Shareholder Engagement at the Forefront of Recently Proposed OBCA Amendments

April 21, 2017

On March 7, 2017, Bill 101,*Enhancing Shareholders Rights Act*, 2017 (the "Bill"), a private member's bill, was introduced in the Legislative Assembly of Ontario for the purpose of amending the *Business Corporations Act* (Ontario) ("OBCA"). Of particular interest to entities incorporated under the OBCA are amendments relating to (1) shareholder meetings, (2) director elections, (3) diversity disclosure, and (4) executive compensation. The apparent aim of the Bill is to provide shareholders with greater opportunities for engagement within the corporate apparatus, while also aligning the OBCA with recently proposed amendments to the *Canada Business Corporations Act* ("CBCA"), with some notable divergences. For more information on the recently proposed CBCA amendments, see the BLG bulletin *Parliament Looks to Enhance Shareholder Democracy and Gender Diversity Disclosure*.

1. Reducing Thresholds for Shareholder Nominations and Shareholder Requisitions

Initiating a shareholder proposal to nominate directors under the OBCA currently requires representation from holders of at least 5% of the shares of the corporation or 5% of the class or series of shares entitled to vote at the meeting at which the proposal will be presented. Similarly, to requisition a meeting of shareholders, representation from holders of at least 5% of the shares of the corporation is required. The Bill proposes to reduce the 5% thresholds to 3% thereby making it easier for shareholders to advance their interests in this regard. By contrast, the CBCA (and proposed CBCA amendments) maintain the 5% threshold.

With respect to meetings at which a shareholder proposal nominating directors has been submitted, the Bill also provides that such a proposal may nominate a single individual director nominee (whereas the current wording of the OBCA arguably allows for the nomination of one or more individuals), and that shareholders present at such meeting will pick an individual in attendance to preside as chair. Neither of these provisions are currently set out in the CBCA, nor are they contemplated by the proposed CBCA amendments.

2. Enhancing Shareholder Democracy in Director Elections

A. *Majority Voting*

The OBCA currently provides for a plurality voting regime in which shareholders can either vote "for" or "withhold" support for a director nominee. Under such regime, directors in uncontested elections can be elected to the board with a single vote "for" and irrespective of the number of votes "withheld" (i.e. directors can be elected even if they obtain less than half of the support of shareholders).

The Bill proposes a majority voting requirement for OBCA corporations, which would require a nominee in an uncontested election to obtain majority support from shareholders. Whereas the proposed CBCA amendments only mandates majority voting for public corporations, the majority voting requirement under the Bill would apply to all OBCA incorporated entities.

The Bill, like the proposed CBCA amendments, also appears to offer shareholders the opportunity to vote "against" directors, but this power is not expressly stated in the current draft of the Bill.

B. *Individual Elections*

The OBCA currently allows for slate voting of directors (i.e. electing directors as a group). The Bill, like the proposed CBCA amendments, introduces a requirement that each director must be elected individually, effectively prohibiting slate voting. Individual voting allows shareholders to express disapproval with a particular director by withholding support for that director, whereas slate voting can often shield directors from individual scrutiny.

C. *Annual Elections*

The OBCA currently permits directors to be elected for up to a maximum term of three years. The Bill, like the proposed CBCA amendments, proposes that directors only be permitted to be elected for a maximum term of one year. Reducing the maximum director term to one year better engages shareholders by requiring them to evaluate the performance of directors on an annual basis, thereby enhancing the accountability of directors to the corporation and its stakeholders.

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The aforementioned amendments with respect to director elections will bring the OBCA substantially in line with the Toronto Stock Exchange ("TSX") company rules. TSX-listed issuers are required to elect directors on an individual basis and for up to a maximum term of one year. In addition, TSX-listed issuers (except in the case of majority-controlled issuers) are required to adopt a majority voting policy. The TSX's mandated majority voting policy, however, is tooled with an exception that is not available in the current draft of the Bill: TSX company rules permit the board to reject the resignation of an incumbent director within 90 days of failing to obtain majority support if "exceptional circumstances" warrant that person's continuation on the board. The Bill, like the proposed CBCA amendments, requires incumbent OBCA directors who fail to obtain majority support to resign without exception.

3. Mandating Diversity Disclosure in respect of the Board and Senior Management

The Bill proposes to require prescribed corporations to disclose to their shareholders, at every annual meeting, prescribed information respecting diversity among the corporation's board and senior management. It is unclear whether the prescribed diversity disclosure will relate exclusively to gender or, like proposed amendments to CBCA, be more expansive to include additional categories of diversity. The scope of the prescribed diversity disclosure, and the prescribed corporations subject to this disclosure requirement, will only be determinable once the accompanying regulations to the Bill are released.

The proposed diversity disclosure under the Bill would better align the OBCA with Canadian securities regulations in place in most jurisdictions of Canada. National Instrument 58-101*Disclosure of Corporate Governance Practices* requires non-venture public issuers in Manitoba, New Brunswick, Newfoundland and Labrador, Northwest Territories, Nova Scotia, Nunavut, Ontario, Québec, Saskatchewan and Yukon to disclose information pertaining to gender diversity in respect of the board and senior management.

4. Giving Shareholders a Definitive Voice on Executive Compensation

The Bill provides shareholders with a definitive voice on executive compensation by permitting shareholders to make a proposal to adopt an executive compensation policy with respect to the remuneration of directors or officers, or make a proposal to amend or repeal such a policy. Notably, directors of an OBCA corporation will be obligated to comply with any adopted proposal.

The Bill's proposed amendment on executive compensation is not available under the CBCA nor is it contemplated by the proposed CBCA amendments. It also marks a divergence from current practices of shareholder oversight of executive compensation, which has taken the form of a “say-on-pay” vote. Say-on-pay involves the corporation voluntarily proposing an advisory resolution at a meeting of shareholders to enable shareholders to express approval or dissatisfaction with the remuneration of executives. Importantly, say-on- pay votes, while influential, are not formally binding on the board, as the board still maintains its discretion to not abide with the say-on-pay vote. The Bill seeks to change this and give shareholders of OBCA corporations the final say on matters of executive compensation.

Note: The Bill has passed Second Reading and has been referred to the Standing Committee on Finance and Economic Affairs for further study. Passing of the Bill into law is not a certainty. And even if passed into law, the final form of the law may differ in material respects from the current draft of the Bill.

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