

## Corporate Securities Law

May 29, 2015

### CCGG Proposes Enhanced Proxy Access Rules

There has been significant discussion recently in Canada and internationally about the merits of, and methods for, “proxy access”, which potentially would increase shareholder involvement in the director nomination process. While the Canadian corporate statutes provide shareholders holding an interest of at least 5% in a company the right to “proxy access” in respect of the nomination of directors, this right has certain limitations and has been exercised sparingly.

The Canadian Coalition for Good Governance (CCGG) this month published a policy paper entitled *Shareholder Involvement in the Director Nomination Process: Enhanced Engagement and Proxy Access* encouraging public companies to:

- seek shareholder input on director nominees, and
- in certain cases, permit shareholders to nominate their own candidates to the board of directors and have those nominees included in management’s proxy materials

based on the premise, about which there is continuing debate, that proxy access is desirable as a component of shareholder democracy and corporate accountability and a potential means of enhancing value.

#### CCGG’s Recommendations

In this context, the CCGG is recommending that independent directors of Canadian public companies engage in an ongoing, informal dialogue with shareholders to seek their input on appropriate director candidates and is advocating that public companies adopt more formal and extensive proxy access procedures with the following elements:

- *Meaningful ownership level.* Shareholders who, individually or in combination with others, hold up to the time of the relevant meeting an economic and voting interest in the outstanding voting shares of at least,
  - o 5% of a company with a market capitalization of less than \$1 billion, or
  - o 3% of a company with a market capitalization of more than \$1 billion,would be permitted to present their director nominees in the company’s proxy materials.
- *Cap on the number of shareholder nominees.* Those shareholders would be entitled to nominate up to the lesser of three directors and 20% of the total number of directors. (Where more than one shareholder or group of shareholders holding the required minimum threshold wish to nominate directors, each eligible shareholder, in order from the largest to the smallest, would select one nominee until the maximum is reached.) The CCGG has suggested that this limit, together with a restriction on the use of proxy access to nominate additional candidates in succeeding years in which the initial proposed candidates remained on the board, would prevent “creeping board control”.
- *No hold period.* Unlike in certain jurisdictions, where only longer-term shareholders (defined by these shareholders having held a company’s shares for a minimum period) have proxy access, the CCGG is advocating that the proxy access mechanism not be limited to shareholders who have held their shares for any prescribed minimum period.
- *Disclosure in the proxy circular and form of proxy.* Information about shareholders’ director nominees would be required to be set out “fairly and on an equal footing” with company nominees in the company’s management proxy circular and form of

# Goodmans<sup>LLP</sup> Update

---

proxy. CCGG proposes that relevant legislation should be amended so that the company's circular would function as a circular for the nominating shareholders as well, allowing them to communicate with other shareholders and solicit proxies in respect of their nominees without requiring a dissident circular.

- *Solicitation costs.* Reasonable solicitation costs on the part of nominating shareholders would be paid by the company, unless a majority of the company's shareholders resolve otherwise. The CCGG has not defined the scope of what would constitute reasonable solicitation costs, in terms of either the nature or the quantum of such costs.

The CCGG is seeking legislative amendments to introduce proxy access requirements along the lines outlined in its policy paper. The CCGG also is encouraging companies to adopt voluntarily its proxy access recommendations in the interim. Whether to adopt such recommendations is a decision that companies and their advisors will need to consider carefully. The CCGG's perspectives are often influential on market practice and its recommendations could potentially effect significant changes – some of which may ultimately be beneficial and some of which may ultimately be detrimental.

Please contact any member of our Corporate Securities Group to discuss CCGG's recommendations or proxy access more generally.