

Bill C-86: Maintaining a Register of Individuals with Significant Control

What you need to know
and how to prepare

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Per capita, Canada has one of the largest number of private companies in the world—and for good reason. Our existing laws and tax policies make it easy to create and maintain a private enterprise and carry on virtually any type of business activity.

But while this makes our country an attractive destination for foreign companies looking to open North American subsidiaries—or for US companies looking to earn a slice of the Canadian market—it also potentially opens the door to a high incidence of money laundering, terrorist financing, tax evasion and tax avoidance.

To safeguard the Canadian economy from these risks, while simultaneously continuing to encourage business growth, the federal government recently introduced Bill C-86, the *Budget Implementation Act, 2018*, No. 2 (Bill C-86). The bill, which takes effect June 13, 2019, is designed to build on existing money laundering and anti-terrorist financing laws by requiring all federal corporations governed by the *Canada Business Corporations Act* (CBCA) to maintain a register of individuals considered to have “significant control” of a business—the “Beneficial Ownership Register (BOR).”

Additionally, recent amendments introduced by Bill C-97, which implements the federal government’s budget measures, also clarify that such federal corporations would have to turn over the BOR on request to any police force, the Canada Revenue Agency and equivalent provincial bodies, and any other prescribed body with investigative powers as determined by the federal cabinet. There is no current coming-into-force date for these amendments, but they are also expected in June 2019.

To meet the June deadline and avoid hefty penalties, non-distributing corporations (i.e., corporations not listed on a public stock exchange) must not only familiarize themselves with the new requirements, but swiftly implement the appropriate processes and procedures to meet them.

A more detailed register

While current CBCA regulations require federal corporations to maintain a securities register, right now these registers only have to reflect information about registered shareholders—not beneficial owners or other individuals that could have influence over a business.

The new bill strives to rectify this by requiring corporations to gather information about every individual considered to have significant control. This includes registered shareholders and beneficial owners as well as virtually any individual or partnership that carries 25 percent or more of the voting rights of a corporation’s shares (or all of the corporation’s outstanding shares measured by fair market value). It also includes any individuals/stakeholders that have direct/indirect control or influence over the corporation—whether or not they are a shareholder.

Specifically, the BOR must contain:

- The name, date of birth and latest known address of each individual with significant control;
- The jurisdiction and address that each individual uses for tax purposes;
- The date on which such individual became or ceased to be an individual with significant control; and
- A description of how each individual has “significant control,” including a description of each individual’s interests and rights in respect of shares of the corporation.

Additionally, the register must be reviewed and maintained on an annual basis and corporations must take reasonable steps to update it within 15 days of becoming aware of any significant changes.

Raising the stakes

One of the biggest differences between the BOR imposed by Bill C-86 and the securities register that corporations are currently keeping is that they cannot simply hire a law firm to maintain it. While many corporations rely on law firms to maintain their securities registers, keep track of minute books and even act as the registered address for corporations, this will not be allowed for BOR, according to the Canadian Bar Association.

Instead, corporations will be required to maintain it themselves and have the internal processes in place to ensure they are updated and reviewed properly. If this fails to happen, directors and officers could be held personally liable—facing fines of up to \$200,000 or jail time—and the corporation itself could also be fined up to \$5,000.00.

In addition, it will be an offense for a corporation to contravene or for a director or officer to knowingly authorize, permit or acquiesce in a contravention of the enforcement provisions introduced by Bill C-97. The maximum potential penalty is a fine of \$200,000 or six months' imprisonment or both.

Asking the right questions

To ensure timely compliance, affected organizations must answer the following critical questions well ahead of the June 13th deadline:

Where will our BOR be located?

Given that the BOR may or may not be stored in a lawyer's office, an organization's first order of business should be to find a secure location to house it and the private information that it will contain. Ideally, the directors should designate—preferably by resolution—where and how the information will be stored.

Depending on your province, there may be specific privacy laws in place dictating how this can be done—which means some preliminary research may be required. For instance, if you choose to house it electronically, privacy legislation may require you to ensure the personal information is stored in Canada, even if your company's head office is situated elsewhere.

While Corporations Canada said it would provide more guidance on this topic before enforcement comes into effect, so far little information has been provided—which means companies must rely on existing privacy legislation to guide their efforts.

Which member of the management team will maintain the BOR?

There's no hard-and-fast rule dictating who should maintain the BOR—and who you choose will vary depending on whether you're a large multinational corporation, a small family-based private company, or something in between. That said, the individual should be someone who is already responsible for managing shareholder information and who would be able to swiftly recognize whether any changes were made to the securities register for the company and whether those changes also need to be made to your BOR.

Once directors identify the individual or role best-suited to maintain the BOR, they must add a few extra tasks to their job description—and ensure clear policies are put in place. For instance, the individual looking after it should be required to provide a compliance statement to the board on a regular basis. So, just as the payroll department is required to certify to the board that all remittances have been paid, the individual responsible for the BOR should issue a statement to acknowledge all information in it is up-to-date and free from misleading claims.

How will we ensure the information included in the BOR is true?

Given that directors can be penalized for storing misleading or erroneous information in the BOR, it is critical to ensure management is doing all that it can to verify the data being inputted. This means that, at every step of the collection process, controls must be in place to ensure the information is true—whether it's by looking up the recorded address and confirming it exists, or asking for forms of government identification to prove a person is who they say they are.

There is a chance that individuals may not be forthcoming in providing personal information—and as of right now, regulators have been quite vague as to what a corporation would be required to do in that situation. Until they offer more guidance on the topic, it's important to have well-documented processes in place and enough checks, balances and details to prove your company did its due diligence.

What information must be disclosed in the BOR?

Although the information does not need to be reported to Corporations Canada, the Director appointed under the CBCA may request information about individuals with “significant control.” Additionally, shareholders and creditors (or their representatives) may also request access to, or an extract from, the BOR.

It is important to note that the information in the BOR cannot and should not be used for any other purposes other than:

1. To influence the voting shareholders of the corporation;
2. To acquire securities of the corporation; and
3. In relation to the affairs of the corporation.

It should also be noted that it has not yet been determined whether an auditor can access the BOR in the course of conducting its review of the financial statements of the corporation—as such, you will want to ensure that you are prepared should it be requested.

Support when you need it

While there are still some questions surrounding Bill C-86 and the BOR, the reality is federal corporations do not have the luxury of waiting until all the wrinkles are ironed out. The road to compliance will require a significant amount of effort and it is best to give yourself enough lead time to meet the June 13th deadline.

Fortunately, you don't have to do it alone. Whether or not your law firm is storing or creating the BOR, they can certainly help by providing you with the information that you—and your board—need to be able to create and maintain a register that is aligned with the new regulations.

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