

Legal update

Virtual AGMs for Canadian Issuers: It's starting!

August 2017

Governance and directors' liability

General context

With the advent of new technologies, many issuers are considering using electronic means to reach a greater number of their shareholders. Integrating technology to annual general meetings of shareholders (AGMs) is certainly an illustration of this. A virtual annual general meeting of shareholders (virtual-only AGM) is a meeting that takes place exclusively using online technology, without a corresponding in-person meeting. It must be distinguished from a traditional AGM, which is held in person, but also from a hybrid AGM, which is held in person with a simultaneous online broadcast.

There has been a growing number of virtual-only AGMs in the United States. According to Broadridge Financial Solutions, the main provider of virtual meeting platforms, the practice has grown more than 700% since 2010, with nearly 200 virtual meetings held in 2016. For instance, companies such as Ford, Sprint, Intel and Hewlett-Packard have recently opted for virtual-only AGMs. Broadridge has noticed a particular popularity among technology companies as well as new issuers.

Very few Canadian issuers have held virtual-only AGMs and, to the best of our knowledge, most virtual meeting platform providers do not currently offer a product tailored to the Canadian market. However, Broadridge is currently working on customizing its American platform for Canada and a Canadian corporation recently held its first virtual-only AGM, with the assistance of TSX Trust Company.¹

The "adequate communication" requirement

Virtual-only AGMs are authorized under most Canadian corporate statutes, often requiring that (i) the corporation's by-laws expressly allow the meeting to be held by means of a telephonic, electronic or other communication facility or do not specifically provide otherwise and (ii) such communication facility "permits all participants to communicate adequately with each other during the meeting."²

It remains unclear what constitutes adequate communication and how virtual-only AGMs would satisfy this requirement. In an effort to keep Delaware law³ current with technological advances, the *Delaware General Corporation Law* was amended in 2000 to allow companies to hold virtual-only AGMs, provided shareholders are given "a reasonable opportunity to participate in the meeting" and "to read or hear the proceedings of the meeting substantially concurrently with such proceedings." We believe the "adequate communication" requirement is more demanding than ensuring shareholders are given a reasonable opportunity to participate.

Potential benefits

- **Increasing shareholder accessibility.** Through technology, shareholders can participate in a virtual-only AGM from wherever they wish. This may be increasingly important as corporations and investors become more global. One could counter-argue that proxy participation already affords shareholders the ability to

contribute to the meeting without being physically present. However, it is incomparable to actual presence, whether physical or virtual.

- **Increasing shareholder participation.** With improved access, more shareholders are able to participate. Furthermore, since many issuers hold their respective AGMs during the same time of the year, shareholders can participate in more meetings if they do not have to go to each of them physically.
- **Reducing costs and disruption for corporations and shareholders.** AGMs require significant time, effort and expense. With virtual-only AGMs, issuers no longer have to rent a venue and shareholders do not have to spend money on travelling. A virtual-only AGM may also be less disruptive by letting everybody involved in the AGM return to their routines quickly.
- **Reducing carbon footprint.** Virtual-only AGMs mean less travel for management, the board and shareholders, and fewer printed materials.
- **Keeping up with technology.** Issuers hosting virtual-only AGMs may seem to be at the forefront of what technology can offer. This may be especially important for technology companies.

Potential concerns

- **Preventing shareholders from communicating adequately.** One of the central challenges of virtual-only AGMs is effectively managing discussion and debate. Since questions are submitted in an electronic format, a meeting's chairperson could choose which questions to acknowledge and answer. This creates a potential for abuse by allowing the chairperson to "cherry-pick" the shareholders who are allowed to ask questions, thereby controlling the agenda of the meeting. Despite the decision to call a virtual-only AGM being made in good faith, the ability of the chair to decide not to answer certain questions could be interpreted as a way to prevent participants from communicating adequately with each other, a legal requirement for issuers incorporated under most Canadian corporate statutes.
- **Complicating the management of shareholder interventions.** A chairperson may have trouble managing questions efficiently when dealing with a large group of shareholders. It may also be more difficult to maintain order among participants who are not physically present in a room. Further, the sense of anonymity created by virtual communications can affect how shareholders act and react, with the risk of diminishing the quality of dialogue and fostering aggressive interventions. Lastly, virtual-only AGMs may present a lack of personal interconnection, which in turn could compromise the ability of shareholders to fully judge the performance of management.
- **Dealing with shareholder opposition.** Some shareholders may oppose an issuer holding a virtual-only AGM. For instance, the comptroller of New York City and overseer of the city's pension funds, with over \$170 billion in assets, recently advocated against virtual-only AGMs, urging issuers to abandon the practice.
- **Increasing uncertainty related to shareholder votes.** With virtual-only AGMs, more shareholders are able to attend and vote. To the extent that votes could be changed in real time, shareholders are less likely to vote by proxy in advance, making voting results less predictable.
- **Handling IT issues.** Should they occur, technical flaws may paralyze and delay a virtual-only AGM.

Recommendations

Canadian issuers who decide to hold a virtual-only AGM in the future will certainly have to deal with a degree of resistance to change. They will need to establish adequate guidelines and best practices to ensure their choice to hold a virtual-only AGM is not perceived as a way to prevent shareholder participation by hiding behind technology.

- **Allowing adequate communication.** Issuers who wish to use virtual-only AGMs will need to make tremendous efforts to allow adequate communication by shareholders. Ideally, that means allowing shareholders to interact in real time with each other and with the chair.

- **Establishing appropriate procedures.** Transparent and comprehensive procedures to securely identify attendees as well as to enable and record online voting should be established. Procedures to ask, manage and answer questions remotely will also need to be put in place, such as displaying all reasonable questions asked during the meeting and organizing and answering questions based on their subject matter or the order in which they are submitted.
- **Choosing the right timing.** Ideally, an issuer's first virtual-only AGM should mainly address uncontentious matters. The optics of an open and transparent meeting are particularly important in the context of significant shareholder dissent or controversy. If one of the meeting's topics is controversial and adequate procedures have not been established, the decision to hold a virtual-only AGM may be criticized as a method of controlling shareholder participation.
- **Achieving a progressive transition.** An issuer could start with a hybrid AGM and slowly move towards the virtual-only model, as it was done by some companies in the United States. Issuers should also discuss the proposed changes with prominent shareholders.

Conclusion

With comprehensive procedures in place and a reliable virtual meeting platform enabling participants to communicate adequately with each other, virtual-only AGMs could be a great tool to broaden shareholder access while reducing costs and disruption for Canadian issuers and their shareholders. The practice is gaining pace in the United States and it will be interesting to see how this trend will catch on in Canada. Canadian issuers seeking to modernize their meeting practices should stay tuned.

Catherine Simard

The author wishes to thank law student Charles-Étienne Borduas for his help in preparing this legal update.

Footnotes

- ¹ Concordia International Corp. (TSX: CXR). For more information, see: <https://www.tmx.com/newsroom/press-releases?id=587&lang=en>.
- ² See Section 132 (5) of the *Canada Business Corporations Act*, Section 131 (3.1) of the *Business Corporations Act* (Alberta) and Section 126 (4) *Corporations Act* (Manitoba). Section 94 (2) of the *Business Corporations Act* (Ontario) does not include the "adequate communication" requirement.
- ³ More than 50% of all publicly traded companies in the United States, including a majority of the Fortune 500 companies, have chosen Delaware as their legal home.

For further information, please contact one of the following lawyers:

> Thierry Dorval	Montréal	+1 514.847.4528	thierry.dorval@nortonrosefulbright.com
> Paul Amirault	Ottawa	+1 613.780.8601	paul.amirault@nortonrosefulbright.com
> Jean-Philippe Buteau	Québec	+1 418.640.5069	jean-philippe.buteau@nortonrosefulbright.com
> Heidi Reinhart	Toronto	+1 416.216.2979	heidi.reinhart@nortonrosefulbright.com
> Katherine Prusinkiewicz	Calgary	+1 403.267.8313	katherine.prusinkiewicz@nortonrosefulbright.com
> Daniel E. Steiner	Vancouver	+1 604.641.4892	dan.steiner@nortonrosefulbright.com

Norton Rose Fulbright Canada LLP, Norton Rose Fulbright LLP, Norton Rose Fulbright Australia, Norton Rose Fulbright South Africa Inc and Norton Rose Fulbright US LLP are separate legal entities and all of them are members of Norton Rose Fulbright Verein, a Swiss Verein. Norton Rose Fulbright Verein helps coordinate the activities of the members but does not itself provide legal services to clients.

References to "Norton Rose Fulbright", "the law firm", and "legal practice" are to one or more of the Norton Rose Fulbright members or to one of their respective affiliates (together "Norton Rose Fulbright entity/entities"). No individual who is a member, partner, shareholder, director, employee or consultant of, in or to any Norton Rose Fulbright entity (whether or not such individual is described as a "partner") accepts or assumes responsibility, or has any liability, to any person in respect of this communication. Any reference to a partner or director is to a member, employee or consultant with equivalent standing and qualifications of the relevant Norton Rose Fulbright entity.

The purpose of this communication is to provide general information of a legal nature. It does not contain a full analysis of the law nor does it constitute an opinion of any Norton Rose Fulbright entity on the points of law discussed. You must take specific legal advice on any particular matter which concerns you. If you require any advice or further information, please speak to your usual contact at Norton Rose Fulbright.