

A GUIDE TO PREPARING AND SUBMITTING SHAREHOLDER PROPOSALS WITH FEDERALLY-INCORPORATED CANADIAN CORPORATIONS

The following is a guide to submitting shareholder proposals with federally-incorporated Canadian corporations pursuant to the *new rules* as stated in Bill S-11 (an amendment to the *Canadian Business Corporations Act*) and the new *Canadian Business Corporations Regulations, 2001*. Bill S-11 received Royal Assent on 14 June 2001 and became law on 24 November 2001.

Each rule in this Guide is followed by a reference to the relevant section of the amended CBCA and/or the regulations. References are based on the numbering in *Bill S-11* and the *Proposed Canada Business Corporations Regulations, 2001*.¹ Numbering may be different when the Act and Regulations are officially published.

The following does not constitute specific legal advice, but is only meant to serve as a general guide to submitting shareholder proposals. Most of the provisions in this Guide have not been tested in Canada, although extensive precedent exists in the United States. Accordingly, shareholders should seek independent legal advice before submitting a proposal to a corporation.

Eligibility

In order to be eligible to submit a proposal, a person must meet the following conditions:

- Be a registered or beneficial shareholder (CBCA, s.137(1))
- Hold either individually or collectively with other shareholders, the lesser of either 1% of the total number of outstanding voting shares of the corporation *or* \$2,000 worth of shares (at fair market value determined at the close of business on the day preceding submission) on the day the proposal is submitted. (CBCA, s.137(1.1); Regs., s.40(a))
- Have held the above number or value of shares for a minimum of six (6) months immediately before the day the proposal is submitted. (CBCA, s.137(1.1), Regs., s.40(b))

If a shareholder fails to hold the required number or value of shares up to and including the date of the meeting, they are barred from submitting any proposals for two (2) years from the date of that meeting. (CBCA, s.137(5.1); Regs. 46) For example, if a shareholder purchases shares in order to be eligible to submit a proposal and then sells the shares prior to the

¹ Copies of Bill S-11 are available on the Canadian Parliament's website at http://www.parl.gc.ca/37/1/parlbus/chambus/house/bills/government/S-11/S-11_4/S-11_cover-E.html. Copies of the proposed regulations are available in the 8 September 2001 edition of the *Canada Gazette, Part II* at <http://canada.gc.ca/gazette/part1/pdf/g1-13536.pdf>.

corporation's AGM, the corporation does not need to entertain the proposal and the shareholder cannot submit any proposals to the company for two (2) years.

Information to include in the proposal

All proposals must include the following information in order to be accepted by the corporation:

- The name and address of the shareholder filing the proposal (and other co-filers if applicable). (CBCA, s.137(1.2)(a))
- The number of shares held or owned by the person (and co-filers if applicable). (CBCA, s.137(1.2)(b))
- Although not mandatory at this stage of the submission process, include documentation demonstrating proof of ownership of the shares when submitting the proposal in order to avoid future delays (see "Requirement to demonstrate proof of ownership" below).

This information is *not* included in calculating the word limit for the proposal and supporting statement (see "Word limit" below). (CBCA, s.137(1.3))

Word limit

The shareholder proposal and supporting statement together may not exceed a total of 500 words. (CBCA, 137(3); Regs., s.42)

Requirement to demonstrate proof of ownership

A corporation may request a shareholder to provide proof that he/she is the registered holder or beneficial owner of the shares within 14 days of receiving the shareholder's proposal. (CBCA, s.137(1.4); Regs. s.41(a)).

The shareholder must provide such proof within 21 days of receiving the corporation's request. (CBCA, s.137(1.4); Regs. 41(b)).

By providing proof of ownership when submitting the proposal, shareholders can avoid being caught by these time requirements, as well as suffering from added delays as a consequence of the corporation delaying to request proof of ownership.

Grounds for excluding a proposal

A corporation must circulate a shareholder proposal, except in the following situations:

- Where the proposal is submitted less than 90 days before the anniversary date of the notice of meeting of the previous annual general meeting.² (CBCA, s.137(5)(a); Regs. s.43)
- Where the primary purpose of the proposal is to enforce a personal claim or redress a personal grievance against the corporation, its directors, officers or security holders. (CBCA, s.137(5)(b))
- The proposal clearly “does not relate in a significant way to the business or affairs of the corporation.”³ (CBCA, s.137(5)(c))
- Where the shareholder failed to present a proposal circulated at the shareholder’s request less than two (2) years prior to the current proposal being received by the corporation.⁴ (CBCA, s.137(c); Regs., s.44).
- Where “substantially the same” proposal was circulated to shareholders within the past 5 years and received less than:
 - (a) 3% of the total number of shares voted in the first time it was submitted;
 - (b) 6% of the total number of shares voted the second time it was submitted;
 - (c) 10% of the total number of shares voted the third time it was submitted. (CBCA, s.137(5)(d); Regs., s. 45)⁵
- Where the proposal is “being abused to secure publicity.” (CBCA, s.137(5)(e))

Where the corporation refuses to circulate the proposal

If a corporation refuses to circulate a proposal, it must notify the submitter of the refusal *on the later of*:

- 21 days after the day it receives the proposal, or

² A corporation is required to publish in the management proxy circular the final date on which proposals may be submitted. (Regs., s.58(z.8)) Caution should be taken not to rely on the management proxy circular since deadlines may expire before the management proxy circular is circulated to shareholders. *According to Industry Canada’s unofficial interpretation, the reference date used to calculate the deadline is 90 days prior to the one year anniversary of the date on the Notice of Meeting (i.e. the date the Board issued the Notice of Meeting, not the date it is sent to or received by shareholders).*

³ This wording is based on the American test. There is voluminous American case law interpreting this standard. Those submitting proposals should consider these interpretations carefully before proceeding.

⁴ The significant dates here are the date of the AGM two years previous and the day on which the current proposal is received by the corporation, not the date of the current AGM. Where corporation’s change the dates of their AGMs significantly, it may be possible to submit a proposal for an AGM two years later provided the submission date is two years after the date of the AGM two years previous.

⁵ It appears that under the new provisions, no shareholder may submit a substantially similar proposal more than five (5) years after the initial proposal was submitted.

- 21 days after the day it receives proof of ownership of the shares. (CBCA, s.137(7); Regs., s.47)

The refusal notification must include a written statement of the reasons for the refusal. (CBCA, s.137(7))

Resolving a dispute regarding circulation of a proposal

Where a corporation refuses to circulate a proposal, the submitter seeking to dispute the refusal must apply to the court. A court may stop the meeting from proceeding at which the proposal was to be presented from proceeding, require the corporation to circulate the proposal with or without modifications, or order any other resolution to the problem it sees fit. (CBCA, s.137(8))

A corporation or any person claiming to be aggrieved by the proposal may also apply to a court to have the proposal omitted from the management proxy circular based on one of the grounds for exempting a proposal outlined above (see “Grounds for excluding a proposal”). (CBCA, s.137(9))

Where a dispute is taken to the courts, the Director must be informed by the plaintiff and permitted to be heard by the court.⁶ (CBCA s.137(10))

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SHARE

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⁶ As of 1 November 2001, the Director was Robert Weist, Director, Compliance Branch, Industry Canada, 365 Laurier Avenue West, Ottawa, Ontario, K1A 0C8, telephone: (613) 941-5756, fax: (613) 941-5781. The Compliance Branch is also responsible for interpreting the application of the Act and Regulations.