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Let's Get Practical: Moving to Virtual AGMs in Response to COVID-19

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As the COVID-19 global health pandemic continues, companies are having to respond to a constantly evolving situation. For Canadian and U.S. public companies, this includes having to make quick decisions about when and how to hold their 2020 annual shareholder meetings (AGMs), while at the same time implementing the necessary precautions to safeguard the health and well-being of their employees, customers, partners, shareholders, communities and other stakeholders. For most issuers, this means deciding in short order whether to hold their historically physical AGMs as virtual meetings or whether to delay or postpone their AGMs to a yet uncertain future time when the COVID-19 crisis has abated. Here we discuss recent guidance and practical tips to help issuers manage their 2020 shareholder meetings.

What Is a Virtual Shareholder Meeting?

In a virtual-only meeting format, shareholders do not have the option to attend a physical meeting. Accessing an online platform is the sole means available to attend, ask questions and vote at the meeting. This contrasts with a hybrid-virtual meeting, which still allows in-person participation and which, in the current environment, may not be feasible or prudent as we work to stall the spread of COVID-19.

Reliable remote-meeting technology, currently made available primarily by either LUMI Global or Broadridge Financial Services, Inc., allows issuers to conduct their shareholder meetings virtually, giving participants the ability to participate in (or, in the case of guests, view and listen to) meetings via an online portal through which they can vote and ask questions.

Virtual-only meetings have been rare in Canada, with only a handful of Canadian public companies hosting them prior to the 2020 proxy season. Now, in the face of COVID-19, the adoption of a virtual-only format is exploding, with many issuers having already announced, or working closely with their service providers and counsel in preparation to announce, the move to a virtual annual meeting of shareholders.

Regulators and Market Participants Are Expected to Be Cooperative and Pragmatic

The Canadian Securities Administrators (CSA) and the U.S. Securities and Exchange Commission (SEC) have each issued consistent guidance for issuers considering alternatives to traditional in-person AGMs. See [CSA provide guidance on conducting Annual General Meetings during COVID-19 Outbreak¹](#) and [SEC Staff Guidance for Conducting Annual Meetings in Light of COVID-19 Concerns²](#) for full details. The main message from the securities regulators is that market participants should be, and the regulators are expecting to be, flexible and collaborative to help issuers hold their shareholder meetings.

Issuers planning to conduct virtual AGMs are expected to notify shareholders and other relevant market participants in a clear and timely manner. However, the precise method of doing so will vary according to each issuer's circumstances. For issuers holding AGMs to address non-contentious annual or special business, provided that their disclosure concerning a virtual meeting is clear, timely and widely disseminated, we do not expect regulators to require the sending of additional solicitation materials or amending previously prepared or filed materials in order to make that move in response to COVID-19.

Similarly, proxy advisory firms Institutional Shareholder Services, Inc. (ISS), and Glass Lewis & Co. (Glass Lewis) – both historically opposed to virtual-only shareholder meetings out of concern that they disenfranchise shareholders – have indicated they are relaxing their views this year. ISS is expected to be “very reasonable” (with expressed caution about virtual-only meetings), and Glass Lewis is

expected to be lenient so long as the company cites COVID-19 as the reason for the move. Details concerning the proxy advisors' positions are summarized in a [memo](#) circulated by Kingsdale Advisors.³

Earlier today, the TSX announced in TSX Staff Notice 2020-0002 that it is providing temporary blanket relief from a variety of stock exchange requirements, including the requirement for issuers to hold their AGMs within six months of their fiscal year-end. Pursuant to that relief, the TSX will allow issuers to hold their 2020 AGMs on any date in 2020 up to and including December 31, 2020, regardless of their fiscal year-end. Issuers are not required to apply to the TSX to avail themselves of this relief. While this announcement will be welcome to some issuers that might be considering postponing or delaying their AGM, companies must still adhere to the relevant corporate law deadlines, absent securing relief via court order or other (if any) available means under the applicable corporate statute.

For the past several weeks, we have been helping our clients understand what a virtual meeting is, how the technology works, and the legal and practical considerations that need to be addressed if moving to a virtual format. In the meantime, several issuers have either announced their move to a virtual format from a previously announced in-person meeting or are working to update (or supplement) their proxy materials to provide for a virtual meeting. As time is of the essence, in our view, an appropriate level of pragmatism must prevail.

Managing Your 2020 (Virtual?) AGM: Top Considerations and How We Can Help

Whether you have already prepared and filed your proxy-related materials for an in-person shareholder meeting and now wish to convert it to a virtual meeting – or you are still in the process of preparing proxy-related materials and are considering a virtual format – we can help. Below are the top considerations and tips to help you navigate this nuanced and evolving issue.

- **Consider postponing your AGM if a virtual-only meeting is not possible.** As discussed above, LUMI and Broadridge are currently the main providers of the remote meeting technology needed for shareholders to participate via virtual AGMs. As a result of the massively increased demand for virtual AGMs due to COVID-19, neither LUMI nor Broadridge may have the capacity to take on additional mandates in the near term to allow issuers to hold their AGMs within the required deadlines. That deadline will be sooner or later depending on an issuer's fiscal year-end and previous AGM. Issuers with an imminent need to hold their shareholder meetings but that have yet to retain a service provider may now find it too late to do so. In this case, you should consider whether to delay or postpone your meeting. Doing so may require a court order or other relief under your corporate statute and/or from stock exchanges (other than the TSX, which has granted the blanket relief discussed above) on which your securities are listed.
- **Review your corporate statute and governing documents.** An issuer's ability to hold a virtual shareholder meeting will depend on its governing corporate legislation, articles and bylaws. Some statutes, such as the *Business Corporations Act* (Ontario), allow a meeting of shareholders to be held by electronic means unless the articles or bylaws provide otherwise. Other statutes, such as the *Canada Business Corporations Act*, allow meetings to be held entirely by electronic means only if the issuer's bylaws explicitly provide for them. Corporate statutes also differ in whether and how quorum for a non-physical meeting will be established. It may be appropriate for some issuers to amend their bylaws to ensure that a virtual meeting can be held this year with the same legal effect as an in-person AGM. In other cases, issuers may need to obtain a court order in light of restrictions under their corporate statute. For example, Canada's major banks recently issued a [joint statement](#)⁴ announcing that they had received a court order to allow them to hold their AGMs through electronic means and to authorize alternative delivery methods for their proxy materials, which would not otherwise be possible under the *Bank Act* (Canada).
- **Provide clear instructions to shareholders in a timely manner.** Issuers should notify shareholders and other market participants of their plans to conduct a virtual AGM (and of any other changes to its meeting format or procedures) in a timely manner. That disclosure should state that the shift has been made due to COVID-19 and include clear directions on the logistical details, including the steps shareholders need to take (which will typically differ for registered and beneficial shareholders) to remotely attend, participate in and vote at the meeting. Both the CSA and the SEC have stated that such disclosure should be set out in a news release if issuers' proxy-related materials have been sent and filed or in the proxy-related materials themselves if they have not yet been sent and filed. Some issuers may be required to mail and file their materials in the coming days and do not have enough time to orchestrate a virtual meeting and revise their disclosure accordingly. We can advise you on the appropriate disclosures to do so given the obvious time constraints.

- **Foster shareholder participation and enfranchisement.** Issuers that intend to hold a virtual AGM should ensure their shareholders have the ability to attend, participate in and vote at the meeting to the same extent that they otherwise would if it were held in person. In particular, the virtual component should allow for communication that enables shareholders to ask questions and voice concerns, even those that are critical of the issuer or its management. The existing technology can be leveraged to accomplish this and we are offering practical tips to issuers on how to handle Q&A in these contexts.
- **Simplify your meeting procedures, scripts and materials.** Often, chair's scripts and associated meeting materials are formalistic and contemplate a regimented process for moving through the business of the meeting, including having each item of business moved and seconded by designated shareholders and voting for each item by separate ballots. The formal business is often followed by management presentations and Q&A. In a virtual format, the usual scripts and approaches will not work well. It is important to understand how the process will work in reality and to modify your processes and scripts accordingly, which, in many cases, will require significant changes. For most issuers that have never held a virtual-only AGM, simplicity will be key.
- **Do not hold a virtual-only meeting for tactical reasons or for special business.** Although meeting mechanics largely fall within the purview of corporate law, securities regulators retain broad public interest jurisdiction to intervene even when there has not been a breach of securities law. Securities regulators are likely to have concerns if there is evidence to suggest that an issuer is holding a virtual-only meeting for tactical reasons. For example, is the issuer aware of an imminent proxy contest that a virtual-only format may undermine? Does the meeting include a vote on an M&A transaction? We encourage issuers who are anticipating meetings at which shareholders will be asked to vote on contentious or special business to contact us, as a virtual format may not be appropriate, or additional protections may be necessary in those cases to ensure shareholders' rights are not undermined.

¹ Online at <https://www.newswire.ca/news-releases/canadian-securities-regulators-provide-guidance-on-conducting-annual-general-meetings-during-covid-19-outbreak-845986418.html>.

² Online at <https://www.sec.gov/ocr/staff-guidance-conducting-annual-meetings-light-covid-19-concerns>.

³ Online at <https://mailchi.mp/kingsdaleadvisors/hlibt2xqzu-1071635?e=5bbb8b827b>.

⁴ Online at <https://www.newswire.ca/news-releases/joint-statement-by-canadian-banks-and-life-insurance-companies-regarding-annual-meeting-planning-876783293.html>.

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