

Coronavirus Information Hub: FAQ Corporate Law

General Introduction

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

On 13 March 2020, the Federal Council adopted the ordinance on measures to combat the Coronavirus (COVID-19 Ordinance 2), as amended from time to time, pursuant to which public and private events are banned until 26 April 2020. The COVID-19 Ordinance 2 was originally in force until 19 April 2020 but has been extended by the Swiss Federal Council to 26 April 2020.

The ban is applicable to events of all company types, including corporations, limited liability companies, cooperatives and associations (directly or *mutatis mutandis*). Company events are, for instance, general meetings of shareholders or members.

To avoid that company events cannot be held at all during the ban, COVID-19 Ordinance 2 has instituted a special regime for general meetings of shareholders or members. Although the regime is applicable to all company types and all events within the meaning of the COVID-19 Ordinance 2, this FAQ focuses on the annual and extraordinary general meetings of shareholders of corporations (**General Meeting**).

Ban of Public and Private Events

What are events under COVID-19 Ordinance 2 in the context of corporate law?

A public or private event is a temporary, planned event that takes place in a defined room or perimeter and is attended by several people. An event usually has a defined purpose and a program sequence with thematic and content-related links. The organization of the event is in the responsibility of an organizer, such as a person, an organization or an institution. In the context of corporate law, the organizer of an event can be a company body such as the board of directors.

General Meetings are considered events. Ordinary business meetings, meetings of the board of directors or meetings at a work place do not necessarily fall within the scope of COVID-19 Ordinance 2.

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.

Nevertheless, to the extent meetings are attended in person, 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.

Are General Meetings prohibited under the regime of COVID-19 Ordinance 2?

General Meetings are not *per se* prohibited under COVID-19 Ordinance 2, but the attendance of shareholders is (to the extent the shareholders do not at the same time exercise essential functions for the General Meeting). Persons required for holding the meeting may participate at the General Meeting, but the recommendations of the Federal Office of Public Health regarding hygiene and social distance must be observed and the number of people present limited to a minimum (see question above). With regard to the shareholders, the board of directors may order that they can only exercise their rights in writing/electronically or through an independent proxy. In other words, the General Meeting remains a physical meeting, without the in-person attendance of shareholders (meeting behind closed doors).

Organization of a General Meeting

Who organizes the General Meeting?

The organizer of the General Meeting is the board of directors.

What does the board of directors have to consider when calling a General Meeting under the regime of COVID-19 Ordinance 2?

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 2. Accordingly, the General Meeting still is to be called with a notice period of at least 20 days, held physically and recorded in minutes.

The regime under COVID-19 Ordinance 2 gives the board of directors the possibility to instruct shareholders to exercise

their rights in writing/electronically or through the independent proxy and to preclude shareholders from in-person attendance. To be able to hold the general meeting, 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 proxy (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 shareholders are attending.

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 proxy?

The order must be notified to all shareholders in writing or published electronically 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, it must be dispatched four days before the General Meeting is scheduled to take place. This might be too tight in time considering that postal services currently work at a slower pace.

To the extent 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 proxy 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 proxy?

If no shareholders are present at a General Meeting, it can be held even if no formal order regarding the exercise of rights has been issued. Should a shareholder show up and insist on in-person attendance, the General Meeting would however have to be cancelled and reconvened. The reason for this is that the 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 participation of the company's shareholders to be essential, it may postpone the General Meeting even if it has already been convened. It is not possible to just postpone the General Meeting by a few days; the notice period of twenty days must be observed again.

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 2. 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 30 June 2020 (should the business year correspond to the calendar year). Listed companies may not defer their annual General Meeting beyond 30 June 2020 due to stock exchange regulations.

What happens if a company holds a General Meeting with the attendance of shareholders?

In case of violations of the ban of events, organizers are subject to harsh criminal sanctions consisting of up to three years of custodial sentence or monetary penalty.

Holding of a General Meeting

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

Shareholders are precluded from attendance at the General Meeting, unless they assume an essential function at the General Meeting (for instance, as chairperson).

Nonetheless, the General Meeting remains a physical meeting. Certain constraints apply to the attendees: The recommendations of the Swiss Federal Office of Public Health regarding hygiene and social distance must be observed and, in addition, the number of people present must be limited to the lowest possible number. Only those persons, whose presence is required to reasonably carry out the business of the meeting, may be present, others must not («need-to-join»-rule).

Based on the «need-to-join»-rule, the following persons may attend the General Meeting: the chairman, secretary/vote counter, the auditor (unless presence is waived), the notary public (to the extent required), and as the case may be, the independent proxy.

How do shareholders exercise their rights?

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

The board of directors chooses the procedure to be followed at the General Meeting and determines the details of it (written form, electronic submission etc.). As mentioned above, notice of the order to exercise rights in writing/electronically or through the independent proxy 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 proxy?

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 proxy.

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.

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.

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 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.

The 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 conference is permissible.

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 proxy?

Companies will probably provide shareholders with a form which resembles the form used for a written/electronic 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 proxy is appointed by the board of directors. The proxy must meet the independence criteria set forth in the Swiss Code of Obligations.

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

Even under the COVID-19 Ordinance 2 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. Circular resolutions are not possible 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 attendance of a notary public. This does not change under the COVID-19 Ordinance 2. The respective agenda items are also voted on in writing/electronically or through the independent proxy by the shareholders. The notary establishes the public deed mentioning that the General Meeting has been held under the regime of COVID-19 Ordinance 2.

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 are relevant.

A peculiarity in the written exercise of 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, 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 chairman, if no vote counter is 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 (public deed), the presence of a notary public at the General Meeting remains mandatory.

Duration of the regime under COVID-19 Ordinance 2

Until when can General Meetings be held under the regime of COVID-19 Ordinance 2?

The measures apply until at least 26 April 2020 (unless further extended). Within this time frame, the board of directors may order that shareholders can only exercise their rights in writing/electronically or through an independent proxy.

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 can call a General Meeting and order, at any time until 26 April 2020, that shareholders can only exercise their rights in writing/electronically or through the independent proxy, even if the General Meeting takes places after the expiry of the measures.

Nonetheless, there is a certain risk that the General Meeting might be challenged if the board of directors calls a General Meeting scheduled long after 26 April 2020 under the regime of the COVID-19 Ordinance 2. This is particularly the case if the General Meeting takes place after 17 May 2020, (which is when the 20-day notice period starting 26 April 2020 ends) and if the motivation is to avoid undesired questions of shareholders at the General Meeting.

What happens when the COVID-19 Ordinance 2 expires?

General Meetings called after 26 April 2020 and General Meetings that have been called on or before 26 April 2020, but for which the board of directors has not ordered the exercise of rights in writing/electronically or through an independent proxy, will be exclusively governed by the Swiss Code of Obligations and the company's articles of association and not the COVID-19 Ordinance 2. 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 articles of association).

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