

Corporate Securities Law

September 29, 2015

CCGG Recommends Universal Form of Proxy

Following on its proposal for enhanced proxy access published earlier this year (see our May 29, 2015 Update, *CCGG Proposes Enhanced Proxy Access Rules*), the Canadian Coalition for Good Governance (CCGG) has published a Universal Proxy Policy encouraging:

- the use of a universal proxy, which lists the names of all director nominees (whether nominated by the issuer or by dissident shareholders) on a single proxy form, in contested director elections of Canadian public companies, and
- changes in corporate and securities laws to make such universal proxies mandatory.

The Current Regime

Under the current Canadian statutory regime (which is similar in this regard to the U.S. regime), where there is a contested director election, each of the company and a dissident can provide shareholders with a separate form of proxy containing the names of only those individuals they are recommending for election to the board. In these circumstances, shareholders who vote by proxy (who generally represent the holders of a significant majority of the company's shares) must choose between mutually exclusive slates of directors: a slate of directors nominated by the company or a slate of directors nominated by a dissident. In contrast, shareholders who attend the contested meeting in person can vote for whatever combination of individuals they believe will comprise the best board.

While this difference is the most significant issue that generally is raised in the context of the current regime, it also has been noted that the current regime can cause

significant confusion as a result of, among other things, multiple forms of proxies and procedural rules that result in later proxies superseding earlier proxies from the same shareholder.

A Universal Proxy Regime

A universal proxy would extend the flexibility afforded to shareholders who attend meetings to shareholders who vote by proxy. According to the CCGG, a mandatory universal proxy would improve director accountability and enhance shareholder democracy by aligning the rights of all shareholders, regardless of whether they attend shareholder meetings. Similar submissions have been made to the United States Securities and Exchange Commission (SEC) by the Council of Institutional Investors.

Although rare, universal proxies have been used in past Canadian proxy contests, perhaps most notably in the proxy contest between Canadian Pacific Railway Limited and Pershing Square Capital Management in 2012.

The CCGG is recommending that, until applicable laws are amended to require universal proxies, each side of a proxy contest should use either a single form of universal proxy or its own form, which must set out all nominees with equal prominence. Whether this recommendation is followed in any given contest likely will depend on the perception by a company and dissidents of the strategic benefit of a traditional or universal proxy.

The Path Forward

As with enhanced proxy access, with limited empirical data and historical experience it is not clear that mandating a universal proxy will necessarily enhance shareholder democracy, corporate accountability and,

Goodmans^{LLP} Update

ultimately, shareholder value. Supporters of universal proxies have suggested that they allow fair treatment of all shareholders and may stimulate settlements between issuers and activists. Critics have raised a number of concerns, including that universal proxies may in fact embolden activists to initiate more proxy contests. They have also noted that where companies and dissidents spend considerable time and resources selecting slates of directors with a balanced range of skills, experience and expertise, a universal proxy could result in a “suboptimal” board that does not have the competencies and skills that the board, as a whole, requires. Such a result would be contrary to what the Canadian Securities Administrators have suggested is a principal objective of the corporate governance process.

Notwithstanding these and other concerns, the CCGG’s recommendation, as well as an indication from the SEC’s Chair earlier this year that the SEC is encouraging the use of universal proxies and considering similar changes to its rules, suggests that universal proxies should be among the matters considered in contested director elections.

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