

# RUNNING AGMS DURING THE COVID-19 PANDEMIC

As the international response to COVID-19 continues to develop, many businesses have responded to social distancing requirements with remote work arrangements and other solutions for front line staff providing essential services.

The social distancing requirements—now ordered in many jurisdictions—make it difficult to hold an in-person annual shareholder meeting and many companies are now looking for solutions.

## Some Considerations with Respect to Annual Meetings:

As many now look for alternatives to in-person shareholder meetings, virtual meetings and hybrid meetings have become popular solutions. Virtual meetings take place over the internet where shareholders and the company meet through online or electronic means with no physical location. A hybrid meeting takes place at a physical location but provides shareholders with the choice to attend physically or remotely and vote electronically over the internet. Companies should first check their governing corporate statute, as these differ across provinces, as well as their corporate articles and by-laws to see if a virtual or hybrid meeting is permitted.

## CORPORATE STATUTES AND QUORUM

According to Andrea FitzGerald of Cassels Brock & Blackwell LLP<sup>1</sup>, a key consideration is whether quorum can be established for the meeting if it is held as a virtual meeting and whether the company can count the vote or establish an electronic connection that would constitute a shareholder being “present” at the meeting.

Generally speaking, unless the articles or the by-laws of the company state otherwise, and in some cases where the by-laws permit, the *Ontario Business Corporations Act* (the “OBCA”), the *Canada Business Corporations Act* (the “CBCA”), the *Alberta Business Corporations Act* (the “ABCA”) and the *Quebec Business Corporations Act* (the “QBCA”) each permit a virtual meeting of shareholders to be held.<sup>2</sup> The *British Columbia Business Corporations Act* (the “BCBCA”) requires that a shareholder meeting be in a specific “location”<sup>3</sup>, so while a hybrid meeting may satisfy this requirement, a full virtual meeting may not.

<sup>1</sup>Andrea FitzGerald, “COVID-19 Impact: Welcome to our AGM – Through our Virtual Gateway”. Cassels Brock & Blackwell LLP. 18-March-2020. <<https://cassels.com/insights/covid-19-impact-welcome-to-our-2020-agm-through-our-virtual-gateway/>>

<sup>2</sup>See Section 94(2) of the *Ontario Business Corporations Act*, RSO 1990, c.B.16 (the “OBCA”); see also Section 132(5) of the *Canada Business Corporations Act*, RSC 1985, c.C-44 (the “CBCA”); see also Section 131(3.1) of the *Alberta Business Corporations Act*, RSA 2000, c.B-9 (the “ABCA”); see also Section 175 of the *Quebec Business Corporations Act*, CQLR c.S-31.1 (the “QBCA”).

<sup>3</sup>See Section 166 of the *British Columbia Business Corporations Act*, SBC 2002, c.57 (the “BCBA”).

The OBCA considers a shareholder who votes at the meeting or establishes a communication link through such electronic means to be “present” at the meeting and considered as part of quorum.<sup>4</sup> The CBCA, the ABCA, the QBCA, and the BCBCA all generally consider a shareholder participating in the meeting by way of electronic means to be present at the meeting where such electronic means also permits or enables all participants to communicate with each other during the meeting.<sup>5</sup>

If a virtual meeting is not permitted under the applicable statute, or by the company’s articles or by-laws, the company can apply for a court order to allow the same.<sup>6</sup> Should companies decide to seek a court order, they should consider court closures that may affect the order being granted and received in a timely manner.

## HYBRID MEETINGS

A hybrid meeting can be a solution in situations where:

- A company cannot secure a virtual service provider;
- A company is not permitted under the corporate governing statute, articles or by-laws to hold a virtual meeting;
- There may be a proxy contest or contentious special business submitted for a vote (virtual-only shareholder meetings are not recommended in these situations); or
- There are very few shareholders that typically attend the shareholders meeting in person.

A hybrid meeting in most cases will satisfy a company’s quorum requirement if management nominees who serve as proxyholders are physically in attendance. It should be noted that a Canadian company providing a webcast of their shareholder meeting online is not the same as a virtual or hybrid meeting which require the shareholders’ full ability to participate, communicate and vote.

## Responses from the Canadian Securities Administrators

### BLANKET TEMPORARY FILING RELIEF FOR MARKET PARTICIPANTS

In response to the COVID-19 crisis, the Canadian Securities Administrators (the “CSA”) encouraged reporting issuers through a notice released on March 16th, 2020, to consider applying for a management cease-trade order if they are not able to file their annual or interim financial statements by their prescribed deadline.<sup>7</sup> This direction was modified through an update bulletin released on March 18th, 2020, where the CSA announced that they will be providing temporary blanket relief from some regulatory filings for market participants in light of the COVID-19 situation.<sup>8</sup> The blanket relief provides for a **45 day extension** for periodic filings normally required to be made by issuers, investment funds, registrants and certain regulated entities on or before June 1, 2020. The updated bulletin also confirmed that market participants are not required to apply for management cease trade orders as they will not be noted in default. The relief is being provided through local temporary blanket orders that are harmonized across the country. Issuers are urged to view these orders on their CSA member’s website and to contact their principal regulator with any questions.

<sup>4</sup>See Section 94(2) of the Ontario *Business Corporations Act*, RSO 1990, c.B.16 (the “OBCA”); see also Section 174 of the Quebec *Business Corporations Act*, CQLR c.S-31.1 (the “QBCA”).

<sup>5</sup>See Section 132(4) of the CBCA; see also Section 131(3) of the ABCA; see also Section 174 of the QBCA; see also Section 174(1) of the BCBCA.

<sup>6</sup>Rima Ramchandani et al., “COVID-19 and AGM virtual meeting planning”. Torys LLP. 16-March-2020. <<https://www.torys.com/insights/publications/2020/03/covid-19-and-agm-virtual-meeting-planning>>; see also Section 106 of the OBCA; see also Section 144 of the CBCA; see also Section 143 of the ABCA; see also Section 193 of the QBCA; see also Section 186 of the BCBCA.

<sup>7</sup>“Canadian Securities Regulators Provide Update On COVID-19 And Potential Filing Delays By Reporting Issuers”. Canadian Securities Administrators. 16-March-2020. <<https://www.securities-administrators.ca/aboutcsa.aspx?id=1876>>

<sup>8</sup>“Canadian Securities Regulators To Provide Blanket Relief for Market Participants Due To COVID-19”. Canadian Securities Administrators. 18-March-2020. <<https://www.securities-administrators.ca/aboutcsa.aspx?id=1877>>



# GUIDANCE ON CONDUCTING ANNUAL GENERAL MEETINGS DURING THE COVID-19 PANDEMIC

The conduct of AGMs is primarily subject to applicable corporate statutes and the Issuer's constating documents. The CSA, however, has the following suggestions:<sup>9</sup>

If an issuer decides to change the date, time, location of its in-person meeting due to the COVID-19 situation and has already sent and filed its meeting material, it can notify securityholders of the change without sending revised or additional proxy-related material by:

- Issuing a news release announcing the change in the date, time or location,
- Filing the news release on SEDAR, and,
- Taking all reasonable steps to inform all of the parties involved (e.g. intermediaries, transfer agents, and proxy service providers) of the change.

If a reporting issuer has not yet sent nor filed its proxy-related material, then the reporting issuer should consider including complete disclosures in its material regarding the possibility of such changes due to COVID-19.

## TSX AND TSX-V

Due to the COVID-19 virus, issuers listed on the TSX are permitted to hold their 2020 Annual Meeting on any date in 2020 up to and including December 31, 2020.<sup>10</sup> The TSX requirement of having an annual meeting within six months from an issuers' fiscal year-end will not be enforced.<sup>11</sup> For those companies that are listed on the TSX-V, they too will have up until December 31, 2020 to hold their 2020 Annual Meeting and the TSX-V will not enforce their policy for issuers to hold a meeting 15 months after its last preceding annual meeting or 18 months from the date of its incorporation or certificate of amalgamation.<sup>12</sup>

## VIRTUAL OR HYBRID AGMS

The CSA has also provided some guidance to issuers choosing to have a virtual or hybrid AGM instead of an in-person meeting.<sup>13</sup> They expect that the issuers will:

- Notify all securityholders, all parties involved in the proxy voting infrastructure and other market participants of the virtual or hybrid meeting in a timely manner; and
- Disclose clear directions regarding the logistical details of the AGM including how securityholders can remotely access, participate in, and vote at the AGM.

If the proxy material has not been filed or sent to securityholders, these logistical details should be clearly disclosed in the materials. If the proxy material has been filed and sent, and the meeting is being changed to a virtual or hybrid meeting, then these details should be disclosed in a news release as mentioned above.

The CSA also notes that Section 2.15 of National Instrument 54-101 'Communication with Beneficial Owners of Securities of a Reporting Issuer', requires that any information sent to the registered holders be also sent to the beneficial holders.

The CSA has indicated that they will continue to monitor the impact of COVID-19 and that they may issue further guidance and updates as required.

<sup>9</sup>"Canadian Securities Regulators Provide Guidance On Conducting Annual General Meetings During COVID-19 Outbreak". Canadian Securities Administrators. 20-March-2020. <<https://www.securities-administrators.ca/aboutcsa.aspx?id=1879>>

<sup>10</sup>"TSX Staff Notice to Applicants, Listed Issuers, Securities Lawyers and Participating Organizations". TSX Staff Notice 2020-0002. Toronto Stock Exchange. 23-March-2020. <<https://decisia.lexum.com/tsx/sn/en/item/466093/index.do>>

<sup>11</sup>Ibid.

<sup>12</sup>"Extension of Deadlines for AGM and Stock Option Plan Approval", TSX Venture Exchange Corporate Finance Bulletin: Notice to Issuers. TSX Venture Exchange. 23-March-2020. <<https://www.tsx.com/resource/en/2230>>

<sup>13</sup>"Canadian Securities Regulators Provide Guidance On Conducting Annual General Meetings During COVID-19 Outbreak". Canadian Securities Administrators. 20-March-2020. <<https://www.securities-administrators.ca/aboutcsa.aspx?id=1879>>



# Guidance and Responses from the Proxy Advisory Firms—ISS and Glass Lewis

## ISS

ISS has acknowledged the impact of COVID-19 on the 2020 proxy season as “more than any other event in recent history” in their March 27, 2020 Governance Insights publication.<sup>14</sup> They also indicated that this pandemic could affect activists, who may opt to remain on the sidelines resulting in slower M&A activity. As a consequence, some supported deals may be in danger of not closing.

Since the pandemic is causing companies to review alternatives to in-person AGMs such as virtual AGMs, ISS recognizes that court orders have been obtained allowing companies to have these virtual meetings. Canada’s largest banks and life insurance companies announced on March 20th, 2020 that they jointly obtained a court order allowing them to hold meetings electronically.<sup>15</sup>

ISS has not yet made a comment on whether the COVID-19 pandemic will have an effect on their proxy guidelines.

## GLASS LEWIS

### Virtual or Hybrid Meetings

Glass Lewis (“GL”) issued an update on Virtual Only Meetings due to COVID-19 on March 19, 2020.<sup>16</sup> In this update, GL made it clear that they do not believe that “discouraging virtual-only meeting during this time serves the interests of shareholders or companies”. Typically, GL will recommend to vote against members of the governance committee for virtual meetings as shareholders have had concerns about the use of a virtual meeting format “as a shield to insulate management and the board from subpar performance or significant controversies”. However, GL has issued an immediate policy update indicating that they will review these meetings on a case-by-case basis and will note whether the companies are providing adequate disclosure indicating clearly their rationale for holding a virtual or hybrid meeting, including citing COVID-19.<sup>17</sup> GL indicated that for virtual only meetings due to COVID-19 held between March 1, 2020 and June 30, 2020, they will generally refrain from recommending a vote against the members of the governance committee to hold such a meeting on this basis.

Companies with shareholder meetings that take place after June 30, 2020 will be required to provide robust disclosure in their proxy statement around shareholder participation for virtual meetings. GL indicates that even if the pandemic continues past that date, their standard policy on virtual shareholder meetings will apply as they believe issuers will have had sufficient time to address the shareholder concerns that are outlined in their standard policy.<sup>18</sup> Some examples of **effective disclosure** that should be included in the meeting materials include:

- Describing how shareholders can ask questions during the meeting, including the time guidelines, rules around what types of questions are permitted, and rules on how questions and comments will be recognized and disclosed to all meeting participants;
- Describing the procedures, if any, of how to post questions received during the meeting and the company’s responses on the investor page of the company’s website as soon as practical following the meeting;
- Providing technical and logistical information related to accessing the virtual meeting platform; and
- Procedures for accessing technical support to assist shareholders in the event of any difficulties.

<sup>14</sup>Subodh Mishra, “Canada Proxy Season Preview”, Governance Data, Analytics, and News from Institutional Shareholder Services. ISS Corporate Solutions. 27-March-2020.

<sup>15</sup>Ibid.

<sup>16</sup>Aaron Bertinetti, “Immediate Glass Lewis Guidelines Update on Virtual-Only Meetings due to COVID-19 (Coronavirus)”. Glass, Lewis & Co., LLC. 19-March-2020. <<https://www.glasslewis.com/immediate-glass-lewis-guidelines-update-on-virtual-only-meetings-due-to-covid-19-coronavirus/>>

<sup>17</sup>Ibid.

<sup>18</sup>Ibid.



## Final Thoughts

We are indeed in uncertain times however, business must continue. Virtual and hybrid meetings are a logical solution to an in-person AGM, but issuers should first check and see if this is a viable option for their company or uncover what is required to offer such a meeting and if it will be possible within an acceptable timeframe. The CSA as well as the TSX and TSX-V have provided some relief for issuers by providing filing extensions as well as extensions to the date of the AGM. Both the regulators and the proxy advisory firms have stated clearly that the requirement for clear disclosure and communication with shareholders is paramount. This communication will be critical during this process and that is where D.F. King Canada is here to assist.

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