

## Legal update

### ***Canada Business Corporations Act* has been amended**

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**May 2018**

#### **Corporate and commercial Corporate finance and securities**

After a 19-month journey through the House of Commons and Senate, long-awaited amendments to the *Canada Business Corporations Act* (CBCA) were finally passed on April 19, 2018, and received royal assent on May 1, 2018. Although some of the changes came into force on royal assent, most will take effect on a date still to be determined by the federal government, which may not be for some time as amendments to the regulations supporting the CBCA still need to be finalized. In fact, Corporations Canada is advising that it may take another 18 to 24 months before all of the amendments are in force. The key amendments (none of which are in force) will affect the election of directors, communications with shareholders and disclosure of diversity policies and statistics involving directors and executive officers of publicly listed CBCA corporations (the Amendments).

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Although the debate in the House and Senate regarding the Amendments centered on issues of diversity in the boardroom and the C-suite (with over 80% of debate time spent on that issue), the majority of the Amendments have to do with the election of directors and the method that corporations use to send information to their shareholders. The following is a summary of the key Amendments to the CBCA, which will likely not come into force until 2020.

#### **Election of directors**

- **Annual Elections with a Separate Vote for Each Candidate.** Directors of public CBCA corporations will need to be elected on an individual and annual basis. Currently, the CBCA allows directors to be elected as part of a slate and for up to a three-year term. The Toronto Stock Exchange (TSX) already requires annual elections and individual rather than slate voting. The Amendments will result in a change for some TSX Venture Exchange (TSXV)-listed issuers, as the TSXV currently permits staggered elections and slate voting as long as shareholders agree to such provisions.
- **Majority Voting for Directors in Uncontested Elections.** The Amendments introduce mandatory majority voting for the election of directors of public corporations where there is only one candidate nominated for each position available on the corporation's board of directors (the Board). Shareholders will be able to vote "for" or "against" each director nominee (instead of "for" or "withhold" under the current system) and each nominee director must receive a majority of "for" votes to be elected. Further, if a nominee director does not receive a majority of votes, he or she may not be appointed a director by the Board before the next annual meeting of the shareholders (AGM), except if necessary to ensure that the Board would have the requisite number of resident Canadians or independent directors. Under TSX requirements, a director must offer to resign if he or she does not receive a majority of votes, but the Board has the option of not accepting such resignation in "exceptional circumstances." The Amendments remove this discretion. The Amendments will result in changes for many TSXV issuers since they are not currently required to follow a majority voting standard.

- **Grace Period for Directors who are Not Re-elected.** If an incumbent director fails to obtain a majority of votes at the shareholder meeting, that director will still be able to act for the corporation for up to 90 days following the meeting. This grace period was added by the Senate following public criticism and much debate.

## Shareholder communications

- **“Notice-and-Access.”** Notice-and-access allows certain shareholder meeting materials to be made accessible online rather than physically mailed to shareholders. Although securities legislation was amended in 2013 to introduce notice-and-access, the CBCA was not entirely compatible with those amendments. The result was uncertainty as to how to reconcile corporate and securities legislation and the need to seek an exemption from the Director appointed under the CBCA to be able to use the notice-and-access system. The Amendments will allow full use of notice-and-access by federal corporations.
- As described above, Corporations Canada is advising it will take approximately 18 to 24 months before the Amendments are fully in force. CBCA corporations wishing to use notice-and-access in the meantime can apply to the Director appointed under the CBCA for a series of exemptions. Amendments to the CBCA that took effect on May 1, 2018, support a broader range of such exemptions than were previously available. Information about the new exemptions is available [here](#).
- **Delivery of Financial Statements.** Public corporations will be able to meet their requirement to send financial statements to registered shareholders if they use notice-and-access and include a link to the financial statements as part of the notice-and-access package. If a public corporation does not use notice-and-access (or at least not in respect of its financial statements), it will only be required to send financial statements to those registered shareholders who specifically request them. Prior to the Amendments taking effect, public corporations are required to mail annual financial statements to all registered shareholders, except those who specifically state that they do not wish to receive them.
- **Shareholder Proposals.** The Amendments and draft regulations change the time frame for a shareholder to submit proposals to a federal corporation to a range of 90 to 150 days before the anniversary of the last AGM (instead of a deadline of 90 days prior to the anniversary date of the notice of the last AGM). This makes the deadline for shareholders to submit proposals clearer and will allow shareholders to submit proposals closer to the date of the AGM.

## Diversity in the boardroom and in senior management

- **Not Just Women.** To support diversity on Boards and in senior management of federal corporations, the Amendments will require public corporations to annually disclose their diversity policies and targets, if any, as well as statistics regarding representation by “designated groups” on the Board and at the executive officer level. The term “designated groups” takes its meaning from the federal *Employment Equity Act*, and includes not just women but also Aboriginal peoples, persons with disabilities and members of visible minorities. Currently Canadian securities regulations relate solely to gender diversity and are applicable to TSX-listed issuers only. The Amendments expand the requirements to apply to diversity beyond gender lines and will apply to all reporting issuers, including both TSX and TSXV issuers.
- **Comply or Explain.** These Amendments were the source of much debate. As described above, more than 80% of the time that senators and members of Parliament spent discussing and debating these Amendments was on the topic of diversity. Although the issue was hotly contested, in the end the federal government did not impose targets or any specific diversity requirements on federal corporations. Rather, the Amendments introduce a “comply or explain” regime borrowed from Canadian securities regulations. In other words, corporations are under no obligation to increase the diversity of their Board or C-suite, but must disclose the number and proportion of directors and executive officers who are members of designated groups. Likewise, they are under no obligation to adopt any specific policies or targets related to diversity, but they must disclose whether or not they have done so and, if not, why not.

- **Five-Year Review.** The federal government will review the new provisions of the CBCA related to diversity disclosure five years from the time that they take effect. If the Amendments do not result in increased diversity in the boardroom and the C-suite, the government may amend the measures, including by introducing specific targets.

For a copy of these Amendments please click [here](#).

## Next steps

The federal government will publish a final version of the regulations that clarifies how the Amendments will operate and will announce when the Amendments will come into force. Corporations Canada is advising that developing those regulations will take approximately 18 to 24 months. The current version of the proposed amendments to the regulations can be accessed [here](#).

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