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ARTICLE

Bill C-25 Approaches Royal Assent

Bill C-25, (the "Bill"), which proposes amendments to the*Canada Business Corporations Act*(the "CBCA"), was passed by the House of Commons on June 21, 2017 and is currently in the final stages of the legislative process.1

The Bill and its draft regulations (the "Proposed Regulations") cover four main areas of interest to federally incorporated public companies: the election of directors; diversity disclosure; shareholder communications; and house-keeping amendments.

On March 22, 2018, the Bill passed third reading in the Senate with amendments made to the original version passed by the House of Commons. On April 19, 2018, the House of Commons adopted the Senate amendments ensuring that both houses of Parliament approve of the final version of the Bill. Royal assent of the Bill is the next step. Not all of the provisions of the Bill will be effective upon royal assent because certain amendments, as detailed below, will only come into force upon an order in council.

This overview is based on the Bill and the Proposed Regulations as of April 23, 2018.

1. Director Election Amendments

The Bill is proposing the following new requirements for the election of directors of federally incorporated public companies:

1. Annual Elections of Directors
   The CBCA currently allows directors to be elected for up to a three-year term(*i.e.*a term nolater than the third annual meeting of shareholders following their election). The Bill is proposing that directors be elected for up to a maximum of a one-year term. This change is based on the premise that annual elections of directors better engage shareholders by requiring them to evaluate the performance of directors on a yearly basis. The Bill allows for exceptions to be provided in the Proposed Regulations, but no such exceptions have been provided to date.

2. Individual versus Slate Director Elections
   The CBCA currently allows for directors of federally incorporated public companies to be elected by slate voting (*i.e.*electing directors as a group). The Bill is proposing that director nominees will have to be elected individually, meaning slate voting will no longer be available. Individual voting empowers shareholders to express their disapproval of a particular director by withholding support for that director, whereas a slate voting regime would often shield individual directors from such scrutiny.

3. Majority Voting to Elect Directors
   The CBCA (and applicable Canadian securities laws) currently provides for a plurality voting regime, meaning shareholders can either vote "for" a director nominee or "withhold" support for such nominee. In uncontested elections, a plurality voting regime permits a director to be elected to the board even if he or she attains less than half of the support of shareholders. In other words, under the current framework of the CBCA, a nominee in an uncontested election can serve as a director with a single vote "for" and irrespective of the number of votes "withheld".

   The Bill is proposing a majority voting requirement which would require a nominee, in an uncontested election, to obtain the majority support of the shareholders. Majority voting helps to ensure that shareholders, as a group, have a greater say in board composition and prevents "zombie directors" — directors that fail to achieve the majority support of shareholders yet remain with corporate boards — from being elected. The Bill allows for exceptions to be provided in the Proposed Regulations, but no such exceptions have been proposed to date.

   These corporate governance amendments proposed by the Bill will help to bring the CBCA substantially in line with the Toronto Stock Exchange ("TSX")company rulesand best practices for corporate governance.

   Public issuers listed on the TSX have been required to hold annual elections and conduct individual voting for directors since December 31, 2012. Further, public issuers listed on the TSX (except majority-controlled issuers) have been required to adopt a majority voting regime (or publicly state that they have not adopted

such a policy and explain their reasoning) since June 30, 2014, with one important exception — TSX company rules permit the board to reject the resignation of an incumbent director within 90 days of failing to obtain majority support, if "exceptional circumstances" warrant that person's continuation on the board.

The Bill does not provide a similar exception. Incumbent and prospective directors of federally incorporated public companies will therefore need to attain majority support from shareholders in uncontested elections.However, if an incumbent director is not re-elected due to a failure to obtain majority support, that director may continue in office until a replacement director is appointed or 90 days have expired following the election, whichever is earlier.

4. Appointment by Directors
   The Bill also proposes to broaden the ability for the board of directors to independently appoint additional directors for a one-year term. This practice is currently allowed under the CBCA (for up to one third of the number of directors elected by shareholders) if a corporation's articles specifically provide for it. The Bill makes this right automatic unless the articles provide otherwise. As a result, the directors will be able to appoint directors up to the number of directors fixed for the corporation or the maximum number of directors provided for in the articles (whichever is applicable). However, the number of directors appointed by the directors cannot under any circumstances be greater than one third of the number of directors elected at the previous annual meeting of shareholders.

   One significant restriction on this right is that a nominee who received a majority of "against" votes in the previous election cannot be appointed to the board by the remaining directors, unless the appointment is necessary to satisfy Canadian residency requirements or the requirement that at least two directors not also be officers or employees of the federally incorporated public company. A similar amendment is proposed under the Bill for the*Canada Not-for-profit Corporations Act*to maintain consistency between the two pieces of legislation.

   The Bill provides that these amendments to the election of directors will come into force on a date set by order in council (not on royal assent). The government will likely provide federally incorporated public companies with some lead time to update their election practices following royal assent, prior to issuing the order in council.

2. Diversity Disclosure Amendments

The Bill proposes to amend the CBCA to require federally incorporated public companies to disclose to their shareholders, for every annual meeting, information regarding the diversity of the company's board of directors and senior management. If not disclosed, federally incorporated public companies will be required to explain why no such policies have been implemented.

The proposed amendments related to diversity disclosure will extend the existing reporting requirements underNational Instrument 58-101*Disclosure of Corporate Governance Practices*to members of 'designated groups' as defined by the*Employment Equity Act*. Federally incorporated public companies will be required to disclose on diversity policies for women, Aboriginal peoples, persons with disabilities and members of visible minorities (*i.e.*persons, other than Aboriginal peoples, who are non-Caucasian in race or non-white in colour). Further, the Proposed Regulations provide that the definition of 'designated groups' is not restricted to the standard in the*Employment Equity Act*, and therefore additional groups may be designated by future regulations.

The proposed amendments will require disclosure on target numbers and the current representation of designated groups on the board or in senior management positions. Also, the amendments will require the disclosure of policies related to the identification, nomination and selection of designated groups for director and senior management appointments. If the federally incorporated public company does not adopt such policies, it will be required to disclose its reasons fornot doing so.

No quotas have been imposed by the Proposed Regulations. These diversity disclosure amendments will also come into force on a dateset by order in council (not on royal assent).

3. Shareholder Communications

Other amendments stemming from Bill C-25 and the Proposed Regulations enable federally incorporated public companies to use electronic communication as a primary means of providing proxy materials and financial statements to shareholders in accordance with the "Notice and Access" requirements of National Instrument 54-101*Communications with Beneficial Owners of Securities of a Reporting Issuer* and National Instrument 51-102*Continuous Disclosure Obligations*. However, non-public federal corporations will still be required to circulate financial statements and proxy materials to shareholders unless the shareholders specifically request not to receive them.

This is a welcome change for federally incorporated public companies that will reduce expenses by avoiding the circulation of copious amounts of documentation to shareholders who may have no interest in reviewing them. These notice and access amendments will also come into force on a date set by order in council (not on royal assent).

4. House-Keeping Amendments

The Bill also proposes a number of minor changes throughout the CBCA which are basically house-keeping amendments. These include the following:

- Prohibition of Bearer Shares— the Bill will prohibit the issuance of conversion privileges, options and rights to acquire shares of corporations in bearer form (*i.e.*a certificate without a registered owner's name); and
- Exemptions to be Granted by CBCA Director— the list of potential exemptions which may be granted by the Director of the CBCA has been expanded, but the test for granting exemptions has been restricted, requiring the reasonable belief of the Director that the detriment that may be caused by compliance will outweigh the benefit to the shareholders or, in the case of a federally incorporated public company, the public.

In contrast to the amendments detailed above, these house-keeping amendments will come into force upon royal assent of the Bill.

Conclusion

The Bill is receiving a substantial amount of public attention as it contains the first comprehensive changes to the CBCA since 2001. If you wish to discuss the proposed amendments, please reach out to the authors or your usual BLG lawyer.

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1 Please see our recent bulletin:Parliament looks to enhance shareholder democracy and gender diversity disclosure.

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