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Legal update

Will the Coronavirus spark a new era of virtual shareholder meetings in Canada?

March 2020
Corporate governance
Corporate, M&A and securities

Concerns over the Coronavirus have prompted issuers to examine whether to hold their upcoming shareholder meetings through electronic means, a format that has seen remarkably slow adoption in Canada. While more common in the U.S., Canadian issuers have lagged behind, with only four virtual meetings held since the first one in 2017. In contrast, Broadridge hosted 326 virtual meetings in the U.S. in 2019.

What is a Virtual Meeting?

A virtual meeting of shareholders is one that takes place using online technology. It can be either a "virtual-only meeting", which is held exclusively online, without a corresponding in-person meeting, or a "hybrid meeting", which is held in-person at a physical location and is also open to online participation. In both cases shareholders are validated through a control number, able to cast their votes in real time and able to ask questions. This is different from holding an in-person meeting and offering a simultaneous webcast over the internet, which is already a popular approach in Canada.

Potential Benefits of a Virtual Meeting

- ***Better shareholder accessibility***. Through technology, shareholders can participate in a virtual meeting from wherever they wish. This is increasingly important as issuers and investors become more global. It also has obvious benefits in the face of a potential matter of public health or safety, such as the Coronavirus.

- ***Increased shareholder participation (numbers)***. With improved access, more shareholders are able to participate. Furthermore, since many issuers hold their meetings during the same time of the year, shareholders can participate in more meetings if they do not have to travel to each of them physically.

- ***Reduced costs and disruption***. Meetings require significant time, effort and expense. With virtual-only meetings, issuers no longer have to rent a venue or spend money on security and shareholders do not have to spend money on travelling.

- ***Reduced carbon footprint***. Virtual-only meetings mean less travel for management, the board and shareholders, and fewer printed materials.

- ***Forefront of innovation and governance***. Issuers hosting virtual meetings may be seen as being at the forefront of both innovation and good governance.

Potential Concerns with a Virtual Meeting

- ***Perceptions regarding effectiveness of communication***. One of the central challenges of virtual meetings is effectively managing discussion and debate. Since questions are submitted in an electronic format, a meeting's chairperson can choose which questions to acknowledge and answer. Even the perception that questions are "cherry-picked" can be problematic.

- ***Decreased shareholder participation (quality)***. While the number of shareholders that can participate may increase with a virtual meeting, arguably the level or depth of such participation may decrease without the opportunity to connect in person with management and the board.

- ***Challenges with meeting management***. A chairperson may have trouble managing questions efficiently when dealing with a large number of questions submitted online. 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 non-productive interventions. Virtual meetings may also present a lack of personal interconnection, which in turn could compromise the ability of shareholders to fully judge the performance of management.

- ***Shareholder opposition***. Some shareholders may oppose an issuer holding a virtual-only meeting. For instance, the comptroller of New York City and overseer of the city's pension funds, with over $170 billion in assets, publicly called on corporations to stop holding virtual-only meetings.

- ***Increased unpredictability of results***. With virtual meetings, 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.

- ***IT issues***. Should they occur, technical flaws may paralyze and delay a virtual meeting.

Institutional Investor Guidance

Since participation in shareholder meetings is a basic right of shareholders, several organizations that advise institutional investors have recently published voting recommendations on this topic.

- ***Glass Lewis.*** Since 2019, Glass Lewis has expressed concern in its proxy voting guidelines that virtual-only meetings may restrict the ability of shareholders to participate in the meeting. As a result, Glass Lewis may recommend voting against members of the governance committee of an issuer that is planning to hold a virtual-only shareholder meeting if it does not provide adequate disclosure regarding how the issuer will safeguard shareholder participation rights.

- ***SHARE.*** The Canadian Shareholder Association for Research & Education included in its 2020 model proxy voting guidelines (for use by Canadian pension funds) the following model guidelines:

    - [The fund] will vote against proposals to hold shareholder meetings entirely by electronic means, unless those electronic meetings give shareholders the same opportunities to participate, including asking questions and engaging in dialogue, as if they were physically present.

    - If a company adopts virtual shareholder meetings without shareholder approval, and if the virtual meetings do not give shareholders the same opportunities for participation as if they were physically present, [the fund] will vote against the entire board.

Legal Considerations

Virtual meetings are authorized under corporate legislation to varying degrees and the rules differ across Canada. Under the federal *Canada Business Corporations Act* and the equivalent provincial legislation in Alberta and Québec, (i) the corporation's bylaws must expressly allow the meeting to be held entirely by telephone or electronic means and (ii) the virtual platform must permit all participants to "communicate adequately" with each other during the meeting. Note that the Québec requirement is that participants be able to "communicate directly with one another", which is arguably a higher standard. Corporations subject to the federal, Alberta or Québec corporate legislation will need to review their bylaws to confirm whether they contain the required provisions.

British Columbia corporate legislation permits participation in meetings by telephone or other communications medium, *unless* the articles or memorandum provide otherwise, but is silent as to whether the meeting may be held *entirely* by electronic means. Also, it is a requirement in British Columbia that meeting participants be able to "communicate with each other". Ontario corporate legislation is the most favourable as it permits meetings to be held by telephone or electronic means *unless* the articles or bylaws provide otherwise. Also, there is no specific requirement that the platform permit "adequate" communication among participants.

Since the meaning of "adequate" communication has not been tested in court, it is uncertain as to whether a virtual meeting is truly permissible under Canadian corporate legislation outside of Ontario . Of the four Canadian companies that have held virtual-only meetings, two have been subject to Ontario corporate legislation and two to British Columbia corporate legislation. So far this proxy season one corporation (which is subject to federal corporate legislation) has announced that it will hold a virtual-only meeting this year as a result of the Coronavirus.

Practical Considerations

- ***Limited number of technology providers.*** There are currently only a couple of companies with the technology to facilitate virtual meetings in Canada: Lumi (since 2017) and Broadridge (since 2019). Interested issuers should contact them as soon as possible if interested in pursuing this type of meeting.

- ***Transfer Agent.*** The issuer's registrar and transfer agent will need to work closely with the technology provider and be involved in preparation for the meeting.

- ***Audio / Visual.*** Issuers will need to decide whether the meeting will be an audio-only event or a video stream. The costs are higher with the video option and the vast majority of issuers in the U.S. elect audio-only. (According to Broadridge, 97% of virtual-only meetings held in 2019 were audio-only.)

Best Practices

We recommend that issuers deciding to hold a virtual meeting establish guidelines that include established best practices to safeguard shareholder participation rights.

- ***Explain the move to investors.*** It is advisable to make investor outreach efforts to ensure that key shareholders are aware of the proposed change to a virtual meeting and the reasons for it. (For example, that the issuer considers it good governance to limit large gatherings in light of the Coronavirus.)

- ***Consider the business of the meeting***. If the meeting is likely to be contentious or involves the consideration of shareholder proposals or items of special business, a decision to hold a virtual-only meeting may be criticized as a method of controlling shareholder participation.

- ***Choose the proper tool.*** Select a technology that allows adequate communication by shareholders. Ideally, that means allowing shareholders to interact in real time with each other and with the chair. The tool also needs to securely identify attendees and enable and record real time voting.

- ***Create formal rules of conduct.*** Establish rules of conduct and make them available before the meeting. Similar to an in-person meeting, there should be sufficient opportunity for shareholders to ask questions and make comments, while being respectful of the time of all participants. Establish reasonable time guidelines and rules for when questions are out of order.

- ***Establish Q&A governance.*** Decide whether to take questions online via a text box, through a phone line or both. Consider hiring an independent moderator to monitor the question queue. Consider 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.

- ***Ask for questions in advance.*** Consider offering shareholders the opportunity to submit questions to the board and management in advance of the meeting (while still maintaining the right of shareholders to ask questions at the meeting). This may allow for questions to be addressed more fully and provide a more orderly Q&A session.

- ***Post questions after.*** Consider posting the questions and answers on the investor page of the corporation's website after the meeting.

- ***Establish voting governance.*** The corporation's registrar and transfer agent, typically appointed as scrutineer of the meeting, will need to work closely with the technology provider to ensure that all online votes are included with the proxy votes in the final results.

- ***Have a technical support line available.*** Consider having a technical support line for shareholders before and during the meeting.

A committee of U.S. investors, public company representatives and proxy and legal service providers published the Principles and Best Practices for Virtual Annual Shareowner Meetings in 2018, which contains additional recommendations and best practices.

Weighing the Considerations

With conferences cancelled and corporate travel curbed, many issuers are looking to the upcoming shareholder meeting season and considering alternatives to holding the meeting in person. Timing for consideration of the issues is tight with proxy circulars being finalized and scheduled meetings being around the corner.

On the one hand, there is a very limited history and culture of holding virtual meetings in Canada and only a small number of technology providers available to facilitate such meetings. There are also concerns as to whether a virtual meeting provides an adequate forum for discussion and debate and an adequate opportunity for shareholder participation.

On the other hand, taking the necessary steps now to plan for a virtual meeting greatly reduces the risk of the meeting not being able to proceed as planned in the event of an epidemic or other significant issue. If an in-person meeting cannot proceed on the intended date, issuers are generally able (subject to their bylaws) to adjourn the meeting for up to 30 days under corporate legislation without having to provide additional notice. But if the reason for the adjournment is a widespread epidemic, it is questionable whether a 30 day adjournment would be meaningful. A virtual meeting also increases the potential for shareholder engagement at a time when people are avoiding crowds, while also reducing costs to the issuer.

A hybrid meeting provides the best governance option since it allows shareholders to choose whether to attend in person or online and in either case to ask questions and to vote in real time. However, this comes at a much higher cost to the issuer while still requiring management and the board to physically attend when it may not be desirable to do so. It is also worth noting that in 2019, only 8% of the virtual meetings conducted by Broadridge in the U.S. were hybrid.

With the heightened focus on, and uncertainty surrounding, the Coronavirus, it would be prudent for issuers who do not already provide access to a webcast of the live meeting to consider whether to do so. Perhaps the threat of epidemics such as the Coronavirus will usher in a new era of shareholder meeting governance.

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