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Corporate governance: New corporate rules and enhanced societal expectations

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There have been rapid developments in ESG-related corporate governance over the past year, including increased ESG-related activism, evolving expectations relating to mandatory climate-related disclosure and developments in diversity. We discuss these developments further in our ESG article.

At the same time, several ongoing and new corporate law changes are affecting, in a less dramatic fashion, the ways corporations are governed. These include changes to the *Canada Business Corporations Act* (CBCA) in relation to director elections and shareholder proposals, as well as amendments to the *Alberta Business Corporations Act* (ABCA) in relation to unanimous shareholder agreements, shareholder resolutions and other matters intended to reduce administrative burdens. We review the impact of these changes as well as a number of other developments in areas such as financial institution legislative reform, universal proxy requirements in the U.S. and board diversity.

Changes to director election and shareholder proposal processes for CBCA companies

Amendments to the CBCA and the *Canada Business Corporation Regulations, 2001* (the CBCA Regulations) became effective August 31, 2022. Among other things, these changes affect how directors of publicly traded CBCA-incorporated corporations are elected in uncontested elections. We previously discussed these changes in our Osler Update.

Historically, shareholders of Canadian corporations have only been able to choose between voting for a nominee for director or withholding from voting. As a result of the amendments, at shareholder meetings where the number of nominees equals the number of directors to be elected at that meeting, which is commonly referred to as an uncontested meeting, shareholders will now be afforded the opportunity to cast votes *for* or *against* the election of each nominee. For a contested meeting, however, shareholders will continue to be limited to choosing between voting for a nominee or withholding from voting for that nominee.

This difference is important. Under the new rules, in an uncontested election, any director who does not receive at least a majority of the votes cast *for* their election will not be elected as a director as a matter of law. This contrasts with the historic plurality basis for electing directors, in which those directors with the most *for* votes are elected until all available positions are filled. In an uncontested election, this meant that even one vote for the director would be sufficient to secure their election to the board.

This change creates some practical challenges for an issuer when sending out a form of

proxy to shareholders because a shareholder meeting can become a contested meeting after the company proxy materials have been sent. The CBCA Regulations have yet to address these challenges.

Following these amendments, The Toronto Stock Exchange (TSX) has previously indicated that it believes that the amendments satisfy the TSX requirements for majority voting for the election of directors. As a result, publicly traded CBCA corporations should repeal any existing stand-alone majority voting policy originally adopted to satisfy TSX requirements.

The CBCA amendments also affect the timelines for corporations to accept shareholder proposals. The practical effect of these amendments is that shareholders are able to submit shareholder proposals later in the annual meeting cycle. This will reduce the time available to a corporation to engage with the shareholders making the proposal or to otherwise respond prior to sending their proxy materials. However, the changes also introduce a limit on how far in advance of an annual meeting a shareholder proposal may be submitted. Shareholder proposals will need to be delivered to the issuer not more than 150 days, and not less than 90 days, before the anniversary date of the prior year's annual meeting of shareholders. The changes to the shareholder proposal deadlines are effective for shareholder meetings held after August 31, 2022, regardless of any deadline the corporation may have previously disclosed in its proxy circular.

ABCA modernizing amendments

In May, amendments to the ABCA came into force. These changes are designed to modernize the legislation to reduce red tape and to make it a more competitive corporate statute for attracting and retaining business in Alberta. The amendments updated various corporate law requirements in Alberta, as we have previously discussed.

The changes permit shareholder resolutions for private corporations to be passed in writing when signed by at least two-thirds of the shareholders, instead of the prior requirement for all shareholders to sign a written resolution.

Alberta business corporations may now include in their articles or a unanimous shareholder agreement provisions waiving any interest or expectancy of the corporation in or to an opportunity to participate in a specified business opportunity that is offered to the corporation or its officers, directors or shareholders. Alberta is the first jurisdiction in Canada to expressly permit these waivers. These waivers can be beneficial to directors and officers who are involved with multiple corporations or potentially competing businesses, such as representatives of private equity or venture capital firms who sit on the board of directors of corporations in which they have invested.

The plan of arrangement provisions of the ABCA have been more closely aligned with the CBCA, making debt restructurings under the ABCA more feasible.

The amendments also include other changes to reduce administrative burdens. For example, private companies may now dispense with an audit requirement with two-thirds shareholder approval, instead of the unanimous shareholder approval previously required. In addition, the minimum notice period for shareholder meetings can be reduced to seven days if specified in the corporation's bylaws.

Consultation on changes to financial institution legislation

During the year, the federal Department of Finance conducted public consultations on proposals to modernize corporate legislation applicable to federally regulated financial institutions. The consultation sought feedback on the use of notice and access and the use of access equals delivery for the electronic delivery of governance documents to owners of such financial institutions, such as shareholders, certain insurance policyholders and credit union members.

The consultations also sought feedback on whether financial institutions should be permitted to hold virtual-only shareholder meetings without first seeking a court order. In addition, the Department of Finance is soliciting feedback about whether the diversity disclosure requirements in the CBCA also should apply to financial institutions.

Universal proxies now required in the U.S.

Long-delayed proposals by the U.S. Securities and Exchange Commission to require U.S. companies to use universal proxies in contested shareholder elections came into effect for shareholder meetings held on or after September 1, 2022.A universal proxy includes the names of all nominees for director, including both management's nominees and any dissident nominees, on a single form of proxy. This enables shareholders to pick and choose from among all nominated candidates rather than choosing candidates solely from the management proxy or the dissident proxy.

The new rules do not apply to Canadian companies that are foreign private issuers or that rely on the multijurisdictional disclosure system. However, the new rules may influence Canadian practice over time.

Continued emphasis on board diversity

Osler's annual Diversity Disclosure Practices Report reported that TSX-listed companies had reached some noteworthy milestones. Among all TSX companies providing diversity disclosure, 26% of all board seats are now held by women. Among issuers comprising the S&P/TSX Composite index, more than one third of directors are women.

For corporations subject to the CBCA diversity requirements, the representation of directors who are visible minorities, Indigenous peoples or persons with a disability increased slightly. However, the results continue to highlight that much work remains to be done to improve diversity on boards and in senior leadership positions beyond gender.

ESG-related activism and climate-related disclosure

The past year has seen continued focus from regulators, institutional shareholders and other stakeholders, as well as from companies on a range of ESG-related matters. There was a continued increase in ESG-related shareholder activism, litigation and regulatory investigations relating to allegations of "greenwashing" and a number of proposed climate-related disclosure requirements in Canada and abroad. Additional discussion of these matters is available in our ESG Chapter.

Conclusion

Apart from developments with respect to ESG, 2022 was a relatively quiet year in terms of corporate governance developments. However, changes to shareholder proposal and director election rules under the CBCA will have a significant impact on shareholder meetings for CBCA companies during the next proxy season. In addition, the new requirement for universal proxies in the U.S. could affect contested company meetings in the years to come. And the report of the Committee on the Future of Corporate Governance in Canada released in December, 2022 sponsored by the Institute of Corporate Directors and the TMX provides additional corporate governance guidance for directors.