

Coronavirus Information Hub: FAQ General Meetings

General Introduction

Do specific rules apply to company meetings during the coronavirus pandemic?

Under normal circumstances, company meetings such as general meetings of shareholders or members are attended by its participants in person (unless otherwise provided for by law and/or the articles of association of a company) which allows all participants to form and convey their opinion at the physical meeting. During the current coronavirus pandemic, human interaction was, however, restricted in order to contain the spread of the virus. Such restrictions applied in particular to company meetings. In the light of such restrictions, the Swiss Federal Council adopted art. 27 of the Ordinance 3 on Measures to Combat the Coronavirus (COVID-19) (the **COVID-19 Ordinance 3**) which deals with company meetings and the exercise of rights by the participants of such meetings during the coronavirus pandemic. COVID-19 Ordinance 3 is based on the Federal Act on the Statutory Principles for Federal Council Ordinances on Combating the COVID-19 Epidemic (the **COVID-19 Act**) enacted by the Swiss Federal Parliament.

To avoid that company meetings cannot be held at all due to certain restrictions during the coronavirus pandemic, COVID-19 Ordinance 3 has instituted a special regime for general meetings of shareholders or members. Although the regime is applicable to all company types including corporations, limited liability companies, cooperatives and associations (directly or mutatis mutandis), this FAQ focuses on the ordinary annual and extraordinary general meetings of shareholders of corporations (*Aktiengesellschaften / sociétés anonymes*) (the **General Meeting(s)**).

Restrictions of Public and Private Events

Which restrictions related to events are currently in place? What are events in the context of corporate law?

An event within the meaning of the Ordinance on Measures during the Special Situation to combat the COVID-19 Epidemic (the **COVID-19 Special Situation Ordinance**) is a temporary, planned public or private event that takes place in a defined room or perimeter. Such event usually has a defined purpose and a programme sequence with thematic and content-related

links. Additionally, there is usually a performance in front of an audience, the visitors of the event stay at the same place for a longer period of time, or actively participate.

Public events involving more than 15 persons are currently prohibited while private indoor events may only be attended by up to 10 persons and private outdoor events by up to 15 persons. Anyone attending an event is obliged to follow the recommendations of the Federal Office of Public Health on hygiene and social distancing. Besides, organisers of public events must draw up and implement a precautionary measures plan prior to an event.

Ordinary business meetings, working team meetings at the workplace, meetings of the board of directors, General Meetings, etc. are considered events in the above sense. While the holding of General Meetings with physical presence of more than 15 persons is prohibited according to the Federal Office of Public Health, special provisions apply to intra-company events such as ordinary business meetings, working team meetings at the workplace and meetings of the board of directors. The holding of such physical meetings is permitted (subject to preventive measures), provided that it cannot be held online.

Can meetings of the board of directors and business meetings still be held?

Meetings in a business context such as meetings of the board of directors or meetings at the workplace may still be held, but such meetings should be conducted online, whenever possible. To the extent meetings are required for the normal operation of the company, they may be attended in person, yet certain constraints apply: The recommendations of the Federal Office of Public Health regarding hygiene and social distance must be observed. Further, meetings should be limited to the lowest number of people possible. We call this the «need-to-join» rule: Those whose physical presence is required to reasonably carry out the business of the meeting may be present, others must not. However, the limitation of the number of participants to 15 persons and the regime of COVID-19 Ordinance 3 on company meetings do not apply to meetings of the board of directors and business meetings. Finally, all necessary and appropriate measures to protect the health of the attendees must be taken.

Can General Meetings still be held?

General Meetings are not *per se* prohibited under COVID-19 Special Situation Ordinance or COVID-19 Ordinance 3 but no more than 15 persons (for details see below) may attend them in person according to the Federal Office of Public Health.

Irrespective of the number of shareholders a company has, the board of directors may exclude shareholders from attending the General Meeting in person and order that they may only exercise their rights in writing/electronically or through an independent representative. In such case, the General Meeting remains a physical meeting, but without the physical presence of shareholders (meeting behind closed doors). Persons attending the General Meeting in person must observe the recommendations of the Federal Office of Public Health regarding hygiene and social distance and their number must be limited to a minimum («need-to-join» rule).

Organisation of a General Meeting

Who organises the General Meeting?

The organiser of the General Meeting is the board of directors according to the Swiss Code of Obligations.

What does the board of directors have to consider when convening a General Meeting under the regime of COVID-19 Ordinance 3?

The board of directors is responsible for compliance with all requirements of the Swiss Code of Obligations and the articles of association of the company when convening and holding the General Meeting. Deviations are only permitted, where explicitly provided for in COVID-19 Ordinance 3. Accordingly, the General Meeting is still to be convened with a notice period of at least 20 days, held physically and recorded in minutes.

The regime under COVID-19 Ordinance 3 gives the board of directors the possibility to instruct shareholders to exercise their rights in writing/electronically or through the independent representative and to exclude shareholders from physical presence. In order to make use of this possibility, the board of directors has to issue an order to all shareholders pursuant to which they are instructed to exercise their rights in writing/electronically or through the independent representative (see questions below for details). If the board of directors does not issue such an order, the General Meeting can only be held if no more than 15 persons (for details see below) attend it in person.

How and when does the board of directors have to order that the shareholders may exercise their rights in writing/electronically or through an independent representative?

The order must be notified to all shareholders in writing or published electronically, for instance on the website of the company, at least four days before the General Meeting is held. According to the Federal Office of Justice, in case that the order is sent in writing by mail, it is sufficient if it is dispatched four days before the General Meeting is scheduled to take place. However, this might be too tight in time considering that postal services currently work at a slower pace and the obligation to work from home still applies. To the extent that the board of directors has not yet convened the General Meeting, the order that shareholders may exercise their rights in writing/electronically or through the independent representative may be included in the invitation.

Can the General Meeting be held if the board of directors has not ordered shareholders to exercise their rights in writing/electronically or through an independent representative?

If no more than 15 persons are present at a General Meeting, it can be held even if no formal order regarding the exercise of rights has been issued. However, the Federal Office of Public Health has not made clear whether the persons who have to be physically present in order to carry out the business of the General Meeting such as the chairperson, secretary/vote counter, auditor and, as the case may be, notary public are to be counted as well or whether persons contributing to the event are not counted but only the audience. We recommend taking a cautious approach and to count all persons present at the General Meeting (including chairperson, secretary/vote counter, auditor, shareholders, and, as the case may be, notary public). If more than 15 persons are present and a shareholder shows up additionally and insists on a physical presence, the General Meeting, however, would have to be cancelled and reconvened. The reason for this is that a shareholder cannot be validly excluded from the General Meeting without a formal order.

Can the General Meeting be postponed?

If the board of directors considers physical presence of the company's shareholders to be essential, it may postpone the General Meeting even if it has already been convened. However, it is not possible to just postpone the General Meeting by a few days because the notice period of twenty days must be observed again when convening the postponed General Meeting.

Do companies have to hold their annual General Meeting within a certain time after the end of the business year?

Pursuant to the Swiss Code of Obligations, companies ought to hold the annual General Meeting within six months after the end of the business year. There is no extension of this deadline under the COVID-19 Ordinance 3. Non-compliance, however, has no direct legal consequences. Given the current circumstances and provided that a General Meeting does not have to be held for other reasons, the General Meeting could be deferred to a date after the expiration date of COVID-19 Ordinance 3 (according to the most current version, the COVID-19 Ordinance 3 expires on 31 December 2021) or to a date when the current restrictions have been further relaxed. However, since the restrictions on General Meetings due to COVID-19 have been in place for more than one year now, the board of directors has to assess carefully whether a further postponement of a General Meeting scheduled to take place in 2020, or even earlier, is still in the best interest of the company. The same applies to the annual General Meeting for the business year 2020, which, if the business year ends on 31 December, must be held by 30 June 2021 according to the Swiss Code of Obligations.

It should be noted, however, that listed companies may not defer their annual General Meeting beyond six months after the end of the business year due to stock exchange regulations.

What happens if a company holds a General Meeting with the physical presence of more than 15 persons?

The board of directors may be held liable to a fine if the company holds a General Meeting which is attended by more than 15 persons.

Holding of a General Meeting

Who may attend the General Meeting in person? Can shareholders attend the General Meeting in person?

If the board of directors issues an order based on COVID-19 Ordinance 3 and a General Meeting is therefore to be held under the regime of COVID-19 Ordinance 3, shareholders are excluded from attendance at the General Meeting, unless they assume an essential function at the General Meeting (for instance, as chairperson, secretary or vote counter).

Nonetheless, the General Meeting remains a physical meeting. Certain constraints apply to the persons attending the meeting in person: The recommendations of the Swiss Federal Office of Public Health regarding hygiene and social distance must be observed and, in addition, the number of persons physically

present must be limited to the lowest possible number. Only those persons whose physical presence is required to reasonably carry out the business of the meeting may be present, others must not (so-called «need-to-join»-rule, see above).

Based on the «need-to-join»-rule, the following persons may attend the General Meeting in person: the chairperson, secretary/vote counter, auditor (unless physical presence is waived), notary public (to the extent required), and as the case may be, independent representative. According to the Federal Office of Justice, the auditor may participate electronically and any other person as well in case that shareholders have been ordered by the board of directors to exercise their rights in writing or electronic form. This interpretation results in the abolition of any physical presence at the General Meeting which is not properly reflected in COVID-19 Ordinance 3.

How do shareholders exercise their rights?

There are two options how companies can order shareholders to exercise their rights at a General Meeting: (i) either in writing or in electronic form, or (ii) through an independent representative appointed by the board of directors or, in case of a listed corporation, by the shareholders respectively.

The board of directors chooses the procedure to be followed at the General Meeting and determines the details of it (i.e. written form, electronic transmission etc.). As mentioned above, notice of the order to exercise rights in writing/electronically or through the independent representative must be communicated to the shareholders at least four days prior to the General Meeting.

When would a company typically order a written/electronic procedure and when would it appoint an independent representative?

The board of directors retains discretion on how the rights shall be exercised. Non-listed companies without a large shareholder base likely tend to order a written/electronic exercise of rights. Listed corporations probably have a preference for the independent representative.

How does a written exercise of shareholders' rights work?

The company will provide shareholders with a written form which lists every agenda item and motion. Shareholders need to be able to tick yes, no or abstention for each motion. The form has to be signed by the shareholder and returned to the company. Shareholders should be urged to return the form to the company by a specified date under the notice that otherwise, their vote will not be considered.

The form should indicate how the votes will be accounted for if a shareholder does not make a choice, but nonetheless returns the signed form.

The Federal Office of Justice states that shareholders have to provide signed originals of the form or, if submitted electronically, attach an authenticated electronic signature to the form. These requirements unnecessarily hamper the smooth execution of the voting process under today's difficult circumstances.

How does an electronic exercise of shareholders' rights work?

If the company orders its shareholders to exercise their rights electronically, it must ensure that all shareholders can access the system, the participants are properly identified/authenticated and that they can communicate, listen, vote and otherwise exercise their rights at the General Meeting. This process suggested by the Federal Office of Justice implies that all participants actually meet electronically, which would not be possible by way of e-mail. In the opinion of the Federal Office of Justice, a telephone or video conference is permissible. The COVID-19 Ordinance 3 is sufficient as a basis; no corresponding provision in the company's articles of association is required.

However, due to the reduced evidential value of electronic transmissions and potential difficulties with the establishment of presence and the vote count at the General Meeting, we do not recommend this procedure for companies that have a considerable shareholder base and where a controversial vote is anticipated. The board of directors holds the responsibility regarding the eligibility of participants and the number of votes exercised.

How does it work to exercise rights through the independent representative?

Companies will probably provide shareholders with a form which resembles the form used for a written exercise of rights. Proxies and instructions may both be given in writing or electronically.

Unless elected by the General Meeting in line with the Swiss Ordinance against Excessive Compensation at Listed Corporations, the independent representative is appointed by the board of directors. The representative must meet the independence criteria set forth in the Swiss Code of Obligations.

Is it possible to offer shareholders several options to exercise their rights?

The board of directors may consider offering shareholders several options to exercise their rights and ask them, for example, to exercise their voting right through the independent representative and their right to ask questions in electronic form. The Federal Office of Justice considered such combination not permissible but withdrew its opinion later. Accordingly, it is unclear whether or not several options may be offered at the same time to exercise shareholder rights. Such an offer involves considerable legal uncertainty.

Can resolutions of the General Meeting be held in a circular way?

Even under the COVID-19 Ordinance 3 regime, a General Meeting is an actual meeting taking place on a certain date, at a certain time and at a certain place, but without the physical presence of shareholders as participants. Unlike members of a limited liability company (*Gesellschaft mit beschränkter Haftung / société à responsabilité limitée*), the shareholders of a corporation (*Aktiengesellschaft / société anonyme*) may not pass circular resolutions under Swiss law.

How are resolutions adopted that require recording in the form of a public deed?

Agenda items that have to be dressed in the form of a public deed require the physical presence of a notary public. This does not change under the COVID-19 Ordinance 3. The respective agenda items are also voted on in writing/electronically or through the independent representative by the shareholders. The notary issues the public deed mentioning that the General Meeting has been held under the regime of COVID-19 Ordinance 3.

How are majorities determined and calculated at the General Meeting?

To determine whether a resolution has been approved or rejected by the General Meeting, the majority requirements pursuant to the Swiss Code of Obligations and the quorum (if applicable) and majority requirements of the articles of association remain relevant.

A peculiarity in the written exercise of shareholder rights is that the number of votes represented at the General Meeting is equal to the number of votes cast. The reason for this is that

shareholders, that do not return the voting form or proxy, respectively, are not present or represented. Votes of shareholders, that return the voting form without ticking an option, should be counted as abstention (in case of voting forms) or as per the default voting option stipulated in the proxy.

The vote counter (or the chairperson if no vote counter has been appointed) of the General Meeting receives the votes cast and the results are recorded in the minutes.

Is it still necessary to prepare minutes of the General Meeting?

Irrespective of the approach chosen, resolutions and elections of the General Meeting must be recorded in minutes. Questions, motions and alike are also recorded.

For resolutions that are subject to qualified form requirements (i.e. public deed), the physical presence of a notary public at the General Meeting remains mandatory.

Duration of the regime under COVID-19 Ordinance 3

Until when can General Meetings be held under the regime of COVID-19 Ordinance 3?

On 13 June 2021, the COVID-19 Act (which is the legal basis of COVID-19 Ordinance 3) will be submitted to a popular vote. If the COVID-19 Act is not approved by the Swiss people and the cantons, it will be repealed as per 25 September 2021. In this case, until 25 September 2021, the board of directors may order that shareholders may only exercise their rights in writing/electronically or through the independent representative, even for General Meetings taking place after 25 September 2021. Resolutions of General Meetings which were held under the regime of COVID-19 Ordinance 3 cannot be challenged due to the fact that the COVID-19 Act and COVID-19 Ordinance 3 have been repealed later.

If the COVID-19 Act is approved by the Swiss people and the cantons on the occasion of the upcoming popular vote, the regime of COVID-19 Ordinance 3 applies until 31 December 2021 (unless further extended). Within this time frame, the board of directors may order that shareholders may only exercise their rights in writing/electronically or through an independent representative. Decisive is the day on which the board of directors issues the order and not the day on which the General Meeting takes place. This means that the board of directors may convene a General Meeting and order that

shareholders may only exercise their rights in writing/electronically or through the independent representative at any time until 31 December 2021, even if the General Meeting will take place after the expiry of COVID-19 Ordinance 3.

Nonetheless, there is a certain risk that the resolutions of a General Meeting might be challenged if the board of directors convenes a General Meeting under the regime of the COVID-19 Ordinance 3 scheduled to take place long after 25 September 2021 or 31 December 2021, respectively. This is particularly the case if the General Meeting takes place some time after the 20-day notice period has ended (depending on the type of notification, after 15/16 October 2021 or 21 January 2022, respectively) and if the motivation for the order is to avoid undesired questions of shareholders at the General Meeting.

What happens when the COVID-19 Ordinance 3 expires?

General Meetings convened after 25 September 2021 or 31 December 2021, respectively, and General Meetings that have been convened on or before 25 September 2021 or 31 December 2021, respectively, but for which the board of directors has not ordered the exercise of shareholder rights in writing/electronically or through an independent representative, will be exclusively governed by the Swiss Code of Obligations and the company's articles of association and not the COVID-19 Ordinance 3. This means that shareholders will be entitled to attend the General Meeting in person and exercise all their rights at the General Meeting or to grant a proxy to a third party (to the extent permitted by the company's articles of association).

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[Coronavirus Information Hub](#)

Walder Wyss is committed to supporting our clients through the challenges the pandemic presents. We will be publishing regular insights on this Information Hub.

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