

Majority voting and shareholder proposal amendments to the CBCA effective August 31, 2022

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Amendments to the *Canada Business Corporations Act* (CBCA), which initially received Royal Assent in 2018, and related regulations concerning the election of directors and the timing for submission of shareholder proposals will come into effect on August 31, 2022.

What you need to know

- CBCA distributing corporations (public companies) will be required to provide for the annual election of directors on an individual basis (consistent with TSX rules in place since 2014).
- In uncontested director elections (where there is only one candidate nominated for each position available on the board), CBCA distributing corporations will be required to give shareholders the ability to vote “for” or “against” each director nominee (instead of a vote “for” or “withhold”) and such nominee will not be elected if he or she fails to receive majority support, but may be reappointed in limited circumstances.
- Shareholder proposals will have to be submitted to the corporation between 90 and 150 days before the anniversary date of the previous annual meeting (instead of the current deadline of 90 days before the notice of the previous annual meeting).
- These new requirements will be effective for meetings after August 31, 2022.
- Certain other amendments to the CBCA have not yet come into effect, including notice-and-access for meeting materials, mandatory say-on-pay voting and required disclosure concerning clawbacks of executive compensation and the well-being of employees, retirees and pensioners.

Discussion

Director election requirements

The CBCA currently permits directors to be elected as a slate and for a term of up to three years. The CBCA amendments require that directors of distributing corporations be elected annually and on an individual basis. For distributing corporations listed on the TSX, this is consistent with the TSX rules.

The CBCA currently provides for shareholders to vote “for” or “withhold” their vote in the election of directors (with the consequence that a director nominee will be elected as long as the nominee receives a single vote in favour). The CBCA amendments provide for the following changes for director elections of distributing corporations where there is only one candidate nominated for each position available on the board:

- Shareholders will be able to vote “for” or “against” each director nominee and such nominee will not be elected if he or she fails to receive majority support, or such greater number of votes required under the corporation’s articles.
- An incumbent director who fails to receive majority support is permitted to remain in office until a successor is appointed or elected, up to a maximum of 90 days after the meeting.
- This is stricter than the TSX rules under which a director receiving less than majority support must immediately tender his or her resignation subject, in exceptional circumstances, to the board declining to accept the resignation.
- The board will not have discretion to re-appoint the director before the next meeting at which an election of directors is required, unless necessary to satisfy the Canadian residency requirement or the requirement that at least two directors not be officers or employees of the corporation or its affiliates.

Under TSX rules, TSX-listed issuers (other than majority-controlled issuers) must adopt a majority voting policy for uncontested director elections, unless the TSX’s majority voting requirement is satisfied in another manner such as in the issuer’s governing statute or articles or by-laws. Going forward, the CBCA amendments should satisfy this requirement, so TSX-listed CBCA distributing corporations may consider amending or repealing their majority voting policies once the amendments become effective.

CBCA distributing corporations, including those that may not have a majority voting policy, will have to describe this new procedure for electing directors in their meeting materials and amend their form of proxy to provide for voting “for” or “against” directors for meetings held after August 31, 2022.

Time period for submitting shareholder proposals

The CBCA currently provides that a corporation does not have to include a shareholder proposal in its management proxy circular for its upcoming annual meeting if the proposal was not submitted to the corporation at least 90 days before the anniversary date of the notice of meeting delivered in connection with the previous annual meeting.

The CBCA amendments require a shareholder proposal to be delivered in a 60-day period between 90 and 150 days before the anniversary date of the previous annual meeting.

A management proxy circular must include a statement indicating the final date by which the corporation must receive a proposal for the following annual meeting. CBCA distributing corporations that have not yet delivered their 2022 meeting materials should consider disclosing the new deadline for delivery of shareholder proposals for their next annual meeting.

To discuss these issues, please contact the author(s).

This publication is a general discussion of certain legal and related developments and should not be relied upon as legal advice. If you require legal advice, we would be pleased to discuss the issues in this publication with you, in the context of your particular circumstances.

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