

Goodmans^{LLP} Update

Legal and Practical Considerations for Virtual Shareholder Meetings

As measures to combat the spread of COVID-19 intensify in the midst of proxy season, many Canadian public companies are considering hosting their annual shareholders meetings either exclusively through an online platform (so-called “virtual meetings”) or as “hybrid meetings”, which provide for online participation while also allowing meeting participants to attend in person. Given the uncertainty about whether large in-person gatherings will be permitted or advisable later in April, May and June when many annual shareholder meetings are scheduled to be held, companies are exploring the possibility of virtual-only meetings. This Update provides an overview of some of the key legal and practical considerations when deciding whether to proceed with a virtual shareholder meeting.

Virtual Shareholder Meetings

Virtual-only meetings can be hosted strictly via audio feed or may include a live video streaming component. In the U.S., where virtual meetings have been more prevalent, most companies host virtual meetings in audio-only format.

Virtual meetings are seen by many as increasing accessibility and shareholder participation, while reducing costs and minimizing environmental impacts. On the other hand, some shareholders have expressed concern that the lack of in-person communication reduces access to, and accountability of, the board and management. Historically, proxy advisory firm Glass, Lewis & Co. (Glass Lewis) has recommended voting against a company’s governance committee if it plans to hold a virtual meeting and the circular does not contain robust disclosure confirming shareholder participation rights will be the same as those available at in-person meetings.

In the current environment, the health and safety benefits (indeed, possible necessity) of a virtual meeting is the primary factor driving most companies’ decisions this year. It remains to be seen whether shareholders and proxy advisors will take a more flexible approach in their voting recommendations given the current situation and uncertainty about whether in-person meetings will even be possible later this spring when many annual meetings are scheduled. The Canadian Securities Administrators (CSA) have acknowledged that many issuers are moving toward virtual meetings as a result of social-distancing measures and are supportive of this risk mitigation measure.

Legal Considerations

Governing Statute

Corporate statutes in Canada differ in terms of whether they permit virtual-only meetings. Ontario’s *Business Corporations Act* (OBCA) is the most permissive, and allows virtual meetings unless the company’s articles or by-laws provide otherwise. A shareholder who votes electronically at the meeting or establishes a communications link to the meeting is deemed to be present at the meeting and there is no requirement for shareholders to adequately communicate with one another.

Authors



Tara Hunt
thunt@goodmans.ca
416.849.6969



Chris Sunstrum
csunstrum@goodmans.ca
416.597.4270

The *Canada Business Corporations Act* (CBCA) also permits virtual-only meetings, but only if (i) the by-laws expressly permit it, and (ii) the communication facility being used allows all participants to communicate adequately with each other during the meeting. Hybrid meetings can be held without authorization in the by-laws so long as adequate communication facilities are available. A person participating in a meeting by electronic means is deemed to be present at the meeting. The requirement for participants to communicate adequately with each other can pose challenges to achieving quorum if this is not feasible for meetings with a large number of attendees. Unfortunately, there is little guidance on the legal interpretation of “adequate” in these circumstances.

Other provincial and territorial corporate statutes are not as permissive as the OBCA. While most expressly address electronic participation at meetings, they may require the by-laws to explicitly permit virtual meetings and impose communication requirements similar to those in the CBCA.

For reporting issuers that are not governed by corporate statutes, such as real estate investment trusts (REITs), these entities will have to look to their declarations of trust or other constating documents to determine if there are any provisions that are not compatible with hosting a virtual meeting.

Articles and Bylaws

In addition to the governing corporate statute, all companies will need to carefully examine their articles and by-laws (or equivalent organizational documents). As described above, CBCA companies need express authorization to hold a virtual-only meeting, while OBCA companies simply need to ensure their constating documents do not prohibit them. Many companies' by-laws contain antiquated provisions that may not fit neatly with the practicalities of a virtual meeting.

Problematic by-law provisions may potentially be addressed through by-law amendments, which under most Canadian corporate statutes become effective once the board adopts them. While by-law amendments must be presented to shareholders for ratification at the next shareholder meeting, even if they are not ratified, they generally remain effective until the meeting ends. As a result, a by-law amendment to facilitate virtual meetings could allow the company to hold a virtual meeting in 2020, even if its shareholders do not ratify the amendment at the meeting. Obtaining a court order permitting a virtual meeting can also be a solution, but may not be practical in some Canadian jurisdictions for the foreseeable future as a result of recent court closures.

Disclosure

The proxy circular for a virtual meeting should include clear disclosure about the fact the meeting will only be held virtually and the procedures for participation and voting. Glass Lewis recommends the disclosure describe:

- the ability of shareholders to ask questions;
- procedures, if any, for posting appropriate questions and the company's answers;
- technical and logistical requirements; and
- procedures for accessing technical support.

For companies that have not historically held virtual meetings, it can also be helpful to explain why the company is holding a virtual meeting this year.

Companies that are in the process of finalizing their proxy materials and have not yet decided whether to hold a virtual meeting (or hybrid meeting) may consider disclosing in their proxy circular that the meeting may later be changed to a virtual-only meeting, and that the company will notify shareholders accordingly in compliance with applicable notice requirements.

Practical Considerations

Two primary service providers offer virtual meeting platforms in Canada – Lumi Global and Broadridge Financial Solutions. Their platforms generally allow for presentation and voting capabilities as well as text or live Q&A submissions. Given the current climate, their services are in extremely high demand and companies seeking to hold a virtual meeting should contact their transfer agent to reserve capacity as soon as possible. Companies should work with these service providers to ensure their platform capabilities are adequate to satisfy any communication requirements in their governing statute or constating documents.

Pending Meetings

Companies that have already mailed their meeting materials and scheduled their annual meeting for the coming weeks may no longer be permitted to meet in-person given government restrictions on public gatherings. Companies may seek to change their meeting to a virtual meeting and notify shareholders of the change in accordance with applicable notice requirements. Where it is not feasible to change the meeting to a virtual-only meeting, companies may need to reschedule the meeting. However, the CSA has recently advised that it will publish guidance on making changes to annual general meetings as soon as possible, and this may ease the burden on companies looking to make such a change.

In the face of the unique legal and practical challenges in the current environment, companies should continue to take reasonable steps to ensure annual meetings are held in the manner and within the timelines permitted under applicable law and their constating documents.

For further information on the issues discussed in this Update, please contact any member of our [Corporate Finance and Securities Group](#).