

**COVID-19 AND SHAREHOLDERS MEETINGS: NOW WHAT?**

by Irwin Greenblatt, Eric Roblin, Elliott Vardin, Rick Moscone and Jennifer Humphrey

We have received several inquiries from clients asking for guidance regarding their shareholders meetings in light of the rapidly evolving novel coronavirus ("**COVID-19**") pandemic and the need to socially distance ourselves. With the annual general shareholder meeting ("**AGM**") season upon us, this article seeks to provide information relating to (i) the options available for holding AGMs in light of the COVID-19 concerns and (ii) the procedures to be followed in the event that an issuer decides to change the date, time or location of its in-person AGM due to COVID-19.

We note that the discussion in this article relates to business transacted at AGMs (for example, election of directors and amendments to equity incentive plans). Issuers involved in proxy contests, holding special meetings for merger and acquisition transactions, or obtaining securityholder approval for transactions under Multilateral Instrument 61-101 *Protection of Minority Securityholders in Special Transactions* should contact counsel to discuss options available to them.

**Options for Holding Annual General Meetings**

We have summarized three options available to issuers<sup>1</sup>, namely: an in-person shareholders meeting; a virtual- shareholders meeting, that is held through the Internet or other electronic means in lieu of an in-person AGM; and a hybrid shareholders meeting, which combines an in-person AGM with shareholder participation through the Internet or other electronic means.

Regardless of which option an issuer decides to pursue, general AGM rules continue to apply, including the necessity for:

1. a quorum of shareholders to be in attendance;
2. the circulation of appropriate disclosure documents, including a notice of meeting, information circular and proxy (assuming the notice and access rules are not being used); and
3. attendees having an opportunity to participate in the meeting.

In deciding on which option is most appropriate, issuers may wish to consider the following factors: the number of shareholders anticipated to attend in person; whether the AGM will consider a contested or special item of business;



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<sup>1</sup> This memo is applicable to issuers incorporated under either the *Canada Business Corporations Act* ("**CBCA**") or the *Business Corporations Act* (Ontario) ("**OBCA**").

and the extent of the circumstances and risks concerning COVID-19 and recommended protocols that may be in effect at the time of the meeting.

### Option 1: In-Person Meeting

Some of our clients have indicated that they would like to proceed with an in-person AGM. In such instances, issuers need to be mindful that they should only do so if they expect that there will be a limited number of attendees at the meeting (or will take steps to ensure that this is the case) such that they can accommodate appropriate social distancing measures. Although there is no magic number, the Ontario government and other authorities discourage any gathering of 50 or more people.

Should an issuer decide to hold an in-person AGM, we recommend that the following steps be taken:

1. limit attendance at the meeting solely to those representatives of the issuer that are critical for the transacting of business along with registered shareholders and proxyholders and ensure that such restriction is strictly enforced; and note that those that wish to attend in person may be subject to health screening at the entrance and will be asked to socially distance themselves from others at the meeting;
2. encourage registered shareholders<sup>2</sup> and proxyholders not to attend the meeting in person and highlight how shareholders may vote their shares through the internet, by facsimile or by mail as set forth in the form of proxy;
3. do not provide any refreshments at the meeting;
4. limit the meeting to the formal business to be completed with no presentations, question and answer sessions or socializing before or after the meeting;
5. confirm the foregoing in the notice of meeting and information circular provided to shareholders;
6. choose a venue for the AGM that allows the issuer to enforce the above restrictions (the issuer's office).

Issuers may also wish to offer a webcast or other electronic means by which interested parties can hear the AGM proceedings, either live or recorded, and able to be replayed from a link on an issuer's website.

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<sup>2</sup> Registered shareholders are those shareholders who hold their shares directly with an issuer and therefore have their names and addresses recorded in the issuer's share registry. Most shareholders are not registered shareholders. Those shareholders that purchased their shares through a broker or other intermediary and/or a broker or other intermediary holds a shareholder's shares in an account they have with them, are a non-registered shareholder

## Option 2: Virtual Meeting

Many of our clients have also considered holding shareholder meetings virtually. "Virtual" meetings are those that are conducted electronically, without any physical location, via Internet or other electronic means. An issuer who would like to hold a virtual meeting should take the following steps:

1. *Determine whether the issuer's constating documents and its governing corporate statute permit a virtual or hybrid AGM.*

An issuer or its counsel should first examine whether its constating documents (articles and bylaws) and governing corporate statute permit it to hold a virtual meeting. Although the CBCA and the OBCA generally have considerable overlap, the two statutes vary with respect to electronic meetings. Notably, a CBCA company is only permitted to hold a virtual meeting if it is explicitly provided for in the company's articles or by-laws and shareholders are able to "communicate adequately" with one another.

The OBCA is more flexible with respect to the holding of virtual shareholders meetings, expressly allowing shareholders meetings to be held entirely electronically unless their articles or by-laws otherwise provide. Further, the OBCA deems a shareholder who votes through such electronic means, or who establishes a communications link to the AGM, to be present at the meeting, thereby facilitating the satisfaction of quorum requirements through electronic participation. The OBCA also does not include the requirement that shareholders be able to "communicate adequately" with one another, unlike the CBCA.

2. *Once determined that a virtual meeting is permissible, an issuer should notify its transfer agent of its intention to hold a virtual meeting and select a virtual meeting provider.*

To date it has not been common practice in Canada to hold virtual shareholder meetings, but with the arrival of COVID-19, we expect the practice to be more widely adopted. There are currently a limited number of service providers in Canada that provide issuers with the ability to hold virtual meetings and given the anticipated high volume of requests to transfer agents and virtual meeting providers, we recommend that issuers contact their transfer agents and virtual meeting provider to determine availability, costs, procedures and timing.

3. *Option 3: Hybrid Meeting*

Clients may also consider holding a shareholder meeting in a hybrid format. "Hybrid" meetings are meetings that are held through a combination of an in-person meeting with a physical location and presence and virtually via the Internet or other electronic means. An issuer who would like to hold a hybrid meeting should take note of Options 1 and 2 above for holding in-person and virtual shareholder meetings.

## Proxy Materials

*What should an issuer do if the issuer's AGM materials have not yet been distributed?*

An issuer who has not yet distributed its meeting materials should include disclosure in these materials of the type of shareholder meeting being held and the procedures to be followed and allow for the possibility of changes in the holding and conduct of its AGM due to COVID-19.

For an in-person meeting, the proxy meeting materials should describe any attendance restrictions and other procedural matters adopted, as described above, and outline other methods of participating in or hearing the meeting.

The [2020 Policy Guidelines](#) prepared by Glass Lewis recommends that virtual meetings include the following disclosure to:

- address the ability of shareholders to ask questions during the meeting, including time guidelines for shareholder questions, rules around what types of questions are allowed, and rules for how questions and comments will be recognized and disclosed to meeting participants;
- provide procedures, if any, for posting appropriate questions received during the meeting and the company's answers, on the investor page of an issuer's website as soon as is practical after the meeting;
- address technical and logistical issues related to accessing the virtual meeting platform; and
- provide procedures for accessing technical support to assist in the event of any difficulties accessing the virtual meeting.

Additionally, clear directions on the logistical details of the virtual or hybrid AGM (including how securityholders can remotely access, participate in, and vote at such AGM), should also be described in the materials provided to shareholders.

### *Procedures to be Followed if Meeting Materials have Already Been Mailed*

On March 20, 2020 the Canadian Securities Administrators (the "**CSA**") issued a notice providing that any issuer who has decided to change the date, time or location of its in-person AGM due to COVID-19 is permitted to notify securityholders of the change without sending additional soliciting materials or updating its proxy-related materials if the issuer:

- issues a news release announcing the change in the date, time or location;
- files the news release on SEDAR; and

- takes all reasonable steps necessary to inform all the parties involved in the proxy voting infrastructure (i.e. intermediaries, transfer agents and proxy service providers) of the change.

In addition, if an issuer has already sent and filed its proxy-related materials, the issuer does not need to send additional soliciting materials or to update its proxy-related materials solely for the purpose of switching to a virtual or hybrid AGM, if the issuer follows the steps described above for announcing a change in the AGM date, time or location.

With respect to beneficial shareholders and dealing with an adjournment or change to a shareholder meeting, exemptive relief of section 2.15 of National Instrument 54-101 *Communication with Beneficial Owners of Securities of a Reporting Issuer* is not required provided registered holders and beneficial owners are treated equally and receive the same information. This includes adhering to the notice methods discussed above.

### General Comments and Next Steps

It will be very important in these volatile times for issuers to be as transparent as possible with stakeholders in order to help maintain confidence. We suggest including a brief explanation for the reasoning behind the meeting type held, as well as a cautionary note that changes may be made depending on ongoing developments and protocols concerning COVID-19. Additionally, we encourage issuers to review our recent [publication](#) discussing the CSA's temporary (45 day) relief from deadlines for some periodic securities regulatory filings.

Please contact any of our authors if you have any questions or require any additional information.