

ASIC's "no-action" position on virtual meetings: key takeaways

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Worthwhile read for: Company directors, CEO, Board members

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As discussed in our [recent alert](#), temporary measures permitting virtual shareholder meetings and e-signing by companies recently expired. Proposed legislation to extend them, namely the *Treasury Laws Amendment (2021 Measures No. 1) Bill 2021 (Bill)* has stalled in the Senate. Debate on the Bill will resume in Parliament's first sitting week in August.

While the temporary measures have expired, COVID-19-related restrictions on gatherings and physical distancing requirements remain in place. To provide companies with greater certainty around conducting meetings, ASIC announced it would take a "no-action" position on the holding of virtual meetings. It has now released further details about its position.

We discuss the key details from [ASIC's release](#) below.

What is covered by ASIC's no-action position?

Holding of virtual meetings

ASIC's no-action position applies in respect of provisions of the Corporations Act which may restrict the holding of virtual general meetings. While it is generally considered that the Corporations Act permits the holding of hybrid meetings (a meeting held in a physical location with the option to attend online), purely virtual meetings are not permitted.

ASIC's no-action position is subject to the following conditions:

- The technology used must give members, as a whole, a reasonable opportunity to participate – including ensuring members can ask questions and make comments at the meeting. It is noted that the Bill included a requirement that members must be able to ask questions orally (as opposed to submitting questions in writing). This does not appear to be a specific condition of ASIC's no-action position.
- Voting must occur by poll rather than a show of hands.
- Members must be able to vote in real time (and where practicable voting should also be available in advance of the meeting).
- The notice of meeting must include information about how those entitled to attend can participate (including how to vote, ask questions, make comments or otherwise speak at the meeting).

ASIC recommends companies have regard to its guidelines on holding virtual meetings, which it has re-issued. We previously discussed those guidelines [here](#).

Convening meetings electronically

ASIC has also adopted a no-action position in relation to sending a notice of a meeting, or supplementary information in relation to a meeting, by email or other electronic means.

This is subject to the following conditions:

- Notice of the meeting or supplementary information in relation to the meeting, whether given electronically or otherwise, must include the contents of the notice or details of an online location where the contents of the notice can be viewed/downloaded.
- Where a shareholder has not previously nominated an email address for receiving notices of meeting, the company will still need to post or deliver a paper copy of the notice of meeting to that shareholder, or a notice which tells them how to access/download the notice of meeting.
- Supplementary instructions for on-line participation in the meeting must be given at least two business days before the meeting is held by:
 1. electronic message (if the member has provided the relevant details);
 2. a notice on the company's website; and
 3. a market announcement if the company is listed on a market.

Holding of AGMs for companies with year end up to 7 April 2021

ASIC has also adopted a no-action position for public companies with a financial year end between 7 January 2021 and 7 April 2021 that do not hold their AGM within five months of the end of their financial year (as required by the Corporations Act), provided an AGM is held within seven months of year end.

How long does the no-action position apply for?

The position on virtual meetings applies to meetings held between 21 March 2021 and the earlier of:

- 31 October 2021; and
- the date that any measures are passed by the Parliament relating to the use of virtual technology in meetings (such as the Bill or other legislation).

Other considerations

It is important to keep in mind that ASIC's no-action position does not amend the Corporations Act but effectively provides assurance that ASIC will not penalise companies for non-compliance with certain aspects of the Corporations Act.

Before holding a virtual meeting, companies must check whether this is permitted or restricted by their constitution. If there is no provision for the holding of meetings using technology, or if there is a requirement for the meeting to be held in a place, the holding of a virtual meeting may not be permitted.

ASIC's no-action position does not prevent a shareholder or third party from challenging the validity of a company's actions. Accordingly, if there is doubt as to whether a hybrid or virtual meeting may be held under the constitution, the best course may be to hold a physical meeting having regard to any restrictions in place.

What about the electronic execution of documents?

ASIC's no-action position does not extend to the temporary measures that were in place to facilitate the electronic execution of company documents. That is because electronic execution is concerned with the capacity of companies to enter into arrangements with third parties rather than Corporations Act obligations which ASIC administers. Accordingly, it will be necessary to wait until the Bill comes before the Senate again to see if the measures which permitted electronic execution will be re-introduced.

When the Bill was announced, the Treasurer stated that the government intended to finalise permanent changes to allow electronic signing and sending of documents after the expiration of the arrangements under the Bill, which would have been from 16 September. This will be welcomed by many companies that made use of electronic systems such as DocuSign for the execution of documents of during the pandemic.

Conclusion

ASIC's no-action position will provide much-needed certainty for companies looking to hold virtual shareholder meetings in 2021 as pandemic-related restrictions remain in place. If your company is considering holding a virtual meeting, the first step is to consider whether this is restricted by the company's constitution. From there, companies should ensure they satisfy the conditions specified by ASIC for the conduct of virtual meetings.

If you have any queries regarding virtual meetings or the other matters raised by this alert, please contact our [Corporate Advisory and Governance](#) team.

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