

Advance Notice By-laws and Policies

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By Michael Dolphin

As shareholder activism increases in Canada, so too are the number of proxy disputes. As such, more Canadian public companies are implementing advance notice by-laws and policies. Advance notice by-laws are common in the United States, having been utilized by American companies for over twenty years. Advance notice by-laws generally require that a company be given advance notice of shareholder proposals relating to the nomination of directors. In the absence of such by-laws or policies, and provided they have sufficient votes to do so, dissidents have the ability to “ambush” a meeting of shareholders and replace some or all of the board of directors without advance notice to the company or to its shareholders.

Northern Minerals Investment Corp. v. Mundoro Capital Inc.

Although such policies are relatively new in Canada, there is some recent jurisprudence on this subject. The Supreme Court of British Columbia considered in *Northern Minerals Investment Corp. v. Mundoro Capital Inc.*, 2012 BCSC 1090, two of the tools used by companies in connection with proxy contests: (i) the implementation of an “advance notice policy”, that in this case had been adopted by the Mundoro board after it had mailed the information circular for its meeting of shareholders, and (ii) the postponement of a shareholder meeting. In sustaining both actions taken by the board of Mundoro, the court reaffirmed the authority of a company's board of directors to pursue such initiatives.

Northern Mineral argued that the advance notice policy diminished shareholder democracy by depriving shareholders of their statutory right to elect directors. The court disagreed and concluded there was no infringement on the rights of Mundoro shareholders stating:

“In this case it has not been established that the Policy is one that infringes shareholder rights. Rather, the Policy in fact ensures an orderly nomination process and that the shareholders are informed in advance of an AGM what is in issue. In doing so the Policy prevents a group of shareholders from taking advantage of a poorly attended shareholders meeting to impose their slate of directors on what could be a majority of shareholders unaware of such a possibility arising. The submission of the petitioner equates the “rights” of a small group of dissident shareholders with all shareholders of the company. The interests of the two groups do not necessarily coincide.”

Despite the court making clear that its conclusion was not a general endorsement of advance notice policies and that each case will be decided based on its particular facts, the decision suggests that such policies could be considered to be consistent with shareholder rights, rather than a tool of board entrenchment.

We note that the court considered shareholder approval of the advance notice policy to be important and we would recommend that such advance notice provisions be adopted by way of a by-law and that the company seek shareholder approval for the advance notice provisions.

Implementation of By-law

The board directors of a company may adopt an advance notice by-law, following which the by-law should be submitted to the shareholders at the next meeting of shareholders. The advance notice by-law would be effective from the date of such directors' resolution until it is confirmed or rejected by the shareholders at the next meeting.

In our opinion, a properly drafted advance notice by-law would prevent shareholders from nominating directors without providing the company with adequate time to consider and respond in an informed way to such proposed nominations. The advance notice by-law should facilitate an orderly and efficient meeting process, not by discouraging nominations, but by ensuring that all shareholders, including those participating by proxy rather than in person, receive adequate notice of the nominations, allowing them to register an informed vote.

Conclusion

As the proxy season nears, WeirFoulds is advising its public company clients on the implementation of advance notice by-laws. We believe that advance notice by-laws can be important instrument for a public company to ensure that all shareholders are treated fairly and are provided with timely information in connection with the nomination of directors, benefiting both the company and its shareholders.

If you would like more information about advance notice by-laws, please contact any member of our Corporate Securities Group.

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