

COVID-19 Update: Ontario Provides Temporary Relief Relating to Meeting Requirements Under the Corporations Act (Ontario) and Business Corporations Act (Ontario)

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By Melanie Cole, Adria Leung Lim and David Mba

In one of our recent posts, we discussed the current COVID-19 pandemic and ways to navigate social distancing requirements during proxy season through virtual meetings. Since then, the Government of Ontario has issued an order on March 30 (the “**Order**”) in response to the provincial declaration of an emergency, with regards to annual corporate meetings.

The Order provides additional flexibility for Ontario corporations that are considering the switch to electronic meetings, and companies that may require an extension to the deadline to hold their annual meeting of shareholders. The Order affects all corporations governed by the *Business Corporations Act* (Ontario) (“**OBCA**”) or the *Corporations Act* (Ontario) (“**OCA**”) and applies to annual meetings of shareholders and to directors’ meetings.

What if my corporation wishes to extend the deadline for holding our annual meeting?

Section 94(1)(a) of the OBCA and section 293(1) of the OCA require annual general meetings of shareholders (or members, for OCA corporations) to be held within 18 months of incorporation and every 15 months following the prior meeting.

The Order provides a deadline extension under the OBCA and the OCA for all annual meetings to 90 days after the day that the provincial declaration of emergency is terminated, if the current deadline day for the annual meeting falls within the ongoing provincial emergency declaration which started on March 17, 2020 (the “**Emergency Period**”). However, if the meeting deadline falls outside the Emergency Period, but such deadline day is within the 30 days after the day that the Emergency Period is terminated, then the meeting can be held up to 120 days following the end of the Emergency Period.

For example, if a company is incorporated under the OBCA and the deadline to hold your annual meeting of shareholders is April 30, 2020, if the Emergency Period is terminated on May 31, 2020, the effect of the Order would be to extend the deadline to hold your annual meeting of shareholders from April 30, 2020 to 90 days after May 31.

Under the OCA, the Order also provides that notwithstanding that a meeting of shareholders and members for election of directors of an insurance corporation should be held within the first three months of every year, any such meeting required to be held in 2020 shall be held no later than the 90th day after the day the Emergency Period is terminated.

Note that while stock exchanges in Canada may have their own policies in place relating to extensions for shareholders’ meetings, these policies are typically subject to corporate law applicable to a company, such as that found under the Order. In addition, a company must still be cognizant of its other continuous disclosure obligations which the Order may not cover.

What about the requirement for public companies to lay the audited financial statements before shareholders within 6 months of the financial year end?

Section 154 of the OBCA requires public companies to lay audited financial statements before shareholders within six months of year end. If a company does not do so, the technical consequence is to have to refresh the date of the audit to a date that is within six months of the meeting date. Ordinarily, a waiver from this deadline would require a court order. The OCA contains a similar requirement in section 97(1).

Given that it's not "ordinary" times with COVID-19 shutdowns, courts in Ontario are currently only hearing "urgent" matters. For companies governed by the *Canada Business Corporations Act*, Corporations Canada has indicated that they have not issued blanket relief from the similar provision contained in the federal statute, but are considering email requests on a case-by-case basis. The Temporary Order is silent on this requirement and whether relief will be granted to OBCA and OCA companies.

What changes does the Order make to electronic meeting requirements?

Prior to the Order, under the OBCA and OCA, shareholders and directors' meetings could be held entirely electronically as long as such means was expressly provided for by the corporation's constating documents, including by-laws, articles or letters patent. The Order temporarily suspends and removes this requirement, thereby allowing companies to hold meetings electronically (or telephonically) for the duration of the temporary suspension regardless of whether such meetings are provided for in the company's constating documents. In addition, the Order does not require the consent of all directors of a company participating at a directors' meeting in order for an electronic meeting to occur.

How should we disclose our electronic meeting to shareholders in light of the pandemic?

In our prior article regarding virtual meetings, we recommended that companies should follow disclosure guidelines provided by leading proxy advisory firm, Glass Lewis, which strongly advocate for robust proxy disclosure for virtual-only meetings. However, in light of the COVID-19 pandemic, Glass Lewis has softened its stance on disclosure with regard to virtual-only meetings.

On March 19, 2020, Glass Lewis issued an immediate update to its guidelines, wherein it stated that for the duration of this 2020 proxy season (March 1, 2020 - June 30, 2020), it would refrain from recommending to vote against members of the governance committee for holding virtual-only meetings, provided that the company discloses, at a minimum, its rationale for doing so, including citing reasons relating to COVID-19. Nonetheless, if your company will be switching to virtual-only meetings this proxy season, it is still good practice to provide fulsome and effective disclosure such as that suggested in Glass Lewis's standard guidelines, including the following:

1. addressing the ability of shareholders to ask questions during the meeting, including time guidelines for shareholders' questions, rules around what types of questions are allowed, and rules for how questions and comments will be recognized and disclosed to meeting participants;
2. procedures, if any, for posting appropriate questions received during the meeting and the company's answers on the investor page of their website as soon as is practical after the meeting;
3. addressing technical and logistical issues related to accessing the virtual meeting platform; and
4. procedures for accessing technical support to assist in the event of any difficulties accessing the virtual meeting.

If your company has been considering holding a virtual meeting this proxy season, or postponing your annual meeting, it is important to understand both the legal requirements and the practical steps to be taken in preparation for the meeting. The Capital Markets Group at Aird & Berlis has the expertise to assist you in navigating proxy season during this challenging time. If you have any questions, please reach out to Melanie Cole or Adria Leung Lim.

Authors



Melanie Cole
Partner
T 416.865.4638
mcole@airdberlis.com



Adria Leung Lim
Partner
T 416.865.3402
aleunglim@airdberlis.com



David Mba
Associate
T 416.865.3422
dmba@airdberlis.com

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