

New CSA, TSX, TSX-V and Legislative Measures Provide Guidance to Public Companies

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By Michael Dolphin,

To mitigate the spread of COVID-19, Public Health Ontario recommends practicing physical distancing, which includes avoiding large gatherings. In light of these recommendations, reporting issuers must re-consider how and when to proceed with their annual general meetings of shareholders (“AGM”).

Generally, issuers must call an annual general meeting within 15 months of the previous AGM, and no more than six months after the issuer’s last financial year-end. However, convening an in-person AGM during the pandemic would contradict the recommendations from Public Health Ontario.

In recognition of the challenge of convening an AGM during the pandemic, the Canadian Securities Administrators (“CSA”) the Toronto Stock Exchange (“TSX”), the TSX Venture Exchange (“TSX-V”) and the Ontario government have recently announced measures to provide relief to issuers that are considering what to do about their AGMs.

In light of these measures, discussed in detail below, issuers may consider:

- holding a virtual AGM (which may be either completely virtual or “hybrid”, meaning that some participants attend in person while others attend virtually); or
- delaying the AGM.

Option I: Holding a Virtual AGM

Is the Issuer Permitted to Hold a Virtual Meeting?

In the normal course, an issuer incorporated under the *Business Corporations Act (Ontario)* (“OBCA”) may convene a virtual AGM unless its articles or by-laws explicitly prohibit virtual meetings. However, on March 30, 2020, the Ontario government passed an order under the *Emergency Management and Civil Protection Act* (the “Emergency Order”), which stated that effective March 17, 2020, despite what is stated in a corporation’s by-laws or constituting documents, a shareholder meeting may be held virtually or electronically and a shareholder participating by such means is deemed to be present at the meeting.

An issuer incorporated under the *Canada Business Corporations Act* (“CBCA”) cannot convene a virtual AGM unless its articles or by-laws expressly provide this as an option. However, if there is no provision allowing for a virtual AGM, the board of directors may add such a provision to the by-laws with immediate effect and seek confirmation of the by-law amendment at the meeting of shareholders.

How to Switch to a Virtual Meeting If Proxy-Related Materials have been Sent and Filed Already

According to guidance from the CSA, an issuer that has already sent and filed proxy-related materials may still switch to a virtual meeting without re-sending or re-filing updated materials. In this circumstance, the issuer must notify securityholders of the change in the date, time or location of the meeting by issuing a news release announcing the change and filing the news release on SEDAR; and taking all reasonable steps necessary to inform all of the parties involved in the proxy voting process, including intermediaries, transfer agents and proxy service providers, of the change.

These actions should be taken promptly after the decision to go virtual is made.

Other Disclosure Requirements and Recommendations

Required

Issuers holding virtual AGMs must disclose clear directions and details on the virtual meeting, including how securityholders can remotely access, participate in, and vote at the AGM.

The CSA has advised issuers that have not already sent and filed proxy-related materials should consider including a caveat in their materials that details about the AGM may be subject to change due to COVID-19.

Further, although legislative changes to the OBCA have made holding shareholders meetings more convenient for Ontario companies, they do not relieve corporations of other formalities for these meetings including the requirements of proper notice, delivering proxies, and ensuring shareholders are able to exercise their right to vote.

Recommended

If an issuer decides to hold a virtual AGM to mitigate the spread of COVID-19, the issuer should consider disclosing this as the reason for the move to a virtual meeting. The issuer should also confirm that shareholder rights to participate will not be limited by the virtual format; that is, the format will still allow shareholders to ask questions, present shareholder proposals and be critical of the business. Although such disclosure is not a regulatory requirement, this type of disclosure is something that proxy advisory firms including Glass Lewis and ISS will be looking for.

Mechanics of Holding a Virtual AGM

Issuers can work with corporate counsel and their corporate trustee to plan and hold the virtual meeting.

These meetings may be run on virtual platforms, including Lumi Global and Broadridge Financial Solutions, or through the issuer's transfer agent. The approximate cost of holding a virtual meeting varies depending on the services provided. See below for a menu of services and sample cost estimates. Companies can expect to spend anywhere from \$7,500+ to hold virtual meetings.

Service:	Fee:
Use of the virtual AGM platform	\$2,500
Project and data management	\$2,500
Use of voting software	\$2,500
Audio webcast with slides	\$2,500
On-site support for 2 days	\$2,500
Delivery, travel and subsistence of on-site support	\$1,500
Registration site for Appointments	\$250

Email communication to Appointer per email	\$0.55
Email communication to Appointee per email	\$0.55
Reconciliation of Appointments (each)	\$17.50
User Guide (each)	\$0.15 (\$40 setup)
Proxy Design to include Virtual AGM icon and Note to Proxyholders to register appointment	\$175.00

Option II: Delaying the Annual General Meeting

On March 23, 2019, the TSX and the TSX-V announced measures to provide relief to issuers who are listed on the TSX and TSX-V: if an issuer must hold their AGM during 2020, it can now delay the meeting, and instead convene it on any day up to and including December 31, 2020, regardless of the issuer's fiscal year end.

The TSX and TSX-V have also accounted for some of the domino effects of these delayed AGMs. For example, the timeframe within which issuers must obtain shareholder approval for security-based compensation arrangements has also been extended: if an issuer's employee stock option plan ("Plan") was scheduled to require shareholder approval this year, the issuer may still continue to grant such employee stock options under the Plan until the earlier of the delayed AGM and December 31, 2020. For TSX-listed issuers, any securities granted under these Plans during this timeframe may be exercised absent ratification by securityholders.

Issuers Incorporated under the Canada Business Corporations Act and Ontario Business Corporations Act

Issuers incorporated under the CBCA must still call the AGM within 15 months of the last AGM, and must hold the AGM within six months of the fiscal year end. Although issuers incorporated under the CBCA can generally apply to the court for an extension under section 133(3) of the CBCA, court closures across Ontario will limit the availability of this process. Therefore, issuers incorporated under the CBCA should consider holding a virtual or hybrid meeting.

Fortunately, issuers incorporated under the OBCA have been granted more flexibility to delay their shareholder meetings. Pursuant to the Emergency Order, an annual general meeting that is required to be held on a date during the state of emergency is instead required to be held no later than the 90th day following the termination of the state of emergency. Additionally, a meeting required to be held on a date that is within the 30-day period after the termination of the state of emergency is instead required to be held no later than 120 days after the termination of the state of emergency.

How to Delay an Annual General Meeting in Light of the Recently-Announced Measures

The TSX and TSX-V do not require issuers who choose to postpone their AGM to apply for an extension. According to guidance from the CSA, the disclosure requirements for postponing the meeting mirror those detailed above for issuers holding a virtual meeting.

An issuer that has already sent and filed proxy-related materials may still change the date without re-sending or re-filing updated materials. Instead, the issuer can notify securityholders of the change by issuing a news release, and filing this news release on SEDAR, announcing the change in the date, time or location, and take all reasonable steps necessary to inform all of the parties involved in the proxy voting process of the change. These actions should be taken promptly after the decision to change the date is made.

Issuers that have not already sent and filed proxy-related materials should consider including a caveat in their materials that meeting details are subject to change due to COVID-19.

When sending a notice of adjournment or other changes related to an AGM to registered holders of its securities, an issuer is required to send the same notice to its beneficial owners, so that both groups receive the same information at the same time.

For more information please feel free to reach out to a member of our [Securities Practice Group](#).

The information and comments herein are for the general information of the reader and are not intended as advice or opinion to be relied upon in relation to any particular circumstances. For particular application of the law to specific situations, the reader should seek professional advice.

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