

Corporate Securities Law

October 4, 2016

Government of Canada Proposes Amendments to *Canada Business Corporations Act* and Other Key Federal Business Statutes

On September 28, 2016, the Government of Canada announced proposed amendments to the *Canada Business Corporations Act* (CBCA) with the stated objectives of:

- increasing shareholder democracy and participation,
- increasing diversity, in particular representation of women, on corporate boards and in senior management,
- improving corporate transparency, and
- reducing regulatory burden and increasing business certainty.

Certain corresponding amendments will be made to Canada's two other federal business framework statutes, the *Canada Cooperatives Act* and the *Canada Not-for-profit Corporations Act*, as well as certain amendments to the affiliation rules in Canada's *Competition Act* intended to ensure that the legislation appropriately reflects modern practice regarding business organizations.

The Government has published the text of the proposed amendments to the CBCA, but certain important aspects of the amendments will be set forth in regulations which have not yet been published. In particular, the new CBCA regulations are expected to clarify the classes of CBCA corporations to whom, and the circumstances in which, certain of the provisions described below will apply. Most significantly, it remains to be seen whether the regulations will distinguish between CBCA corporations that are listed on the

Toronto Stock Exchange (TSX) (and other foreign senior exchanges) and those listed on the TSX Venture Exchange (and other foreign venture exchanges) or unlisted. The following is a summary of certain key aspects of the proposed amendments to the CBCA based on the materials that have been published by the Government of Canada to date.¹

Election of Directors

Currently, directors of all CBCA corporations can be elected for terms of up to three years, can be nominated (and voted on) as a group or "slate" rather than individually, and are elected through a "plurality" voting system, whereby shareholders can only vote "for" or "withhold" from voting on director nominees. Under this system, the directors who receive the greatest number of votes "for" are elected, regardless of the number of votes withheld. As a result, where the number of directors nominated is the same as the number to be elected (referred to as an "uncontested election"), directors will be elected if they receive even a single vote "for".

Under the proposed amendments, subject to exceptions to be specified in the regulations, certain CBCA corporations would be required to:

- hold annual elections for directors,
- use a "majority voting standard" for uncontested director elections, whereby directors would only be validly elected if a majority of the votes cast are "for" their election; and
- elect directors individually (rather than by slate).

This proposal follows amendments to the TSX Company Manual in 2014 – adopted in response to concerns about the framework for electing directors under Canada's business corporations legislation – requiring all TSX-listed companies to elect directors

¹ Certain information contained in this update is based solely on materials published by the Government of Canada on September 28, 2016, that summarize provisions that will be set forth in the new regulations yet to be published.

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individually and adopt a “majority voting policy” (see our February 14, 2014 update, *Toronto Stock Exchange Announces Amendments to Director Voting Requirements*). Under a majority voting policy, the issuer’s directors must immediately resign if they do not receive a majority of votes for their election. The issuer’s board must then accept or refuse the resignation within 90 days of the relevant shareholder meeting. While the TSX rules provide that a decision to refuse a resignation should only be made on an exceptional basis, the Canadian market’s experience with majority voting policies thus far has demonstrated that boards have often refused to accept director resignations tendered under these policies, for reasons that include board independence and individual directors’ skills and expertise. This trend has led many governance proponents to advocate for a legislative solution to the prevalence of these so-called “zombie” directors.

The proposed amendments to the CBCA would eliminate the discretion currently afforded to an issuer’s board under a majority voting policy by making the legal effectiveness of a director’s election in an uncontested election contingent on receiving a majority of votes “for” their election. The amendments also include provisions to ensure that directors who are not elected under this system are not otherwise appointed to the board in between shareholder meetings (subject to certain exceptions to be set forth in the regulations). In a contested election (i.e., a proxy contest), the current plurality voting system would continue to apply. It is also possible that the CBCA amendments will apply to publicly-traded CBCA corporations that are listed on exchanges other than the TSX (though this will only be known once the new regulations are published).

Notice and Access System for Proxy-Related Materials

The proposed amendments would implement a “notice and access” system to allow CBCA corporations to deliver proxy related materials to shareholders by providing online access to the documents in lieu of mailing physical copies. Since the adoption of notice and access by Canadian securities regulators in 2013, there has been concern about the legal ability of CBCA companies to use the notice and access system given certain provisions of the CBCA that require the express consent of shareholders to electronic delivery of documents and that require brokers and other

intermediaries to “send” proxy materials to beneficial owners in order to vote their shares (see our March 1, 2013 update, *Industry Canada Announces Availability of Exemption for CBCA Issuers Seeking to Adopt New Notice-and-Access System*). While many of the details of the new system are expected to be set forth in the regulations, the amendments are expected to eliminate the existing uncertainty that to date appears to have limited the adoption of notice and access by some of Canada’s largest corporations.

Enhancing Gender Diversity

The proposed amendments seek to improve diversity on public company boards and among senior management, in particular representation of women, by requiring certain CBCA corporations to disclose the gender diversity composition of their board and senior management, as well as their diversity policies or explain why there are none in place. These amendments follow the approach recently taken by certain Canadian securities regulators in 2014 through the adoption of a similar “comply or explain” approach to gender diversity policies (see our October 16, 2014 update, *Canadian Securities Regulators Announce Rules on Gender Diversity*).

Conclusion

In general, we believe that, if adopted, the proposed amendments will help to modernize the CBCA and align it more closely with Canadian securities laws. The proposed adoption of a majority voting standard – which has been advocated by governance proponents for a number of years – has historically and is likely to continue to receive mixed reviews from various market participants. None of Canada’s business corporations statutes currently has a majority voting standard.

Further information regarding the proposed amendments can be found in the following resources on the Government of Canada website:

- News Release: *The Government of Canada introduces a bill to promote corporate transparency and diversity*
- FAQs: *Enhancing Business Frameworks and Promoting Inclusive Economic Growth*

Please contact any member of our Corporate Securities Group to discuss these developments or the implications of the proposed amendments.