



# Annual general meetings: how to proceed in the face of COVID-19

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## Key Take-aways

- 1.** In-person general meetings are banned until April 19 and are likely to be subject to continued restrictions thereafter.
- 2.** During the ban, companies can nevertheless hold their meetings by requiring that shareholders vote in writing, electronically or via an independent representative.
- 3.** For Swiss public companies, a key consideration turns on whether they should go ahead with a planned annual meeting behind closed doors or postpone.

COVID-19 poses a threat to businesses affecting all aspects of corporate life, chief among them the protection of the workforce and the preservation of liquidity.

As we are now in proxy season, Swiss public companies are grappling with unprecedented difficulties to even hold their annual general meetings.

The annual general meeting is an essential ritual in the lifecycle of a company. This is because the Swiss legal framework vests a range of critical decisions to the company's shareholders.<sup>1</sup>

The general meeting is also the forum where shareholders express their views or engage with the board and management on topics of corporate life. This season, for example, shareholders are likely to raise concerns with the impact of COVID-19.

Under Swiss law, annual general meetings must be held within six months following the end of the financial year.<sup>2</sup> Companies and their boards however would not face specific sanctions if they were to postpone the general meeting beyond the six-month outside date.

Accordingly, Swiss companies may seek to reformat their annual meeting to comply with the government's contingency measures or delay. It is already apparent that different paths are being adopted in the market.

This briefing takes into account the FAQ issued by the Department of Justice on March 18, 2020.

## 1 The ban on all public and private "manifestations"

Earlier this week, the Swiss government moved to impose a wholesale ban on all public and private manifestations in Switzerland in an effort to contain the spread of the coronavirus. Accordingly, as of March 17, in-person general meetings can no longer take place in Switzerland, irrespective of the number of participants.

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# The ban is now in force until April 19, 2020.

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It could well be extended. It is not yet possible to predict how the pandemic is going to affect the country in the future and how long the ban will endure.

It is also worth noting that even before the wholesale ban was instituted, Swiss public companies were grappling with health prescriptions and guidance as to how best to format their general meetings. In this context, we expect that even beyond April 19, the situation will remain fluid. The net result is that it is unlikely that Swiss public companies will be able to conduct general meetings in a normal way this season.

## 2 Temporary relief to exclude in-person participation

Under Swiss law, shareholders have an inherent right to attend the meeting in person.<sup>3</sup> To allow Swiss companies to navigate the ban, the Swiss government has therefore granted a number of relaxations. Specifically, Swiss companies can require that the shareholders exercise their rights exclusively in writing, electronically or via an independent representative designated by the company. To go down that route, Swiss companies are simply required to notify the shareholders of the restrictions they decide to implement in writing or electronically four days before the general meeting at the latest.

Accordingly, companies have a menu of options to choose from.

Private companies, including those with a large shareholder base, such as venture capital enterprises, are likely to make use of the written or electronic votes - a simple and cost effective approach.

The situation is more complex for Swiss public companies. Since Swiss public companies are in any event required to have an independent representative (elected by the shareholders at the prior general meeting), if they determine to proceed with a general meeting during the ban, they are likely to conclude that requiring all shareholders to exercise their rights via such an independent representative would be the most practicable option. Voting by proxy is the natural way of voting for large public companies, and a process with which the shareholders are very familiar.

## 3 General meetings behind closed doors

Beyond the voting mechanics, Swiss companies however would be well advised to consider the further aspects of a shareholder meeting and, very importantly, shareholders' participation. This is especially true because it is becoming more and more apparent that Swiss companies may alter their dividend policy due to the current turmoil.

The relaxations afforded by the Swiss government lay the foundation for holding general meetings behind closed doors. In this configuration, shareholders would have no ability to meaningfully engage with the board on matters of corporate relevance. This would be truly exceptional in the decision-making process of a Swiss company, although this could be an approach that companies may conclude is justified in the face of the current pandemic.

On the international scene, we see that a number of public companies are seeking to preserve a form of participation via webcast, livestream or virtual meetings. Swiss public companies may thus consider testing the waters (and build a consensus) with institutional investors and proxy advisors before forging ahead with a general meeting behind closed doors.

In particular, virtual general meetings have started to emerge over the past few years in jurisdictions where the legal framework allows them to take place. The investor community

is often concerned that virtual participation could impair the ability of shareholders to meaningfully take part in the meeting. This has prompted newly formed advocacy groups to issue best practices and guidelines.

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## **Facing a ban on all in-person meetings, Swiss companies may however consider the feasibility of combining proxy voting with the ability for shareholders to participate in the meeting virtually.**

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As between closed meetings and a form of virtual participation, institutional investors and proxy advisors are likely to favor the latter. The parameters of such hybrid forms of general meeting will however, even in light of the relaxations afforded by the Swiss government, have to be carefully examined.

### **4 How to amend the format and the date of the general meeting?**

A general meeting must normally be called 20 days prior the meeting.

As indicated above, in the face of the current extraordinary circumstances, the Swiss government has allowed Swiss companies to amend the notice of general meeting to impose participation restrictions four days before the meeting at the latest.

Technically, if a meeting is postponed, a replacement date normally must be fixed, although multiple postponements are possible. In circumstances where a company were to seek to amend the agenda of the meeting as well, this can also be accomplished but the usual 20 days' notice must be complied with.

Swiss listed companies postponing their general meetings will need to advise and coordinate their actions with SIX, so as not to be penalized for not complying with their previously disclosed annual calendar.

The text of the Swiss government's ordinance instituting the ban and temporary relief created uncertainty as to whether a company could call a meeting precluding in-person participation during the ban and hold such an atypical meeting after the lifting of the ban. On March 18, 2020, the Federal Department of Justice clarified that the government would view this as permissible. Swiss companies considering such an approach may nevertheless want to proceed with caution. Shareholders may react negatively if such an atypical general

meeting happens at a time when no state measures would any longer preclude their participation at the meeting.

In any event, Swiss public companies will need to devise a communication strategy to inform their shareholders clearly. In our view, the company's communication should address the following: What considerations did the board take into account when determining the timing and format of the general meeting? What impact is the chosen format going to have on the manner in which the votes are required to be cast? And what impact is the format of the meeting going to have on shareholder participation at the meeting?

### **5 Conclusion**

The Swiss government has created ways for Swiss public companies to continue to operate and hold their general meetings despite the ban on all public and private manifestations. This includes the possibility to hold a general meeting behind closed doors. Swiss public companies however would be well advised to keep an eye on international best practice to ensure that to the extent feasible under the Swiss legal framework they offer similar opportunities for shareholders to engage with the board and management during these critical times.

<sup>1</sup> This includes the approval of the annual financial statements, the appropriation of the financial results and any dividend distribution, the election of directors and, for public companies, the appointment of the chairman and the members of the compensation committee and the approval of executive compensation (in practice, shareholders often approve the fixed portion for the current year and the variable portion for the prior year).

<sup>2</sup> SIX-listed companies publish annual calendars at the beginning of the financial year, including the date of the annual general meeting.

<sup>3</sup> It is not yet possible to adopt shareholder resolutions by "written consents" (that is however expected to change as part of the upcoming reform of Swiss company law). In addition, it is not clear (and often rejected in the legal community) whether a purely virtual shareholder meeting can be held.

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