

# COVID-19 and AGM virtual meeting planning

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In light of the rapidly evolving developments relating to COVID-19 and the social distancing measures being widely implemented, public companies are rethinking their plans to hold in-person annual shareholder meetings. As annual meeting season fast approaches, companies that want to move towards a virtual meeting but preserve their scheduled meeting date must move quickly.

## What you need to know

- “Virtual” meetings are those that are conducted entirely through electronic means over the internet with no physical meeting location.
- In light of COVID-19, we expect the vast majority of companies this proxy season will hold virtual meetings or strongly discourage in-person attendance.
- Companies should check their governing corporate statute, articles and by-laws to confirm they are permitted to hold a virtual meeting.
- If not permitted under corporate law, companies may seek a court order to hold a virtual meeting. While we expect such orders would be granted, recent announcements regarding court closures may impact a company’s ability to obtain an order on a timely basis.
- Given that the risk of legal challenge for an uncontested meeting is low, we expect companies will take an approach that is most practical in the circumstances.
- There are limited technology service providers available to conduct virtual meetings, so companies should act quickly to make appropriate arrangements if a virtual meeting is desired.

## What is a “virtual” meeting?

A “virtual” meeting is conducted entirely through electronic means over the internet—there is no physical meeting location. This is distinct from a “hybrid” meeting where there is both a physical meeting location and internet access to the meeting—in a hybrid meeting, shareholders can choose to participate (which includes voting) either in person or electronically.

## Can any company hold a virtual meeting?

The answer depends on the applicable corporate statute and the company’s articles and by-laws.

- Companies incorporated under Ontario (OBCA) or Québec (QBCA) corporate law generally have flexibility to conduct virtual meetings—unless the articles or by-laws of the company provide otherwise, a virtual meeting can be conducted<sup>1</sup>.
- Companies incorporated under Canadian federal (CBCA) or Alberta (ABCA) corporate law must have express authority in their by-laws to conduct a meeting by electronic means<sup>2</sup>.
- The Canadian federal, Québec and Alberta corporate statutes also require that the communication facility used for an electronic meeting must permit all participants to communicate adequately with each other during the meeting. If shareholders are able to see or hear the conduct of the meeting, ask questions and see or hear the questions of other participants, we believe this would satisfy these requirements. Bi-lateral communication between shareholders should not be necessary to hold a virtual meeting under the CBCA, QBCA or ABCA.
- There are differences across provinces and the particular statutory requirements in other jurisdictions should be confirmed.

Even if permitted under the applicable corporate statute, virtual meetings are not recommended where there is a proxy contest or other matter being put before shareholders that may be contested—in these instances, given the special nature of the business, an in-person meeting is preferable and the company may therefore choose to adjourn or postpone the meeting.

## What can a company do if a virtual meeting is not permitted under corporate law?

If a virtual meeting is not permitted under the applicable corporate statute or the company’s articles and by-laws, or if a company requires some accommodation under corporate law in order to proceed with a virtual meeting, a company can apply for a court order (if the applicable corporate statute permits—the OBCA, CBCA, ABCA and the QBCA all provide for this). Under the current circumstances, we expect most companies would be successful in obtaining a court order to conduct a virtual meeting if necessary. Companies that decide to seek a court order will also need to consider recent announcements regarding court closures, which may impact court orders being granted on a timely basis.

## How does a company hold a virtual meeting?

Once a company has confirmed it is permitted to conduct a virtual meeting under corporate law, the company should call its transfer agent and connect with a virtual technology service provider. There are a limited number of these service providers in Canada who are currently in high demand, and companies will need to ensure they are able to engage someone who can meet their needs and timing.

## Companies who have not yet distributed proxy materials

If a company has not yet distributed its proxy materials and has decided to proceed with a virtual meeting, the details regarding the virtual meeting must be communicated in the proxy materials and delivered in the ordinary course.

If a company has not yet decided whether to conduct the meeting virtually, it would be prudent to advise shareholders in the proxy materials that a decision may be later made to conduct the meeting (in whole or in part) through electronic means. The proxy materials should also indicate that shareholders will be notified of any change in the meeting location through a press release and website posting. Taking this approach preserves flexibility for the company to later change the meeting location, while also ensuring that the company has satisfied shareholder notice requirements. Should the company later determine to conduct the meeting virtually, shareholders should be given as much notice of the change as is practicable prior to the meeting date. Failure to give sufficient notice may result in shareholder complaints, poor shareholder attendance or, in the worst case, failure to make quorum for the meeting.

## Companies who have already distributed proxy materials

If a company has already distributed its proxy materials, shareholders will need to be notified of the change to a virtual meeting. Under the OBCA, CBCA, ABCA and QBCA, companies are required to send shareholders notice of the meeting location at least 21 days prior to the meeting and this notice must be delivered by mail or personal delivery (unless an issuer has obtained the consent of the shareholder to receive communications electronically—though in the case of the OBCA and ABCA, consent may be implied if a shareholder does not object to receiving communications electronically)<sup>3</sup>. If a company cannot meet the minimum 21-day notice requirement, it may choose to apply to court for an order allowing it to provide notice within a shorter timeframe and in a different form (for instance, by press release and website posting).

## What are the alternatives to a virtual meeting?

For some companies, conducting a virtual meeting may not be a readily available or desirable option. The meeting date may be fast approaching without sufficient time to comfortably make the change. A virtual meeting may require the company to incur costs to obtain a court order, for an additional shareholder mailing or for a virtual technology service provider. In such cases, a company may choose to pursue any of the following options:

- continue to hold its regularly scheduled in-person annual meeting with a simultaneous webcast, strongly discourage physical attendance and encourage shareholders to vote in advance
- subject to any restrictions that may be contained in the articles and by-laws of the company, conduct a hybrid meeting and strongly discourage physical attendance; hybrid meetings can be conducted under the CBCA, OBCA, ABCA and QBCA and in many other Canadian jurisdictions
- if a public health advisory is issued shortly before the scheduled meeting date that imposes a ban on public gatherings, adjourn or postpone the meeting to a later date
- given the risk of legal challenge is low in the circumstances, proceed with a virtual meeting notwithstanding any legal impediments

## The regulatory response to date

On March 13, the United States Securities and Exchange Commission announced a relaxation of its proxy rules in the face of COVID-19, allowing issuers to notify shareholders of a change in the date, time, or location of annual meetings without mailing additional soliciting materials or amending proxy materials. Under the SEC guidance, issuers are permitted to announce changes through a press release provided they also file the announcement as definitive additional soliciting material on EDGAR and take all reasonable steps necessary to inform other intermediaries in the proxy process (such as any proxy service provider) and other relevant market participants (such as the appropriate

national securities exchanges) of such change. Issuers are encouraged to make this disclosure promptly after making a decision of any such change and sufficiently in advance of the meeting to ensure the market is alerted to the change in a timely manner.

Canadian securities laws do not currently prohibit annual meetings to be conducted, in whole or in part, through electronic means and to date, Canadian regulators have not published any guidance on the topic<sup>4</sup>.

## Conclusion

Companies that want to conduct a virtual meeting may be faced with one or more legal and logistical hurdles. In such a case, companies will need to balance their obligations to hold shareholder meetings in compliance with corporate law with their duties, as good corporate citizens responding to the global COVID-19 pandemic, to conduct such meetings in a manner that protects the health and safety of their shareholders and other members of the community. Companies will be well-served to maintain flexibility (including through appropriate language in their proxy materials) to adapt their meeting plans to these rapidly evolving circumstances and changing market practices.

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<sup>1</sup> In April, the governments of Ontario and Quebec each passed emergency orders permitting virtual shareholder meetings for OBCA and QBCA companies, respectively, notwithstanding any provisions in the company's constituting documents or the provisions of the applicable statute. Additionally, in Ontario, OBCA companies have been granted an extension to the AGM deadline for at least 90 days following the termination of the emergency (120 days for OBCA companies who would otherwise be required to hold their AGM within 30 days following termination of the emergency). In May, the Ontario emergency order was codified into law pursuant to the *COVID-19 Response and Reforms to Modernize Ontario Act, 2020*. In October, the government of Ontario made regulatory amendments permitting OBCA companies to hold virtual shareholder meetings to May 31, 2021.

<sup>2</sup> In April, the government of Alberta passed an emergency order suspending the obligation of ABCA companies to hold an AGM during the period of the declared emergency. As a result, ABCA companies will now have additional time following the termination of the emergency to hold their AGMs. In August, the Minister of Innovation, Science and Industry issued an order to extend the deadlines for calling an AGM and presenting financial statements for CBCA corporations. The order is retroactive to March 13, 2020, and ends on December 31, 2020. Corporations automatically qualify for the extensions and do not need to apply to Corporations Canada. The order extends the time for calling an AGM to the shortest of: (i) 21 months after the previous AGM and no more than 12 months after the last financial year-end; or (b) December 31, 2020. Directors may now present financial statements to shareholders at the AGM no more than 12 months after the corporation's last financial year-end. This extends the usual requirement by six months.

<sup>3</sup> In April, the Ontario government passed an emergency order providing that if a notice of an AGM has already been sent and the date, time or place of the meeting is changed in order to hold the meeting virtually, another notice of meeting is not required to be sent but the persons entitled to receive the notice must be informed of the change in a manner and within a time that is reasonable in the circumstances.

<sup>4</sup> On March 20, 2020, Canadian securities regulators published guidance on virtual AGMs that is largely consistent with SEC guidance, advising issuers that they can notify the market of a change to a virtual AGM by way of press release issued sufficiently in advance of the AGM. On May 1, in recognition of the fact that many issuers may be required to delay their AGMs (including delivery of their information circulars which typically contain the required executive compensation disclosure), the CSA provided blanket relief from the requirement to file executive compensation disclosure within 140 days of year end (180 days for venture issuers), provided that they issue a press release disclosing that they are relying on the exemption and send their executive compensation disclosure or AGM information circular to securityholders by December 31, 2020.

**Read all our coronavirus-related updates on our [COVID-19 guidance for organizations](#) resource page.**

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