

Director Elections: Amendments to the CBCA Coming Soon

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Overview

On August 31, 2022, certain amendments to the *Canada Business Corporations Act* (CBCA) and related regulations affecting the election of directors will come into force.¹ The amendments will apply to shareholder meetings held after August 31, 2022.

Key Takeaways

- **Individual Voting:** to conform with Toronto Stock Exchange (TSX) rules that have been in place since 2014, public companies incorporated under the CBCA will be required to solicit separate votes for each nominee director on an annual basis. Currently, the CBCA permits directors to be elected as part of a slate and for up to a three-year term.
- **“For” or “Against”:** in uncontested director elections, corporations will be required to deliver forms of proxy that allow shareholders to vote “for” or “against” each nominated director (rather than the current system which includes an option to “withhold”). Once the amendments take effect, each nominee will only be elected if they receive a majority vote in support of their election.
- **Shareholder Proposals:** the timeline for submitting shareholder proposals will require proposals to be submitted to the corporation within 60 days of the 150th day before the one-year anniversary of the previous annual meeting of shareholders, rather than the current timeline of 90 days prior to the one-year anniversary of the notice of the previous annual meeting.

Director Elections

The CBCA currently permits the election of directors through a slate (i.e., all nominee directors are elected as a group) elected for a term of three years. Once the amendments take effect, the CBCA will require that shareholders of a public company vote for or against each director individually at each annual meeting.

Notably, these new requirements will only impact those CBCA corporations that are not currently listed on the TSX, which already requires annual elections and individual voting. CBCA corporations listed on the Canadian Securities Exchange or the TSX Venture Exchange may need to revise their voting and election process to comply with the amendments.

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Majority Voting

The current CBCA regulations permit a situation where a nominated director could be elected by a single “for” vote, despite any number of votes “withheld”, so long as there are no votes “against” that director. The new amendments aim to remedy this by requiring shareholders to vote “for” or “against” a nominee director, without the option to withhold. In an uncontested director election, the nominee will only be elected if they receive majority support. If a nominee does not receive the required majority of “for” votes, they will not be elected to the board but may still be appointed by the board to meet the Canadian residency requirement, or to ensure that the corporation has at least two directors that are not officers or employees of the corporation.

Shareholder Proposals

Currently, shareholder proposals must be submitted at least 90 days before the anniversary date of the notice of the previous annual meeting of shareholders. Once the amendments take effect, the revised deadline will allow shareholders to submit proposals within the 60-day period following the 150th day before the anniversary of the previous annual meeting.

Looking Forward

The upcoming changes to the CBCA – and in particular, the changes regarding slate elections – may help to establish consistency between the CBCA and the rules imposed by the TSX. However, the new majority voting requirement may create conflict between the CBCA and securities laws because securities laws require that a form of proxy gives shareholders the right to “withhold” their vote. The Canadian Securities Administrators have yet to provide clarification on how these competing requirements should be viewed, though existing exemptions may circumvent potential conflict.

The upcoming amendments do not include other potential amendments that have not yet come into force but that have been proposed.² Some of those amendments include:

- notice and access: amendments to notice and access provisions would permit corporations to provide shareholder materials online. This is already permitted by securities legislation, but CBCA corporations must seek an exemption to use notice and access systems;
- disclosure related to well-being: amendments would require corporations to disclose information regarding the “well-being” of employees, retirees, and pensioners. Additional details of this unique requirement have not yet been provided by Corporations Canada;
- say-on-pay-vote: amendments would require corporations to hold annual shareholder votes on the

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corporation's remuneration of directors and executive officers. The corporation would not necessary be bound by the vote; and

- clawback policy: amendments would require corporations to disclose the recovery of incentive payments and/or other benefits paid to directors and executive officers where those payments were later found to be undeserving.

Additional resources about the proposed amendments to the CBCA can be found [here](#).

¹ The amendments were introduced by Bill C-25, *An Act to amend the Canada Business Corporations Act, the Canada Cooperatives Act, the Canada Not-for-profit Corporations Act, and the Competition Act* 1st Sess, 42nd Parl, 2016, (as passed by the House of Commons 21 June 2017).

² The amendments were proposed in Bill C-97, *An Act to implement certain provisions of the budget tabled in Parliament on March 19, 2019 and other measures* 1st Sess, 42nd Parl, 2019, (as passed by the House of Commons 6 June 2019) and Bill C-25, *An Act to amend the Canada Business Corporations Act, the Canada Cooperatives Act, the Canada Not-for-profit Corporations Act and the Competition Act* 1st Sess, 42nd Parl, 2016, (as passed by the House of Commons 21 June 2017). See also *Regulations Amending Certain Regulations Administered by the Department of Industry*: SOR/2022-40, Canada Gazette, Part II, Volume 156, Number 6 (online: <https://www.gazette.gc.ca/rp-pr/p2/2022/2022-03-16/html/sor-dors40-eng.html>)

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