

SANGRA MOLLER LLP

Barristers & Solicitors

LEGAL CURRENCY

A Client Communication

COVID-19: Virtual AGMs and Canadian Securities Regulatory and Stock Exchange Updates

In light of the COVID-19 pandemic, companies may be considering alternatives to conducting an in-person annual shareholder meeting (an "AGM"). Such alternatives, as well as recent relief measures provided by the Canadian Securities Administrators (the "CSA"), the Toronto Stock Exchange (the "TSX") and the TSX Venture Exchange (the "TSXV"), are discussed below.

I. AGMs

Companies may consider conducting AGMs entirely online with no physical meeting location (a "virtual AGM"), or in-person with the ability to also permit online securityholder participation (a "hybrid AGM"). Conducting an AGM in such manner is subject to the company's constating documents, statutory requirements and CSA requirements.

Conducting an AGM electronically requires specific technology that allows for shareholder participation and voting, of which there are limited service providers some of which are operating at reduced capacity. Companies wishing to take this approach should act quickly to make appropriate arrangements.

If you have AGMs scheduled in the near future and would like to implement alternatives to in-person meetings, please contact us and we would be pleased to assist.

Constating Documents

Companies must check their constating documents to see if they permit holding a virtual or hybrid AGM.

Statutory Requirements

The *Canada Business Corporations Act* ("CBCA") as well as certain provincial corporate statutes (notably

in Ontario and Alberta), clearly state that shareholder meetings may be held either partially or entirely through telephonic or electronic means if the by-laws so provide. Most standard-form CBCA by-laws include this flexibility. A virtual AGM must permit all "participants to communicate adequately with each other" during the meeting and vote in the virtual setting. Bi-lateral communication between shareholders should not be necessary to hold a virtual meeting under the these statutes.

For a company incorporated under the *Business Corporations Act* (British Columbia) ("BCBCA"), unless the company's articles provide otherwise, a meeting of shareholders may be held by telephone or other communications medium if the "shareholders are able to communicate with each other". This introduces the issue of whether or not virtual AGM technologies must include private shareholder-to-shareholder communications as well, which is unsettled.

The BCBCA also requires that a general meeting of shareholders be held in British Columbia, or another location if: i) the location is set out in the articles, ii) there is no restriction as to where the meeting must be held in the articles and the location is approved by the shareholders, or iii) the registrar approves the location. A hybrid AGM may therefore be more feasible for such companies.

If a virtual AGM is not permitted under the applicable corporate statute or the company's articles or by-laws, a company can apply for a court order, which we expect would be successful under the current circumstances. On March 11, 2020, Telus Corporation, a BCBCA company, was granted such an order. However, recent announcements regarding court closures may make it difficult to obtain such an order on a timely basis.

Even if permitted, virtual AGMs 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 under the current circumstances.

CSA Requirements

On March 20, 2020, the CSA issued a news release providing guidance for the calling and conduct of AGMs during the COVID-19 outbreak. Reporting issuers who plan to conduct a virtual or hybrid AGM must notify shareholders, parties involved in the proxy voting infrastructure (such as intermediaries, transfer agents and proxy service providers) and other market participants of such plans in a timely manner and disclose clear directions in its proxy-related materials as to how shareholders can remotely access, participate in and vote at such AGM.

Changing the Date, Time or Location of an In-Person AGM

Issuers that have already sent and filed their proxy-related materials and decide to change the date, time or location of their in-person AGM due to COVID-19 concerns, or decide to host a virtual or hybrid AGM, can notify securityholders of the change without sending additional proxy materials. Such issuers must:

- 1) issue a news release announcing the change;
- 2) file the news release on SEDAR; and
- 3) take all reasonable steps necessary to inform all the parties involved in the proxy voting infrastructure (such as intermediaries, transfer agents and proxy service providers) of the change.

Issuers are expected to take the above actions promptly after making such a decision and sufficiently in advance of the AGM to alert the market in a timely manner.

Issuers that have not yet sent and filed proxy materials for their 2020 AGM should consider including disclosure in those materials that highlights the possibility of changes to meeting logistics due to COVID-19. The CSA expect that proxy materials will include clear directions on logistical details and instructions for any virtual or hybrid AGM (for example, how security holders can remotely access, participate in, and vote at the AGM).

United States Response

The United States Securities and Exchange Commission (SEC) has announced similar guidance in relation to the various measures discussed above.

Under the SEC guidance, issuers are permitted to announce changes to their AGMs 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.

Issuers with a class of securities listed on a U.S. exchange will also need to consider applicable U.S. securities laws and exchange requirements.

Glass Lewis Recommendations

Glass Lewis has historically discouraged virtual-only AGMs because of concerns that such meetings do not approximate an in-person experience and could potentially curb the ability of a company's shareholders to meaningfully communicate with members of management. However, in light of the COVID-19 outbreak, for virtual AGMs between March 1, 2020 and June 30, 2020, Glass Lewis will generally refrain from its usual recommendation. For

all meetings after June 30, 2020, Glass Lewis will continue to apply its standard policy.

Practical Considerations

Issuers wishing to hold a virtual or hybrid AGM should consider adopting the following practices:

- Contact their transfer agent and technology provider as soon as possible in order to ensure proper disclosure in its proxy circular or news release, as applicable, and to ensure technical support is available.
- Clearly communicate the chosen meeting technology ahead of time and ensure accessibility by using a platform that will accommodate shareholders.
- Provide detailed disclosure in the proxy circular or news release, as applicable, of how to access the meeting electronically, any minimum technology requirements to do so and provide contact information for providing technical support resources for shareholders before and during the meeting.
- Test the platform before going "live".
- Establish procedures to validate meeting attendees as shareholders or proxyholders, and for the scrutineer to collect votes.
- Establish reasonable guidelines for questions, including how shareholders can submit questions in advance.

Alternatives to a Virtual AGM

If conducting a virtual AGM is not a readily available or desirable option, for example if the company is unable to implement all necessary procedures in time, a company may:

- 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; or
- 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.

II. 45-Day Filing Extension for Certain Disclosures

The CSA is providing a 45-day extension for certain periodic disclosures normally required to be filed between March 23, 2020 and June 1, 2020.

Issuers choosing to rely on this relief and complying with its conditions will not need to file applications for management cease trade orders.

The relief is implemented through blanket orders of each of the securities regulators and are substantially harmonized across the country.

Exemption from Group A Requirements

The orders extend the time required to comply with the following deadlines:

- filing deadline for annual and interim financial statements
- delivery of financial statements
- filing and delivery of MD&A
- filing deadline for an AIF
- executive compensation disclosure for certain reporting issuers
- technical report filing and reserves data disclosure
- any similar annual or interim disclosure document of a reporting issuer required pursuant to an exemption from one of the requirements listed above included in an exemptive relief decision made by a regulator prior to the date of this order.

In order to be eligible for this relief, the issuer must:

- Issue and file on SEDAR, as soon as reasonably practicable, a news release in advance of the deadline that:
 - a. discloses each applicable requirement for which the issuer is relying on this exemption;
 - b. states that the issuer's management and other insiders are subject to a trading black-out policy;
 - c. discloses the estimated date by which the issuer expects to file, send or deliver the document; and
 - d. provides an update of any material business developments since the date of the last annual or interim financial statements that the issuer filed, or confirms that there have been no material business developments since that date.
- Issue, and file on SEDAR, as soon as reasonably practicable:
 - a. a news release no later than 30 days after the first day of the extension period; and
 - b. a subsequent news release no later than 30 days thereafter until the issuer has filed all applicable documents, disclosing an update of any material business developments since the date of the last news release or confirming that there have been no material business developments since that date.
- Not file a preliminary prospectus or a final prospectus until it has filed all documents for which it is relying on an exemption from the Group A Requirements.
- File, send or deliver all documents for which it is relying on an exemption from the Group A Requirements by the date that is 45 days after the date the issuer was otherwise required to file, send or deliver the document (or, in respect of financial statements and MD&A, before or in conjunction with the delivery of the management information circular for the issuer's next AGM).

Exemption from Group B Requirements

The orders also extend the time required to comply with the following deadlines:

- notice of change in year-end
- notice of change in corporate structure
- change of auditor reporting package
- obligation to file a business acquisition report and filing deadline

In order to be eligible for this relief, the issuer must:

- Issue and file on SEDAR, as soon as reasonably practicable, a news release in advance of the applicable deadline that discloses each applicable requirement for which the issuer is relying on this exemption; and
- File, send or deliver all documents for which it is relying on an exemption from the Group B Requirements by the date that is 45 days after the date the issuer was otherwise required to file, send or deliver the document.

Base Shelf Prospectus Requirements

If the 25 month expiration of a base shelf prospectus (the "**lapse date**") occurs during the period from March 23, 2020 to June 1, 2020, the lapse date is varied so that it is extended by 45 days if the following conditions are complied with:

- The issuer issues, and files on SEDAR as soon as reasonably practicable, a news release in advance of the lapse date that discloses the specific requirements for which the issuer is relying on this variation.
- The issuer is not relying on the Group A Requirements discussed above.

III. TSX Relief

Financial Statements

The TSX will not require an issuer to file a Form 9 – Request for Extension or Exemption for Financial Reporting/Annual Meeting for any late filing of its annual or interim financial statements.

Annual Meeting

A TSX listed issuer that must hold an AGM during 2020 may hold its AGM on any date in 2020 up to and including December 31, 2020 and will also not have to file a Form 9. However, issuers are reminded to continue to comply with the meeting requirements under the statute under which it was incorporated.

Security Based Compensation Arrangements

The TSX is also providing relief from the requirement to seek shareholder approval, every three years after institution of a security based compensation arrangement that does not have a fixed maximum of securities issuable, all unallocated options, rights or other entitlements. Such shareholder approval may therefore be obtained after the three year period. In addition, any awards granted during this period may be exercised without shareholder ratification.

Normal Course Issuer Bids

From March 23, 2020 to June 30, 2020, the TSX is increasing the volume of daily purchases condition for normal course issuer bids from a maximum of 20% of the average daily trading volume to 50% of the average daily trading volume.

Delisting Criteria

From March 23, 2020 to June 30, 2020, the TSX will not apply the market value delisting criteria when determining whether to initiate a delisting review of an issuer's securities.

"Market Price" Definition

On a case-by-case basis, the TSX may use a shorter timeframe for the determination of market price for the purposes of pricing securities (including warrants) for private placements.

IV. TSXV Relief

A TSXV listed issuer that must hold a 2020 AGM may hold its 2020 AGM on any date in 2020 up to and including December 31, 2020. However, issuers are reminded to continue to comply with the meeting requirements under the statute under which it was incorporated. The issuer may also obtain shareholder approval of any rolling stock option plans when it holds its 2020 AGM.