CANADIANS ARE FRIENDLIER: SHAREHOLDER PROPOSAL REGIME IN THE U.S. COULD SOON BE MORE RESTRICTIVE

Posted on February 4, 2020

Categories: Insights, Publications

Introduction

Shareholder proposals are an important corporate governance tool which allow shareholders to engage with public companies with respect to environmental, social and corporate governance issues. However, facilitating shareholder democracy is not without cost – in the U.S., the estimated cost to companies of including a shareholder proposal in a proxy statement can be up to US$150,000 per proposal.[1] As such, regulations governing shareholder proposals seek to balance the costs and benefits.

On November 5, 2019, the U.S. Securities Exchange Commission (the "**SEC**") announced a number of proposed amendments to the shareholder proposal requirements and resubmission thresholds in the U.S. If implemented, the amendments would result in a regime that is comparatively less friendly to shareholders than the one in Canada.

Current Regime in the U.S. and the Proposed Amendments

Minimum ownership thresholds

At present, Rule 14a-8(b) of the U.S. *Securities Exchange Act of 1934* states that to be eligible to submit a proposal, a shareholder must have continuously held at least US$2,000 or 1% of the company's securities entitled to vote on the proposal for at least one year.[2]

The SEC's proposed amendment would eliminate the 1% threshold and require a shareholder to satisfy one of the following three ownership requirements:

1. continuous ownership of at least US$2,000 of the company's securities entitled to vote on the proposal for at least three years;
2. continuous ownership of at least US$15,000 of the company's securities entitled to vote on the proposal for at least two years; or
3. continuous ownership of at least US$25,000 of the company's securities entitled to vote on the proposal for at least one year.[3]

The SEC believes that the proposed increased ownership thresholds would more appropriately balance the interests of shareholders seeking to use the company's proxy statement to advance their proposals with those of other shareholders and companies bearing the burdens relating to such shareholder activism.[4] The alternative thresholds, according to the SEC, provide shareholders with multiple options to demonstrate sufficient economic stake or investment interest.[5]

Importantly, the proposed rule would not allow shareholders to pool their securities to meet the minimum ownership thresholds.[6]

Additional documentation from a shareholder submitting a proposal through a representative

The SEC proposed that a shareholder submitting a proposal through a representative provide, among other items, a statement from the shareholder confirming his, her or its support of the proposal as well as a statement authorizing the representative to submit the proposal on the shareholder's behalf and/or otherwise act for the shareholder.[7]

Engagement with the company after submission

The SEC proposed that Rule 14a-8(b) should also be amended to include a new requirement that a shareholder proponent provide a statement of availability to meet with the company in person or via teleconference between 10 and 30 days after the submission to discuss the proposal.[8] The proposed new requirement is intended to facilitate dialogue between the company and the shareholder proponent and encourage more efficient shareholder engagement.[9]

Clarification of the one-proposal limit

Under Rule 14a-8(c), each shareholder may submit only one proposal to the company for a particular shareholders' meeting.[10] The SEC proposed to amend the rule to restrict each person, as opposed to each shareholder, to only one proposal to the company for a particular shareholders' meeting. This would address situations where a shareholder submits a proposal on his, her or its own behalf, but acts as a representative for another shareholder proposal at the same meeting. In the SEC's view, such indirect submission of multiple proposals not only constitutes an unreasonable exercise of a shareholder's right to submit a proposal at the expense of other shareholders, but may also take attention away from other material matters in the proxy statement.[11] Additionally, the SEC is seeking comments on whether natural persons should be disallowed from submitting proposals through a representative.[12]

Resubmission thresholds

It is possible for a proposal that is substantially the same as a previous one to be resubmitted if the proposal

received sufficient shareholder support. Rule 14a-8(i)(12) provides that a company may exclude a shareholder proposal dealing with substantially the same matter as one that has been previously included in its proxy materials within the past five years, if such proposal was voted on at least once in the last three years and received less than: (i) 3% of the vote if previously voted on once within the preceding five years; (ii) 6% of the vote if previously voted on twice within the preceding five years; and (iii) 10% of the vote if previously voted on three times or more within the preceding five years.[13]

The proposed amendments replace the current thresholds with 5%, 10% and 25%, respectively. Further, an additional proposed provision would permit companies to exclude proposals that were submitted three or more times in the preceding five years if such proposals received between 25% and 50% of the vote, and support declined by more than 10% from the last time substantially the same subject matter was voted on.[14]

The SEC asserts that the increased thresholds would allow management to exclude resubmitted proposals that have not gained sufficient traction among shareholders, thereby decreasing the burdens associated with repeated consideration of such proposals.[15]

In determining the proposed thresholds, SEC staff reviewed shareholder proposals that eventually received majority support on a second or subsequent submission between 2011 and 2018. Of these successful submissions, 98% of proposals had over 5% shareholder support on their first submission. Of proposals that ultimately obtained majority support on their third or subsequent submissions, approximately 95% received over 15% shareholder support on their second submission, and 100% received over 25% shareholder support on their third or subsequent submission.[16]

Canada's Shareholder Proposal Regime

In Canada, the shareholder proposal regime is regulated by the applicable federal or provincial corporate statute.

Minimum ownership thresholds

Under the *Canada Business Corporations Act* (the "**CBCA**"), a shareholder wishing to submit a proposal must hold at least 1% of the total number of outstanding voting shares of the corporation or hold shares with a fair market value of at least $2,000 up to and including the day of the relevant shareholders' meeting.[17] A shareholder must have held the shares for at least six months at the time he, she or it submits a proposal.[18] Shareholders may aggregate their holdings to meet the threshold so long as each shareholder meets the length of ownership requirements.[19]

Ontario's *Business Corporations Act* (the "**OBCA**") allows the submission of shareholder proposals from shareholders who are entitled to vote.[20] Under British Columbia's *Business Corporations Act* (the "**BCBCA**"), a

shareholder must hold at least 1% or $2,000 of the outstanding voting shares and must have held such shares for at least two years before the date of the proposal.[21] The BCBCA, like the CBCA, also accepts aggregating ownership to meet the minimum ownership threshold, provided that each shareholder has held their shares for at least two years before the date of the proposal.[22] Alberta's *Business Corporations Act* (the "**ABCA**") has the same minimum ownership thresholds provided under the CBCA,[23] and also requires that a shareholder must have the support of other shareholders holding at least 5% of the company's voting shares, to be eligible to submit a proposal.[24]

Resubmission thresholds

Under the OBCA and the regulations of the CBCA and BCBCA, the current thresholds for resubmission are 3%, 6% and 10% if substantially the same proposal was voted upon once, twice or three times in the last five years, respectively. If the applicable resubmission threshold is not met, a corporation may exclude the proposal from its proxy materials.[25] The ABCA however, states that a corporation is not required to include a shareholder proposal in the management proxy circular if substantially the same proposal was submitted and defeated within the last two years.[26]

The New Reality: the Proposed U.S. Thresholds Compared with the Canadian Thresholds

If the SEC's proposed amendments are implemented as currently drafted, the shareholder proposal regime in Canada will be more shareholder friendly than that in the U.S.

Currently, the minimum ownership thresholds under Rule 14a-8(b) and those under the CBCA, BCBCA and ABCA are substantially similar. However, the proposed amendments would make it more difficult for shareholders of U.S. public companies to submit a shareholder proposal. The SEC's first proposed requirement of continuous ownership of at least US$2,000 of the company's voting shares for at least three years is more onerous than the two-year period mandated by the BCBCA and the six-month period prescribed by the CBCA and ABCA. Recall that the Ontario legislation does not even set out a minimum ownership threshold or period.

In some jurisdictions in Canada where a single shareholder does not meet the minimum ownership requirements, shareholders are allowed to pool their shares to satisfy one of the minimum ownership thresholds. This is favourable to minority shareholders who would otherwise be ineligible to submit a proposal. The SEC's proposed amendments, in addition to raising the ownership thresholds, would disallow shareholders from aggregating their security holdings to meet the minimum ownership requirements. The practice of minority shareholders pooling their securities for the purpose of submitting a proposal would be eliminated.

Further, the SEC's proposed amendments raise the resubmission thresholds and require shareholder proponents to be willing to engage in discussions with the company in respect of the proposal.

Overall, the proposed amendments in the U.S. seem to shift the shareholder proposal regime to be less burdensome for corporations. If the proposed amendments are implemented, the Canadian regime may be comparatively more conducive to shareholder activism. There do not appear to be similar changes proposed in Canada, but only time will tell.

The public comment period for the SEC's proposed amendments closed on February 3, 2020.

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[1] *US, Securities and Exchange Commission, Procedural Requirements and Resubmission Thresholds under Exchange Act Rule 14a-8: Proposed Rule*, SEC Release No. 34-87458 (5 November 2019) at 12 [*SEC Proposed Amendments*].[ps2id id='1' target='/]

[2] US, General Rules and Regulations, Securities Exchange Act of 1934, 17 CFR § 240.14a-8 (last modified 2010), *Electronic Code of Federal Regulations* [Rule 14a-8].[ps2id id='2' target='/]
[3] US, Securities and Exchange Commission, Press Release, 2019-232, "SEC Proposes Amendment to Modernize Shareholder Proposal Rule" (Washington, DC: 5 November 2019) [SEC Press Release]; *SEC Proposed Amendments, supra* note 1 at 21.[ps2id id='3' target='/]
[4] *SEC Proposed Amendments, supra* note 1 at 20.[ps2id id='4' target='/]
[5] *Ibid* at 21.[ps2id id='5' target='/]
[6] *Ibid* at 23.[ps2id id='6' target='/]
[7] *Ibid* at 31.[ps2id id='7' target='/]
[8] *Ibid* at 34.[ps2id id='8' target='/]
[9] *Ibid* at 35.[ps2id id='9' target='/]
[10] *Rule 14a-8, supra* note 2 at §240.14a-8(c).[ps2id id='10' target='/]
[11] *SEC Proposed Amendments, supra* note 1 at 38.[ps2id id='11' target='/]
[12] *Ibid* at 39.[ps2id id='12' target='/]
[13] *Ibid* at 9.[ps2id id='13' target='/]
[14] *Ibid* at 50.[ps2id id='14' target='/]
[15] *Ibid* at 47-48.[ps2id id='15' target='/]
[16] *SEC Press Release, supra* note 3.[ps2id id='16' target='/]
[17] Canada Business Corporations Act, RSC 1985, c C-44 ss 137(1.1)(a), 137(5.1) [*CBCA*]; *Canada Business Corporations Regulations, 2001*, SOR/2001-512, s 46(a)(i)-(ii) [*CBCR*].[ps2id id='17' target='/]
[18] *CBCR, supra* note 17, s 46(b).[ps2id id='18' target='/]
[19] *CBCA, supra* note 17, s 137(1.1)(b).[ps2id id='19' target='/]
[20] *Business Corporations Act*, RSO 1990, c B 16, s 99(1)(a) [*OBCA*].[ps2id id='20' target='/]
[21] *Business Corporations Act*, SBC 2002, c 57, ss 187(1)(b), 188(1)(b)(i)-(ii) [*BCBCA*]; *Business Corporations*

Regulations, BC Reg 257/2019, s 17 [*BCBCR*].[ps2id id='21' target='/]
[22] *BCBCA, supra* note 21, ss 187(1)(b), 188(1)(b)(i).[ps2id id='22' target='/]
[23] *Business Corporations Act*, RSA 2000, c B-9, s 136(1.1)(a) [*ABCA*]; *Business Corporations Regulations*, Alta Reg 118/2000, s 18.1(a)(i)-(ii) [*ABCR*].[ps2id id='23' target='/]
[24] *ABCA, supra* note 23, s 136(1.1)(b); *ABCR, supra* note 23, s 18.1(c).[ps2id id='24' target='/]
[25] *CBCA, supra* note 17, s 137(5)(d); *CBCR, supra* note 17 at s 51(1)-(2); *OBCA, supra* note 20, ss 99(5)(d)(i)-(iii), 99(5.4); *BCBCA, supra* note 21, s 189(5)(c); *BCBCR, supra* note 21, s 18(1)-(2).[ps2id id='25' target='/]
[26] *ABCA, supra* note 23, s 136(5)(d). Note that the *ABCA* and *ABCR* are both silent on the meaning of "defeated".[ps2id id='26' target='/]

A Cautionary Note

The foregoing provides only an overview and does not constitute legal advice. Readers are cautioned against making any decisions based on this material alone. Rather, specific legal advice should be obtained.