

Shareholders divided on proxy access

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Author: [John M. Valley](#)

Over the past week, a shareholder proposal requesting that the board of directors take steps to adopt a “proxy access” by-law was considered at the annual meetings of both The Toronto-Dominion Bank (TD Bank) and Royal Bank of Canada (RBC). The proposal was approved by 52.2% of the votes cast at the TD Bank meeting last week, but was defeated at the RBC annual meeting yesterday, where it received support from 46.83% of the votes cast.

The level of support for the proposal at both of these meetings suggests a degree of interest among shareholders that will ensure that proxy access remains on the board agenda in Canada.

What is proxy access?

“Proxy access” refers to the ability of qualified shareholders to have director nominees included in the company’s proxy circular and form of proxy, subject to certain restrictions.

The ability of shareholders to include director nominees on the company’s form of proxy has long been a feature of Canadian corporate law. Under the *Bank Act*, as in the *Canada Business Corporations Act*, shareholders who collectively hold at least 5% of the outstanding shares may do so provided that, for the prior six months, they have held shares which either (i) represent 1% of the outstanding shares, or (ii) have a market value of at least \$2,000. Notwithstanding the availability of proxy access in Canada, it has rarely been used.

By contrast, in the U.S. proxy access generally has not been available. It was one of the changes mandated by the *Dodd-Frank Act*. However, the SEC’s proposed rule to introduce proxy access was challenged and struck down on the basis that the SEC had failed to adequately assess the economic effects it would have. U.S. institutional shareholders sought to introduce proxy access by initiating shareholder proposals, and have had some success. However, there is a wide variation in the versions of proxy access which have been adopted and an ongoing debate on the conditions which must be satisfied for shareholders to be qualified to submit nominations.

The shareholder proposal

The same shareholder proposal was considered at the TD Bank and RBC meetings. It was submitted by an individual retail shareholder, not an institutional shareholder, and was one of several shareholder proposals put forth. Although the proponent of the proposal did not attend either meeting, both banks accommodated the shareholder by arranging for the proposal to be moved and seconded at the meeting in his absence.

Similar to most U.S. proxy access proposals, the proposal would have permitted shareholders

holding at least 3% of the outstanding shares to submit director nominees to be included in the company's proxy circular and form of proxy. However, unlike U.S. proxy access proposals, this right would have been subject to several restrictions, including

- the number of shareholder-nominated candidates could not exceed 25% of the directors then serving
- the submitting shareholders must have held at least 3% of the outstanding shares continuously for at least the three preceding years
- advance notice of the nominations, including the consent of the nominees and proof of ownership of the required shares, must have been provided
- the submitting shareholders must certify that they will assume liability arising from their communications to shareholders (including the content of the shareholder proposal) and that they will comply with all applicable laws and regulations if they use their own soliciting material, and must have acquired the shares in the ordinary course of business and not to change or influence control

Compared to the proxy access rights currently afforded to bank shareholders under the *Bank Act* (and the corresponding provisions under the *Canada Business Corporations Act*), the shareholder proposal was significantly more restrictive, except that it proposed an ownership threshold of only 3% of the outstanding shares (instead of the 5% prescribed under the statutes). As a result, it is somewhat surprising that the shareholder proposal received the level of support that it did at each bank. That support may reflect a more general desire for change in the area of proxy access rather than an endorsement of this specific shareholder proposal at these particular institutions.

Conclusion

In light of shareholder interest in proxy access demonstrated at the meetings, both TD and RBC have committed to continuing the dialogue with stakeholders on proxy access and to report back to shareholders next year. Accordingly, proxy access will continue to be on the board agenda in the coming year.