potential to curb the ability of a company’s shareholders to meaningfully communicate with the company’s management.”10 In its 2020 United States guidelines, Glass Lewis now provides that:

Specifically, for companies opting to hold a virtual-only shareholder meeting during the 2020 proxy season (March 1, 2020 through June 30, 2020), we will generally refrain from recommending to vote against members of the governance committee on this basis, provided that the company discloses, at a minimum, its rationale for doing so, including citing COVID-19.

Additionally, should these companies opt to continue holding virtual-only shareholder meetings in subsequent years, we expect future proxy statements to include the robust disclosure concerning shareholder participation described in these guidelines.11

Meetings Of The Members of Other Colorado Entities. Several other Colorado entities have requirements for meetings of members which are similar to the CBCA requiring meetings of members ‘at a place.’ These laws should be reconsidered in connection with the current environment for future amendment. For example:

The Colorado Revised Nonprofit Corporation Act (“CNPCA”) provides that “a nonprofit corporation that has voting members shall hold a meeting of the voting members annual” unless the bylaws eliminate that requirement,12 and that notice of the meeting “is fair and reasonable if [t]he nonprofit corporation notifies its members of the place, date and time of each … meeting.”13


11 https://www.glasslewis.com/wp-content/uploads/2016/11/Guidelines_US.pdf at page 1. See, also, the updated 2020 guidelines from Institutional Shareholder Services (April 8, 2020 at page 5) which provides: “If boards opt to hold “virtual-only” meetings, we would encourage them 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 (subject to local laws) to participate as fully as possible, including being able to ask questions of directors and senior management and to engage in dialogue if they wish.” https://www.issgovernance.com/file/policy/active/americas/ISS-Policy-Guidance-for-Impacts-of-the-Coronavirus-Pandemic.pdf.

12 C.R.S. § 7-127-101(1).

13 C.R.S. 7-127-104(3)(a).
As with the CBCA, the CNPCA provides that meetings of members by telecommunications are permissible “unless otherwise provided in the bylaws.”

The *Colorado Uniform Limited Cooperative Association Act* ("CLCAA") provides that “[m]embers shall meet annually at a time” and “at the place stated in the articles or bylaws or selected by the board of directors.” The CLCAA also provides for meetings by telecommunication “unless the articles or bylaws otherwise provide.” The CLCAA provides similarly for special meetings of members. In all cases, the notice of the meeting must set forth the “time, date, and place of a members meeting.” Article 55 (“Cooperatives – General”) and the Colorado Cooperative Act have similar provisions. Article 55 cooperatives do not permit voting by telecommunication, but require voting “either in person or by mail.”

Entities formed under the *Colorado Common Interest Ownership Act* ("CCIOA") require that the notice of the required annual meeting of unit owners state the “time and place of the meeting and the items on the agenda.” There is no provision in CCIOA for meetings or voting by telecommunications. CCIOA is not, however, the governing statute for entities operating under CCIOA. C.R.S. § 38-33.3-301 requires that a unit owners’ association under CCIOA be organized “as a nonprofit, not-for-profit, or for-profit corporation or as a limited liability company in accordance with the laws of the state of Colorado.” Thus, depending on the organization of the CCIOA unit owners’ association, the provisions in the organizational statute would apply except “[t]o the extent that provisions of this article [CCIOA] conflict with applicable provisions” of the organizational statute.

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14 C.R.S. § 7-127-108.
15 C.R.S. § 7-58-506(1), (2).
16 C.R.S. § 7-58-506(3).
17 C.R.S. § 7-58-507.
18 C.R.S. § 7-58-508.
19 See C.R.S. §§ 7-55-103(1), 305.
20 See C.R.S. §§ 7-56-302, 305.
21 C.R.S. § 7-55-110.
22 C.R.S. § 38-33.3-308(1).
23 C.R.S. § 38-33.3-319.
Other entities\textsuperscript{24} do not have statutory provisions for meetings of their members, but many likely address that subject in their governing documents. Those provisions also should be reviewed.

\textit{Issues To Consider When Deciding Whether to Hold A Hybrid or Virtual Meeting.} There clearly are benefits to a Colorado corporation in any environment, and especially the current environment, to hold an annual or special shareholders’ meeting by telecommunication. Once legal counsel has determined that a hybrid or virtual meeting is permitted by the corporation’s articles of incorporation and bylaws and the Board of Directors determines that such a meeting should be called, management will need to be involved in the logistics of conducting the meeting. The following problems will become more significant as the shareholder base becomes more numerous. For example:

1. Will the meeting be held by audio-only, or will it include video? If the meeting includes video, will the corporation hire a video production company to organize the meeting or can “GoToMeeting” or “Zoom” handle it? What will be the alternative should the technology fail?

2. How will the corporation verify that each participant is a shareholder? A telephonic roll call probably will not work with more than a couple shareholders.

3. Will there be a question and answer period, and, if so, how will it be conducted? By live telephone? By a chat feature on the audio or video device? By email? Will questions be accepted in advance of the meeting? Will the meeting chair control access to the audio participation?

4. How will shareholders vote, and, again, how will that be verified by the corporation? What secure process for shareholder voting will be available?

5. Will the meeting be recorded and archived? If recorded and archived, will it be available to shareholders only, or to non-shareholders as well?

6. Given the troubles we frequently have with technology, having technical support in place will be important.

\textsuperscript{24} This statement addresses general partnerships, under C.R.S. § 7-60-101 et seq. (Colorado Uniform Partnership Law) and § 7-64-101 et seq. (Colorado Uniform Partnership Act), limited partnerships under C.R.S. § 7-61-101 et seq. (Colorado Uniform Limited Partnership Law) and § 7-62-101 et seq. (Colorado Uniform Limited Partnership Act), limited liability companies (C.R.S. § 7-80-101 et seq.) and limited partnership associations (C.R.S. § 7-63-101 et seq.). There are numerous other specialized Colorado entities that have not been considered, many of which incorporate the CBCA by reference.
Broadridge Financial Solutions Corporation (“Broadridge”) is a United States-based corporate services company which, according to its information, launched its Virtual Shareholder Meeting (“VSM”) platform in 2009. Broadridge claims to have handled about 1,500 virtual meetings for its clients. When Broadridge sets up a meeting, it assigns a unique control number to each shareholder that the shareholder must enter to log in to the virtual meeting. Additional features of Broadridge software include allowing guests to log in to the meeting, if the client company authorizes guest attendance, and allowing shareholders to engage in a question-and-answer with management.

There may be companies with other technology at a different (that is, lesser) cost than Broadridge, and other technology is likely in development. Without that technology being available on reasonable terms, the hybrid meeting or the virtual-only meeting probably only makes sense for larger public companies who can afford to implement the technology. Smaller companies will have to find other solutions that accomplish the legal requirements of an annual meeting, or delay the meeting until an in-person meeting can be held.

**Conclusion.** Of course, many Colorado corporations may want to wait to hold a ‘normal’ meeting until the world returns to normal (whenever that will be). In our experience, many Colorado corporations go for years without holding an annual meeting of shareholders despite the statutory requirement in C.R.S. § 7-107-101(1) that the “corporation shall hold a meeting of shareholders annually at a time and date stated in or fixed in accordance with the bylaws, or, if not so stated or fixed, at a time and date stated in or fixed in accordance with a resolution of the board of directors [emphasis supplied].”

The only consequence under Colorado law in failing to hold an annual meeting when required is that a court may order that the corporation hold a meeting “if an annual meeting was not held within the earlier of six months after the close of the corporation’s most recently ended fiscal year or fifteen months after its last annual meeting.” C.R.S. § 7-107-103(1)(a). C.R.S. § 7-107-101(3) provides that the failure to hold an annual meeting “does not affect the validity of any corporate action and does not work a forfeiture or dissolution of the corporation.”

Corporations listed on stock exchanges have other regulatory requirements to consider if they fail to hold an annual meeting of shareholders.

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