

# Canada



## Advance Notice Requirements

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Frequently Asked Questions

**Effective for Meetings on or after February 1, 2018**

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# ADVANCE NOTICE REQUIREMENTS FAQ

## Introduction & Background

### Background in Canada

Advance Notice Requirements (ANRs) continue to be adopted by Canadian issuers. Since 2012, ISS has reviewed well over 1,000 ANRs, the majority of which have been adopted by TSX Venture-listed issuers and smaller TSX-listed issuers. During more recent years however, a greater proportion of ANR adopters have been larger companies, including constituents of the S&P/TSX Composite Index.

ANRs represent an evolving area of corporate governance in Canada, one which is being challenged within the courts by dissidents and which is generating significant interest, and some concern, from institutional shareholders. Specifically, Canadian institutional investors have voiced serious concerns regarding certain provisions included within these requirements, which could be construed to interfere with shareholders' fundamental ability to nominate directors for election to the board. More recently, in March 2017, the TSX updated its Company Manual and provided guidance with respect to the use of ANRs in the context of director election requirements.

### 1. What is an ANR and what is its purpose?

These requirements set out procedures for any shareholder who intends to nominate any person for election as director of the company other than pursuant to shareholder rights instilled within the company's governing statute (i.e. Business Corporations Act) or via shareholder proposal. The requirement stipulates a deadline by which shareholders must notify the company of their intention to nominate directors and also sets out the information that shareholders must provide regarding each director nominee and the nominating shareholder in order for the advance notice requirement to be met.

ANRs were introduced as a form of protection against last minute or "stealth" proxy contests, whereby a dissident shareholder would submit a slate of nominees shortly before the meeting or nominate directors from the floor of the meeting. In each of these circumstances, limited or no information would be made available either to the company or to other shareholders who had not physically attended the meeting. As such, a board takeover could occur with just a few shareholders voting for the change and without the knowledge or input of other shareholders. These "ambushes" were seen to be of greater concern at smaller companies with historically lower voter turnout levels and larger concentrations of shareholdings. ANRs were expected to provide an organized process by which nominees could be proposed within a specific timeframe and with adequate information, so that all shareholders would be provided with the opportunity to evaluate and review the proposed candidates for election to the board and vote in an informed and timely manner on these nominees. Consequently, when adopting an ANR most issuers state that the instrument is designed to:

- › ensure an orderly and efficient shareholder meeting process;
- › ensure that all shareholders receive adequate notice of any director nominations and sufficient information with respect to all nominees; and
- › allow shareholders to register an informed vote having been afforded reasonable time for appropriate deliberation.

Recently, however, institutional shareholders have voiced concerns that some provisions within ANRs may serve to impede shareholders' ability to nominate individuals for election to the board.

## 2. Why are Advance Notice Requirements adopted as by-laws or policies?

ANRs are adopted as either an amendment to the company's constating documents or as a board policy.

Within most Canadian jurisdictions, alterations to articles and by-laws become effective immediately upon adoption by the board, with ratification of these amendments upon receipt of shareholder approval at the next shareholders' meeting. As such, the most common method of ANR adoption within Canada is as an addition to the company's constating documents.

Under the *Business Corporations Act* (British Columbia), however, any alterations to the articles must be approved by shareholders before coming into effect. As such, many reporting issuers within this jurisdiction adopt ANRs as policies rather than as article amendments so that these requirements become effective immediately and are applicable at the next shareholders' meeting.

Under Canadian corporate law, amendments to constating documents, such as by-laws (or articles in B.C.) require shareholder approval in order to be ratified; however, board adopted policies are not subject to this requirement. Consequently, in a limited number of cases, shareholder approval has not been sought at the next shareholders' meeting after the adoption of an ANR in the form of a policy, nor was adequate information provided about the provisions included within the policy. Within the *Northern Minerals Investment Corp. v Mundoro Capital Inc.* decision, the court noted that the company's intention to seek shareholder approval and confirmation of the Policy at the next annual meeting demonstrated "good faith and the reasonableness of the Policy."

The adoption of a policy that may impact the rights of shareholders to nominate directors, without obtaining shareholder approval, is seen to be unacceptable by Canadian institutional investors.

## 3. What is contained within an ANR?

In order for notice to the company to be valid, ANRs fix the deadline within which notice from the nominating shareholder must be provided to the company prior to any shareholders meeting at which directors are to be elected. ANRs also specify the information that must be included within the notice regarding the nominating shareholder and any proposed director candidates. The chair of the meeting typically has the power to determine whether a nomination was made in accordance with the procedures included within the ANR, including whether notice was provided within the proper form as dictated by the ANR. If any proposed director nomination is not in compliance with such requirements, then the chair has the power to invalidate such nomination.

### **Definition of Timely Notice**

This section defines the timeframe within which a nominating shareholder must provide notice to the company of its intention to nominate directors to the board, and disclose any information required under the ANR regarding nominating shareholders and proposed nominees. The notification timeframe contained in ANRs reviewed by ISS now generally establish a minimum notice period of 30 days prior to a shareholders' meeting.

### **Required Content of Notice**

This section outlines the information which must be provided with respect to each proposed director nominee and the nominating shareholder. These disclosure requirements are typically aligned with those required within dissident proxy circulars and usually include the following:

- › Age;
- › Occupation and employment;
- › Address;

- › Citizenship or residency status;
- › Shareholdings in the company receiving notice;
- › Details of any agreements between the nominee and/or the nominating shareholder and/or any other parties.
- › With respect to the nominating shareholder, any proxy, contract, arrangement, understanding or relationship pursuant to which the shareholder has the right to vote shares of the corporation.
- › Any other information relating to the person/s that would be required to be disclosed within a dissident proxy circular.

The above list is not exhaustive and individual ANRs may require any number of additional disclosures.

#### 4. What if only a summary of the ANR is included within the proxy circular?

If an issuer is requesting shareholder approval for the adoption of an ANR, the full provisions related to this requirement should be included within the circular, or at a minimum, a reference should be included to where the complete ANR document outlining all of the provisions pertaining to the ANR can be found on SEDAR. Without having access to all of the stipulations within the requirement, it is impossible for shareholders to accurately ascertain whether, or the extent to which, their right to nominate directors to the board has been affected by the requirement. As such, ISS will determine that proposed ANRs, where only summary information is made available, may be potentially detrimental to shareholders' rights and are therefore unsupportable.

Furthermore, any company that has already adopted an ANR would be expected to include this information within the proxy circular, similar to shareholder proposal deadlines or majority voting policies.

### Notification Period

#### 5. What is deemed to be an acceptable notification timeframe by ISS?

[\*National Instrument 54-101 – Communication with Beneficial Owners of Securities of a Reporting Issuer\*](#) stipulates that issuers must provide proxy-related materials to shareholders no later than 21 days prior to the meeting date. However, in order for the materials to be made available by this deadline, the management proxy circular and other documents must be finalized and ready for delivery several days in advance of the 21 day deadline as a matter of practicality. As such, a 30-day deadline prior to meeting date for nominating shareholders to provide notice of their intention to nominate directors is deemed to be the minimum reasonable timeframe.

#### 6. What about maximum notice periods?

Canadian institutional investors have expressed concern with a maximum limit, stating that it is overly restrictive and unnecessary. In addition, as discussions commence with regard to proxy access in Canada, it is believed that the maximum notice period may be potentially incompatible with future proxy access expectations.

ISS has therefore determined that any maximum threshold for shareholder notice is not supportable. As such, the removal of any maximum timeframe is expected to facilitate the nominating shareholders' access and provide shareholders with additional time to consider the dissident's concerns and any proposed director nominees.

#### 7. What about companies that have adopted Notice & Access?

Companies that have voluntarily implemented notice-and-access, which provides for electronic dissemination of proxy materials for shareholders, must provide proxy-related materials no later than 30 days prior to meeting date. Given that the timeframe for providing proxy materials to shareholders is earlier under notice-and-access, ISS may accept timeframes above the 30 day deadline, to a maximum of 40 days prior to meeting date, in order to support notice-and-access provisions.

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## 8. Why does ISS oppose any provision that restricts the notification period to that established for the originally scheduled meeting in the event that a meeting is adjourned or postponed?

These provisions lock the notification period to the original meeting date and do not allow dissidents to change or update their nominees in the wake of an adjourned or postponed meeting. As such, boards could use this provision as an entrenchment mechanism or, at a minimum, use the additional time to develop defensive tactics or add new nominees to the management slate.

The problematic aspects of this issue were highlighted during the 2014 *Orange Capital, LLC v Partners Real Estate Investment Trust* case, in which Partners REIT invalidated Orange Capital's formal notice on the basis that Orange failed to adhere to the notice period within the ANR which did not provide for a new notice period upon postponement or adjournment of the meeting.

The Ontario Superior Court noted and agreed that the actual date of the shareholders' meeting triggers the nomination window, not the originally scheduled date of the meeting where such meeting has been postponed. The ruling also indicated that, insofar as said proviso may be ambiguous, it should be interpreted in favour of the unitholder (in this case) voting rights.

## Content of Notice

### 9. What disclosure requirements does ISS support?

ISS supports disclosure provided by nominating shareholders and proposed director nominees as applicable under corporate securities laws and disclosure requirements for dissident proxy circulars. Disclosure requirements which go beyond those required by securities laws, however, (i.e. information about equity holdings or voting interests), may also be of benefit to both management and investors. As such, ISS will generally support disclosure requirements which provide shareholders with clear and relevant information as to the qualifications, experience, economic or voting interests and independence of director nominees. However, any disclosure requests which go beyond those required by securities law and which are not also required of management nominees may be deemed problematic.

### 10. Does ISS support disclosure requirements which provide the board with blanket authority to request disclosure?

No. These types of blanket provisions could be utilized by the existing board and management as entrenchment tools to prevent or delay potential shareholder nominees from standing for election and thus hinder shareholders' ability to nominate directors for election to the board. Such disclosure requests may be of little or no relevance to a potential director's abilities on the board and could be used by management for its own benefit. These provisions could be used to prevent proper access to the proxy through unreasonably onerous disclosure requests, and requested information which is not then disclosed would be of negligible benefit to shareholders.

### 11. Should all requested disclosure be publicly disclosed?

Companies should disclose information requested by them under ANR disclosure requirements. In particular, any information that is required under corporate securities law or that could be used by shareholders to determine director nominee qualifications, relevant experience, independence, and/or shareholding / voting / economic interests in the company held by a director nominee or the nominating shareholder should be clearly provided to shareholders. This information should be requested, gathered and disseminated in the same manner for shareholder nominees as for management nominees.

ANR provisions that stipulate that the corporation is not obligated to include any information provided by shareholder nominees or the nominating shareholder in any shareholder communications including the proxy circular, may be viewed as contrary to the stated purpose of adopting an ANR, which is to provide shareholders with sufficient information about all director nominees.

## Other Provisions

### 12. Why does ISS require a provision which allows the board to waive all sections of an ANR?

In the 2012 case of *Northern Minerals Investment Corp. v Mundoro Capital Inc.*, the Supreme Court of British Columbia ruled that the ANR adopted by Mundoro was legal and enforceable. Section 51 of the court's decision noted that "The Policy in this case leaves with the board the sole discretion to waive any requirement in the policy which discretion can be reviewed by a court", and determined that this factor was "evidence [of] good faith and the reasonableness of the Policy."

In light of this statement, the board's ability to waive all aspects of the ANR, in addition to the company's intention to seek shareholder approval, are key considerations under ISS policy.

### 13. Why does ISS oppose ANRs which require nominees to provide written compliance with the company's policies and guidelines for directors?

Written agreements to comply with all policies and guidelines of the board, in advance of being elected to the board and potentially without knowing what is included in such policies or guidelines could be problematic for nominating shareholders and potential nominees intending to affect change on the board and in the governance of the company itself. There could potentially be situations where a policy or guideline of the board is contrary to the objectives of the nominating shareholder and could prevent or restrict the implementation of such change. These types of provisions go beyond the stated purpose of an ANR and should therefore not be included.

### 14. Why does ISS oppose ANRs which require that any nominating shareholder provide representation that the nominating shareholder be present at the meeting at which his or her nominee is standing for election for the nomination to be accepted, notwithstanding the number of votes obtained by such nominee?

On March 9, 2017, the TSX published [Staff Notice 2017-0001](#), clarifying that a provision contained within an ANR "requiring the nominating security holder to be present at the meeting at which his or her nominee is standing for election for the nomination to be accepted, notwithstanding the number of votes obtained by such nominee" would not be "consistent with the policy objectives of the Director Election Requirement." ISS' policy aligns with TSX guidance and client views that such provision is in contravention of the stated purpose of an ANP, which includes providing an orderly and efficient shareholder meeting process.

### 15. Why is there such a difference between ISS' Canadian and U.S. policy approach on ANRs?

Unlike the U.S., the legal and regulatory structure in Canada affords substantial shareholder rights. Corporate law provides shareholders with the ability to call special meetings to replace or remove directors, and the ability to remove directors by a simple majority vote, in most jurisdictions. Also, TSX and TSX-Venture listed issuers cannot maintain classified board structures or hold slate ballot director elections, and majority voting director resignation policies have become mandatory for non-controlled TSX-listed issuers. Additionally, company by-law and article amendments require shareholder approval in Canada. Given these substantial shareholder rights, a review of all of the provisions of an ANR is required so that shareholders can ensure that their ability to put forward director nominees is not unnecessarily or inappropriately impeded

before approving a requirement that will become part of the company bylaws, or a shareholder approved board policy that may be relied upon later in the case of a legal challenge.

## 16. How will ISS approach new developments in ANRs?

ISS' approach to new ANR developments has been based upon institutional investor feedback and court decisions on these requirements. Originally, ANRs were generally deemed to be a positive development, which provided nominating shareholders with a clear framework for nominating directors to the board within a reasonable timeframe and all shareholders with sufficient disclosure to properly consider any potential nominees standing for election.

In July 2012, the Ontario Superior Court of Justice ruled in the case of *Maudore Minerals Ltd. v The Harbour Foundation* that "there was nothing unfair or inappropriate in introducing the Advance Notice By-Law to ensure that all shareholders would have sufficient notice of a contested election of directors."<sup>1</sup>

In the case of *Northern Minerals Investment Corp. v Mundoro Capital Inc.*, 2012; ANRs, even when adopted as policies, were seen as a protective device for shareholders against stealth proxy contests as stated in this case as follows:

"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."<sup>2</sup>

More recently, however, significant concerns have arisen as to whether these requirements are being used as a defensive or strategic tactic by management with respect to potential director nominees, as a means by which to exclude or inhibit changes to the board and thereby entrench existing board and management.

The 2014 court case involving *Orange Capital, LLC v Partners Real Estate Investment Trust*, provided greater guidance and clarity as to how to interpret ANRs on the basis of the following statement from the decision in this case:

"Advance notice policies are intended to be a shield to protect shareholders or unitholders, as well as management, from ambush; they are not intended to be a sword in the hands of management to exclude nominations given on ample notice or to buy time to develop a strategy for defeating a dissident shareholder group."<sup>3</sup>

This quote exemplifies the spirit of an ANR and will be the general basis for how ISS considers future ANR provisions, with the potential effect on shareholders' rights being of primary importance.

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<sup>1</sup> ONSC 4255

<sup>2</sup> BCSC 1090

<sup>3</sup> ONSC 3793



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