New CSA exemption provides clarity for CBCA director elections

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An exemption for reporting issuers incorporated under the *Canada Business Corporations Act* (CBCA) from the form of proxy requirements for the uncontested election of directors has been implemented by the Canadian Securities Administrators (CSA) by way of substantively harmonized blanket orders.

Takeaways

- As a result of amendments to the CBCA that came into force on August 31, 2022, CBCA-incorporated reporting issuers must give shareholders the option to vote “for” or “against” each nominee director in an uncontested director election.
- Effective January 31, 2023, blanket orders adopted by the CSA (the Blanket Orders) give CBCA-incorporated reporting issuers an exemption from the securities law requirement that a form of proxy sent to shareholders provide such shareholders with the option to vote securities registered in their name “for” or “withhold” in respect of director nominees (the Exemption).
- The Exemption does not impact the form of proxy requirements for any other matter to come before shareholders at an annual or special meeting.

CBCA majority voting amendments created uncertainty for reporting issuers

Amendments to the CBCA that came into force in August 2022 imposed a majority voting requirement on CBCA-incorporated issuers (the Majority Voting Amendments). This is a first amongst Canadian corporate statutes and, as a result, the CBCA now requires that issuers allow shareholders to vote “for” or “against” individual director nominees in uncontested director elections rather than “for” or “withhold”, as has been historically required. The Majority Voting Amendments created some uncertainty for reporting issuers incorporated under the CBCA as National Instrument 51-102 *Continuous Disclosure Obligations* (NI 51-102) requires that a form of proxy sent to securityholders of a reporting issuer provide an option for such holders to either vote or withhold from voting the securities registered in their name in respect of the election of directors.

Blanket Orders address discrepancy between NI 51-102 and the CBCA

Effective January 31, 2023, Blanket Orders adopted by the CSA provide an exemption from the requirement in NI 51-102 that securityholders either vote or withhold their votes in respect of director nominees, provided that:

- The issuer is a reporting issuer incorporated under the CBCA;
- If there is only one candidate nominated for each board seat at a meeting of shareholders (an uncontested director election), each candidate is elected only if the number of votes cast in their favour represents a majority of the votes cast "for" and "against" them by shareholders present in person or by proxy (unless the issuer's articles require a greater number of votes);
- The issuer sends a form of proxy to each shareholder entitled to receive notice of the meeting concurrently with giving notice of the meeting;
- The form of proxy complies with the requirements set out in section 9.4 of NI 51-102, reading paragraph 6 thereof without reference to the election of directors; and
- The form of proxy allows shareholders to specify, for each candidate nominated for director, whether their vote is to be cast "for" or "against" the candidate.

Notably, the Exemption does not impact the form of proxy requirements as they relate to any other matter to come before shareholders at a shareholder meeting. As such, NI 51-102 still requires that securityholders be provided with the option to vote or withhold votes in respect of the appointment of an issuer's auditor.

Next Steps

As noted above, the Blanket Orders came into force on January 31, 2023. In Ontario only, the Blanket Order will expire on the earlier of (i) July 31, 2024 (unless extended) and (ii) the effective date of any amendment to NI 51-102 that addresses this issue. The CSA has indicated that it is considering whether future amendments to NI 51-102 are warranted.

For further information, please see CSA Staff Notice CSA Coordinated Blanket Order 51-930 Exempting Reporting Issuers Incorporated under the *Canada Business Corporations Act* from the Director Election Form of Proxy Requirement (January 31, 2023) and the local blanket orders (CSA Coordinated Blanket Order 51-930 – *Exemption from the Director Election Form of Proxy Requirement*) in British Columbia, Alberta, Ontario and Québec.

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