

Virtual-Only Shareholders' Meetings:

Re-Thinking the AGM

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Public companies are required to hold annual general meetings of security holders. As global concern over the outbreak of COVID-19 continues to grow, so too does the clear need for shareholders' meetings held digitally. Companies interested in holding a "virtual-only" shareholders' meeting (a "VOSM") should be aware of the following benefits, potential concerns, and practical considerations.

What is a VOSM?

A VOSM is held entirely online. All of the elements of a traditional in-person meeting - including shareholder participation, the casting of votes, and asking questions of the board - are substituted with a virtual platform. VOSMs have the potential to improve accessibility for shareholders and management, increase shareholder participation, and lower the costs of meetings by eliminating expenses associated with traditional shareholders' meetings such as catering and travel fees.

As the spread of COVID-19 has hindered our ability to meet in person, a VOSM can be a practical alternative to traditional shareholders' meetings and can minimize or eliminate health risks to all meeting participants. Despite these benefits, some shareholders may be resistant to the implementation of VOSMs. Such shareholders have concerns about the impact a VOSM could have on their ability to participate in the meeting and whether their concerns will be properly addressed in a virtual setting. Companies should be aware of these concerns and ensure that shareholder participation is not unintentionally limited as a result of holding a VOSM.

Which jurisdictions allow VOSMs?

Whether a company may hold a VOSM depends on the company's applicable corporate statute and the company's constating documents (articles of incorporation and by-laws). With the exceptions of Newfoundland, Nova Scotia, and Prince Edward Island, the corporate statutes across Canada permit the holding of shareholders' meetings outside of the traditional in-person forum.

For companies incorporated in **Ontario**, the [Ontario Business Corporations Act](#) (the "OBCA") provides the most permissive regime for VOSMs. Section 94(2) of the OBCA allows companies to hold a shareholders' meeting by electronic means, unless the company's constating documents say

otherwise. For quorum purposes, a shareholder who votes or establishes a communications link to the meeting shall be deemed to be present.

For **federally incorporated** companies, section 132 of the *Canada Business Corporations Act* (the “CBCA”) permits VOSMs to be held, though under comparatively stricter conditions. Unless the company’s constating documents provide otherwise, the company can hold a shareholders’ meeting by electronic means if the communications system used allows all participants to communicate adequately with each other during the meeting.* It is the company’s responsibility to ensure that an “adequate” communication method is provided to participants. Any shareholder participating in the meeting by virtual means shall be deemed to be present. Electronic voting is also permitted, with the requirement that all votes must be verified without knowing the identity of the applicable shareholder. The corporate legislation in **Alberta** and **Quebec** each permit companies to hold VOSMs under similar rules.

Other provincial corporate statutes are less instructive. In **British Columbia**, shareholders are permitted to participate in a meeting by telephone or other communications mediums as long as all shareholders are able to communicate with each other during the meeting. The British Columbia *Business Corporations Act* (the “BCBCA”) is otherwise silent on the issue of VOSMs. In order to obtain confirmation that a VOSM is permitted, companies incorporated in British Columbia may wish to seek a court order under section 186 of the BCBCA, which states that a shareholders’ meeting can be called, held, and conducted in the manner that the court considers appropriate - and then carried out as ordered by the court. The company may further seek an order that the quorum or notice required in respect of a shareholders’ meeting may be varied or dispensed with.

Practical Considerations When Conducting a VOSM

- **Governing corporate statute and organizational documents.** Before any plans to organize a VOSM, companies should ensure that their applicable corporate statute and constating documents permit VOSMs and, if so, whether any limitations are imposed.
- **Involve key personnel.** Both the company’s transfer agent and the meeting’s Chairperson are integral to the success of the VOSM; it is important that they be involved in the early planning, preparation, and coordination stages.
- **Costs to consider.** A VOSM may reduce traditional costs associated with holding an in-person meeting; however, companies should factor in other fees, such as retaining an outside virtual meeting service provider and/or licensing a virtual meeting platform. For smaller companies, the cost of holding a VOSM may outweigh the benefits.
- **Meeting format.** Companies should consider whether the VOSM will be audio-only or will include audio and video. While audio-only meetings are technologically easier to

* Pursuant to section 132(4) of the CBCA, any shareholder participating in the meeting by virtual means shall be deemed to have been present at the meeting.

organize, meetings with audio and video will better duplicate face-to-face interaction and may be preferred by shareholders.

- **Communication with shareholders is key.** As mentioned above, shareholders have concerns about the impact a VOSM could have on their ability to participate in the meeting. To alleviate these concerns, the company's management should consider communicating to shareholders prior to mailing proxy material:
 - (i) the motivation for holding a VOSM,
 - (ii) that the company welcomes shareholder input throughout the planning process, and
 - (iii) steps that will be taken to facilitate meaningful shareholder participation.
- **Proxy materials.** The company's management should ensure that proxy materials clearly instruct shareholders on how to access the virtual meeting platform and restate management's motivation behind holding a VOSM.
- **Encourage meaningful shareholder participation.** The company and its management should take steps to ensure shareholder participation during the meeting, which may include accepting shareholder's questions in advance, allowing for anonymous questions, and ensuring adequate communication between participants during the meeting.
- **Adequate communication.** Depending on the company's applicable corporate statute, it may be required to ensure that all participants can communicate adequately with one another during the meeting. This may mean ensuring adequate communication by virtual messaging, teleconference, or other communications mediums.
- **Promote and ensure transparency.** If shareholders are allowed to submit questions in advance of the meeting, the company's management should take steps to encourage transparency and should be careful to avoid filtering questions—especially difficult or uncomfortable ones. To best promote transparency, management should consider publishing all received questions prior to, during, and after the meeting and circulating said questions to shareholders following the meeting.
- **Establish meeting rules and protocols.** The company's Chairperson and board members should work together to establish the rules to govern the conduct of the meeting, including voting, question-and-answer periods, and speaking out of turn. The rules and protocols should be published and communicated to shareholders in advance of the meeting.
- **Meetings involving proxy contests or contentious proposals.** A VOSM is not ideal where there is the risk of a proxy contest or where contentious proposals are on the agenda. VOSMs require extensive planning and preparation. The disruptions caused by a proxy contest or contentious proposal may not be best dealt with by a VOSM.



Companies faced with the risk of either should consider addressing these items in a traditional shareholders' meeting.

- **Prepare for technological issues.** Companies should plan for potential technological issues, including connectivity, user log-in, and live streaming (both audio and video) difficulties during the meeting. Proper planning may require holding a “test run” before going live and providing technical support resources during the course of the meeting.

For more information or guidance on how to create or manage a VOSM, or for any other business issues involving public companies, please contact [Andrew Elbaz](#), [Alexander Katznelson](#), or [Darren Nguyen](#) in our [Securities and Capital Markets Group](#):

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