Proxy Access Policy

CCGG believes that the ability of shareholders to have a meaningful say as to which directors are nominated to the board is an important right and central to giving meaning to the shareholders' right to elect directors, a right that is at the core of our system of corporate governance. In the ordinary course, shareholders should exert their influence through communicating with boards on a regular basis. On the rare occasions when this communication fails, CCGG believes shareholders should have the proxy access right described below, in order to provide shareholders with a reasonable means of nominating a certain number of their own candidates directly to the board.

Form of proxy access

CCGG believes that shareholders should have the right to nominate directors on the following terms:

- A shareholder or group of shareholders must hold an aggregate economic and voting interest of at least 3% of the outstanding shares.
- The 3% minimum threshold must have been held for at least 3 years.
- The number of directors to be nominated by shareholders using the proxy access mechanism cannot exceed the greater of 2 or 20% of the board.[1]

In addition to the above terms, CCGG believes that proxy access should be subject to the following terms:

- Nominating shareholders must represent that they are not seeking control and that their economic ownership interest is at least equal to 3% of the issuer's outstanding voting shares.[2]

[1] Such a cap is necessary to avoid 'creeping board control' though the proxy access mechanism. Shareholders would not be able to nominate another 20% of the board in following years so long as the previously nominated directors, if elected, remain on the board.

[2] The requirement that a nominating shareholder not be seeking control will provide comfort to people who fear hedge funds or others will abuse proxy access to attempt to gain control by circumventing laws dealing with change of control. The only case of proxy access that we are aware of to date in the U.S. failed because the nominating shareholder GAMCO Asset Management Inc.(GAMCO) withdrew its director nominations at National Fuel Gas Company (NFG) after NFG challenged the nominations on the basis that GAMCO's past behaviour showed

- Disclosure about shareholder nominees should be set out fairly in the company's proxy circular, including being located in the same section of the proxy circular with the same prominence and on essentially the same terms as disclosure about the company's nominees, along with the use of a fair "universal proxy" form.
- Shareholders nominating directors should be able to use the company's proxy circular to solicit support (i.e., as referred to below, they should not be required to deliver a dissident circular).
- Shareholders must continue to hold the prescribed percentage of shares up to the time of the meeting at which the shareholder-nominees are proposed for election.
- Proxy access be adopted in the form of a by-law rather than a board policy.[3]

Proxy access in the above form will require one change to existing securities law. Currently, proxy solicitation rules restrict shareholders to communicating with a maximum of 15 shareholders unless they prepare a dissident proxy circular. CCGG's view is that shareholders who nominate a director should not only be permitted to have their nominees included on a universal form of proxy but also should be able to use the management proxy circular as their own proxy circular for purposes of soliciting support for their nominees. Accordingly, securities law would have to be amended to accommodate this right. However, issuers are encouraged to adopt all other aspects of proxy access voluntarily in advance of statutory change.

Backgrounder

Attached to this policy as Appendix A is a backgrounder which briefly outlines recent developments in Canada and the U.S. with respect to proxy access and explains CCGG's thinking behind the positions expressed in this policy.

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that GAMCO was, in fact, acting with the intent to change or influence control of NFG and not in the ordinary course of business as a passive investor.

[3] By-laws ultimately require shareholder approval (and thus full public disclosure) to be adopted and, importantly, to be amended or repealed, but board policies do not. While there may be a benefit to the flexibility inherent in a board policy if changes to the policy are believed to be appropriate in the future, CCGG believes this is outweighed by the importance of proxy access being subject to shareholder approval, whether at the time of adoption or at the time of any proposed amendment or repeal.

Appendix A

Backgrounder – Supporting statement for CCGG's Proxy Access Policy

CCGG released our May 2015 policy entitled *Shareholder Involvement in the Director Nomination Process: Enhanced Engagement and Proxy Access* (the "2015 Policy") with the purpose "of bring[ing] our views on proxy access forward in order to begin a public dialogue in Canada about enhancing proxy access"[4]. There have been significant developments in both Canada and the U.S. with respect to proxy access since then. Accordingly, CCGG is releasing this *Proxy Access Policy* (the "Proxy Access Policy"), to which this supporting statement is attached as Appendix A. This supporting statement briefly outlines those developments and explains CCGG's thinking behind the positions expressed in the Proxy Access Policy.

Recent developments

Since the 2015 Policy was released, proxy access has become mainstream in the U.S., with more than 425 companies of various sizes and across industries, including more than 60% of the companies in the S&P 500 index, having enacted proxy access bylaws which give shareholders the right to nominate directors provided certain condition are met. The standard set of conditions which has emerged in the U.S. in the last two years provides that shareholders holding at least 3% of the company's outstanding shares for a minimum of 3 years can nominate up to a specified percentage of the directors on the company's proxy.[5]

[4] Shareholder Involvement in the Director Nomination Process: Enhanced Engagement and Proxy Access, page 5.
[5] There are additional conditions in the U.S. model, which are also important and which will be discussed later (such as a requirement to certify that the nominating shareholder is not seeking control or limits on the number of shareholders whose holdings can be aggregated to reach the specified thresholding) but the three referred to here are the primary consistent features of the U.S. model.

In Canada, no companies adopted proxy access until after shareholder proposals requesting the adoption of proxy access by-laws, in the standard U.S. form[6], were submitted in 2017 at Toronto Dominion Bank ("TD") and Royal Bank of Canada ("RBC"). These were the first shareholder proposals brought forward in Canada that requested a company adopt a proxy access bylaw and the proposals did exceptionally well, receiving a vote of 52.2% in favour at TD and 46.8% in favour at RBC. Both banks committed publicly to working with their stakeholders, including CCGG, to develop a regime for proxy access[7] and on September 29, 2017 identical proxy access policies were adopted by TD and RBC. In the following weeks, Bank of Montreal, Bank of Nova Scotia, Canadian Imperial Bank of Commerce and National Bank followed suit. Thus, proxy access is starting to make headway in Canada.

The following discussion focuses on the merits of proxy access in Canada and its importance to shareholders and corporate governance generally and sets out CCGG's current thinking thereon.[8]

[6] The shareholder proposals submitted at TD and RBC differed from what is now standard in the U.S. in that, while the U.S. form typically permits shareholders to nominate up to 20% of the directors, the TD and RBC shareholder proposals set a higher cap of 25%.

[7] RBC Directors to Engage with Shareholders and other Stakeholders on Proxy Access and TD Message re Proxy Access.

[8] We assume that the ability of shareholders to influence board composition through on-going dialogue with the board of directors on a regular basis is, at this stage, a recognized benefit for corporations and uncontroversial.

The argument for proxy access

Under Canadian corporate law, shareholders have the right to elect directors. In CCGG's view, however, this right is meaningful only if shareholders can have some say on who they are voting for: "the right to nominate is inextricably linked to, and essential to the vitality of, a right to vote for a nominee".[9] In this context it is always important to remember that the right to nominate directors is not the same as the right to appoint directors – a nominee still must receive a majority of votes in favour[10] to be elected a director.[11]

Canadian corporate law does provide shareholders with several statutory rights to nominate directors. Shareholders have the right to nominate directors from the floor at an annual general meeting ("AGM").[12] However, given our present day widely dispersed ownership of public companies, attendance at the AGM is not feasible for most shareholders and the majority of proxy voting is done electronically in advance of the AGM and thus this right is of little practical utility. It is CCGG's view that shareholders should be able to replicate as closely as possible their ability to nominate directors at the AGM through the proxy voting process in alignment with accepted contemporary shareholder and voting practices.

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[9] Proposed Rule on Facilitating Shareholder Director Nominations, Release Nos. 33-9046; 34-60089, June 10, 2009. See also Durkin v. Nat'l Bank of Olyphant, 772 F.2d 55, 59 (3d Cir. 1985) (where the court stated that "the unadorned right to cast a ballot in a contest for office, a vehicle for participatory decision-making and the exercise of choice, is meaningless without the right to participate in selecting the contestants. As the nominating process circumscribes the range of the choice to be made, it is a fundamental and outcome-determinative step in the election of officeholders. To allow for voting while maintaining a closed candidate selection process thus renders the former an empty exercise. This is as true in the corporate suffrage context as it is in civic elections, where federal law recognizes that access to the candidate selection process is a component of constitutionally-mandated voting rights."

[10] We are speaking here of uncontested director elections. In the case of contested director elections, a nominee must be elected by a plurality vote.

[11] In conjunction with the foundational point that every director is subject to a fiduciary duty to the corporation and hence not to any specific shareholders, the fact that directors in uncontested elections must be elected by a majority of votes cast should mitigate concerns that shareholder-nominated directors will reflect only the interests of the shareholder that nominated him or her.

[12] See for example section 137(4) of the Canada Business Corporations Act ("CBCA"), described in H.R. Nathan, *Nathan's Company Meetings Including Rules of Order,* 8th ed. (Scarborough: Carswell, 1998 at 82). Advance notice bylaws place conditions on this ability. Although CCGG is not arguing that companies should not have the ability to

Canadian law provides shareholders with other means of nominating directors: shareholders holding 5% of a CBCA company's outstanding shares may either (i) requisition a meeting to elect directors[13] or (ii) submit a shareholder proposal to nominate directors to be included in the company's proxy circular.[14] Those opposed to enhancing proxy access in Canada by providing shareholders with an additional means of nominating directors along the lines of the U.S. standard model point to these existing statutory rights to argue that because a right to proxy access already exists in Canada, CCGG's proxy access policy is "a solution in search of a problem".

However, rights are of value only if they are practical to exercise and have a reasonable expectation of being effectively exercised. In CCGG's view, the statutory rights of proxy access currently available under Canadian law do not meet these tests: as we stated in the 2015 Policy, they are impracticable, ineffective, onerous to implement and unreasonably expensive.

With respect to the shareholder proposal method of nominating a director, there is no statutory requirement for the corporation to include information about the shareholder's nominee in the circular in an equitable manner that will afford the nominee with the same prominence as that provided to management's nominees. Shareholder proponents are limited to a 500-word statement while the length of management's response is unrestricted. Further, there is no requirement to use a universal proxy form that displays both shareholder and management nominees fairly and on the same form. Shareholder nominees are at a clear disadvantage compared to management nominees in terms of the effective disclosure that is likely to garner support from shareholders.

enact advance notice bylaws, CCGG believes that companies should not use advance notice bylaws or any other mechanisms to impede the proxy access policy to which this supporting statement is attached as Appendix A.

[13] CBCA section 143(1)

[14] CBCA section 137(4)

With respect to shareholders' ability to requisition a meeting to nominate a director, the nominating shareholder can issue a general public statement explaining its position but can directly solicit only up to 15 other shareholders without preparing a dissident proxy circular, an onerous and expensive means of implementing a basic right. The same restriction on proxy solicitation applies to directors nominated through the shareholder proposal mechanism.

Further, CCGG views a required threshold of 5% to be too demanding for purposes of nominating directors. There is no scientific means of establishing the right threshold but the fact that the existing proxy access rights are so rarely used may suggest that the bar is too high.[15]

CCGG would like to see a feasible way for significant shareholders to nominate directors when dialogue with a company's board has failed. CCGG believes that proxy access in the form of the U.S. standard model, as discussed below and as set out in the policy to which this supporting statement is attached as Appendix A, would provide shareholders with the ability to meaningfully exercise their right to nominate directors.

Importantly, as stated in the 2015 Policy, "CCGG believes that this mechanism will be used sparingly by shareholders … most likely when company performance is poor and attempts to engage have failed"[16].

[15] The lack of utilization does not suggest that there is no need for proxy access, as some would argue. As evidence that the reasonableness of conditions attached to a right will impact its use or likelihood of being exercised, note that the 5% shareholder proposal mechanism in Alberta has resulted in no proposals in that province since the 5% provision was adopted in 2005 whereas the significantly lower threshold in other provinces has resulted in hundreds of proposals in those other provinces.

[16] Supra note 4 at page 4.

Holding period

CCGG's 2015 Policy did not include a condition that required shareholders to hold their shares for a specified period before being eligible to nominate a director. This absence of a holding period was the feature of the 2015 Policy that received the most criticism from directors, issuers and their advisors. Their expressed fear was that without a holding period, companies would be vulnerable to opportunistic short-term shareholders who will abuse proxy access to further their own ends to the detriment of long-term shareholders. While past holdings do not ensure that a shareholder will continue to hold the shares in the future, holding shares for a length of time provides some indication that shareholders do in fact have the long-term interests of the corporation and all its shareholders at heart.

Supporters of a three-year holding period argue that there is merit in consistency with the U.S. model, not only for the benefit of Canadian companies that are dual listed in Canada and in the U.S. but also for the advantages of clarity, simplicity and certainty that accrue to both shareholders and companies dealing with similar frameworks. Canada also can benefit by learning from the U.S. experience with this model of proxy access.[17]

Challenge to adopting proxy access – statutory change required

Proxy access in the form CCGG is proposing will require one change to existing securities law. Currently, proxy solicitation rules restrict shareholders to communicating with a maximum of 15 shareholders unless they prepare a dissident proxy circular. CCGG believes that shareholders who nominate a director should not only be permitted to have their nominees included on a universal form of proxy but they also should be able to utilize the management proxy circular. As such, no dissident circular should be required for purposes of soliciting support for their nominees. Accordingly, the law would have to be amended to accommodate this right. However, CCGG encourages issuers to adopt all other aspects of proxy access voluntarily in advance of statutory change.

[17] For the same reasons, CCGG's new policy no longer proposes different thresholds of 3% and 5% depending on the market capitalization of the company.

Legal opinion

CCGG obtained a legal opinion from Professor Stéphane Beaulac in connection with CCGG's Proxy Access Policy. Professor Beaulac is a professor at the Faculty of Law, University of Montreal, with a background in both common and civil law, and specializes in statutory interpretation.[18] After a detailed analysis Professor Beaulac concludes as follows:

> Considering all the above, it is my expert legal opinion, as a specialist of statutory interpretation, that the section 137(4) CBCA 5% minimum requirement is not a mandatory rule or condition, but rather a supplementary (suppletive) norm. As a result, the alternative standard proposed by CCGG, namely for corporations to pass bylaws in order to bring the minimum requirement down to 3% of the shares (or voting shares), is fully in line with the CBCA statutory rules regarding proxy access to the director nomination process.

Accordingly, CCGG believes that Canadian public corporations governed by the CBCA or similar statutes can voluntarily implement the principles set out in CCGG's Proxy Access Policy without the requirements of any statutory amendment (except for the ability of shareholders to use the company's proxy circular to solicit proxies from greater than 15 shareholders, which will require a statutory change).

[18] Professor Beaulac has a masters degree in legislative drafting and statutory interpretation from the University of Ottawa as well as LL.M. and Ph.D. degrees from University of Cambridge. He is the author or co-author of half a dozen books on statutory interpretation including the seminal Canadian treatise on the subject entitled *The Interpretation of Legislation in Canada,* 4th ed. (Toronto: Carswell, 2011) Pierre-Andre Cote (coll. Stephan Beaulac and Mathieu Devinat).

Summary

CCGG believes that the ability of shareholders to have a meaningful say as to which directors are nominated to the board is an important right and central to give meaning to the shareholders' right to elect directors, a right that is at the core of our system of corporate governance. In the ordinary course, shareholders should exert their influence through communicating with boards on a regular basis. On the rare occasions when this communication fails, CCGG believes shareholders should have the right of proxy access as set out in our Proxy Access Policy, in order to provide shareholders with a reasonable means of nominating their own candidates directly to the board.