

Canada is first jurisdiction worldwide to require diversity disclosure beyond gender; Diversity disclosure rules will apply to federally incorporated public companies effective Jan. 1, 2020

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Authors: [Andrew MacDougall](#), [John M. Valley](#)

Effective January 1, 2020, corporations governed by the *Canada Business Corporations Act* (CBCA) with publicly traded securities will be required to provide shareholders with information on the corporation's policies and practices related to diversity on the board of directors and within senior management, including the number and percentage of members of the board and of senior management who are women, Aboriginal persons, members of visible minorities and persons with disabilities. These requirements go beyond the disclosure required under Canadian securities rules and apply to all "distributing corporations" governed by the CBCA, including venture issuers (which are not subject to the securities law diversity disclosure requirements).

Although there has been an increasing focus on disclosure relating to diversity beyond gender internationally, we believe that Canada is the *first* jurisdiction in the world to mandate diversity disclosure with respect to specific personal characteristics *in addition to* gender.

This Update highlights the key changes, describes key takeaways, contrasts the requirements with initiatives in other jurisdictions and summarizes the new requirements.

Background

On May 1, 2018, *An Act to amend the Canada Business Corporations Act, the Canada Cooperatives Act, the Canada Not-for-profit Corporations Act and the Competition Act* (the CBCA Amendment Act), received royal assent. An order in council fixing January 1, 2020 as the day on which the new diversity disclosure rules contemplated in section 24 of the CBCA Amendment Act comes into force was issued June 22, 2019. Also, on June 22, 2019, regulations setting out further details of the new disclosure requirements were issued (the new regulations, and collectively with the CBCA Amendment Act, the CBCA diversity disclosure requirements).

The stated rationale of the new CBCA diversity disclosure requirements is to "foster a conversation between corporate management and shareholders on this important issue" and "to place responsibility on Canada's corporations to advance this issue by utilizing the "comply or explain" approach with respect to formulating a policy on diversity. By providing shareholders with the facts, corporations may increasingly recognize the benefits of greater board and management diversity."

Highlights

- Applies to all distributing corporations governed by the CBCA, including venture issuers.
- Unlike the existing Canadian securities law diversity disclosure requirements that apply in all jurisdictions of Canada other than British Columbia and Prince Edward Island (the securities law disclosure requirements), no exemptions are available for (i) investment funds or issuers of asset-backed securities, (ii) exchangeable security issuers or credit support issuers or (iii) corporations for which the only publicly traded equity securities are non-convertible and non-participating preferred securities and which are subsidiaries of a corporation which is required to comply with the CBCA diversity disclosure requirements.
- Is modelled on and follows the same “comply or explain” approach to disclosure required of most non-venture issuers under the securities law diversity disclosure requirements.
- Requires the same disclosure regarding the use of term limits and other mechanisms of board renewal required under the securities law diversity disclosure requirements.
- The CBCA diversity disclosure requirements not only require disclosure with respect to the representation of women, but also with respect to the representation of each of Aboriginal persons, persons with disabilities, and members of visible minorities, plus any other group the corporation wishes to include in its designated groups, including identifying the number and percentage of members of each such designated group on the board and in senior management, any target level of representation adopted for that group and, if no target has been adopted for a particular group an explanation of why not.

Key takeaways

- The number of corporations which will be required to provide gender diversity disclosure will increase substantially. For example, there are approximately 250 CBCA companies listed on the TSX venture exchange which will now be subject to the new disclosure obligation, in addition to those listed on other exchanges which qualify them as “venture issuers.”
- The volume of diversity disclosure will increase significantly even for CBCA companies which have been complying with the securities law diversity disclosure requirements since disclosure will be required with respect to Aboriginal persons, persons with disabilities and members of visible minorities on a standalone basis. As a result, we expect CBCA companies may be reluctant, at least initially, to voluntarily add other groups to their designated groups reflecting other diversity characteristics, such as geography, age, sexual preference, or status as a veteran.
- CBCA companies may find it challenging to explain why they have not adopted targets for certain of the designated groups.
- Corporations should ask members of the board and of senior management whether they identify as belonging to one of the designated groups. While the new regulations do not require the corporation to disclose the name of any individuals who are members of any designated group, we recommend surveying such individuals as a matter of due diligence and to avoid any discrepancy between the corporation’s disclosure and how members of

the board and senior management self-identify. This approach is also consistent with recent compliance and disclosure interpretation guidelines published by the United States Securities and Exchange Commission in respect of the disclosure of diversity characteristics under applicable U.S. securities laws.

Diversity disclosure beyond gender

In recent years, there has been an increasing focus on disclosure relating to diversity beyond gender internationally. EU Directive 2014/95 (the Directive), approved by the European Parliament and the Council on October 22, 2014, requires certain large companies to disclose information regarding their administrative, management and supervisory diversity policies with regard to aspects such as age, gender or educational and professional backgrounds. Last year, the Corporate Governance Code (the Code) promulgated by the United Kingdom's Financial Reporting Council was amended to include a general principle that both appointments and succession plans should be based on merit and objective criteria and, within that context, should promote diversity of gender, social and ethnic backgrounds, cognitive and personal strengths. The Code also states that companies should report annually on their diversity and inclusion policy, its objectives, its linkage to company strategy, how it has been implemented and progress on achieving the objectives outlined in the policy. These initiatives do not, however, mandate disclosure with respect to specific personal characteristics beyond gender.

Although Canada appears to be the first jurisdiction to require disclosure with respect to the representation of Aboriginal persons, members of visible minorities and persons with disabilities, others look likely to follow soon. The U.S. State of Illinois is currently considering legislation to require publicly-traded companies headquartered in the state to include detailed demographic diversity information of their board and executives in their annual reports, including whether each member of its board of directors self-identifies as a minority person and, if so, which race or ethnicity to which the member belongs.

The new diversity disclosure requirements

The CBCA diversity disclosure requirements adopt a “comply or explain” approach to disclosure that applies to all distributing corporations including venture issuers. A “distributing corporation” is a corporation that (i) is subject to continuous disclosure requirements under Canadian provincial and territorial securities rules or (ii) has filed a prospectus or registration statement under provincial legislation or under the laws of jurisdiction outside Canada, has securities listed and posted for trading on a stock exchange in or outside Canada, or is involved in, formed for, resulting from or continued after an amalgamation, reorganization, arrangement or statutory procedure with any such corporation.

The CBCA diversity disclosure requirements require that distributing corporations disclose:

- **Term limits and board renewal:** Whether or not the distributing corporation has adopted term limits for the directors on its board or other mechanisms of board renewal and, as the case may be, a description of those term limits or mechanisms or the reasons why it has not adopted them;
- **Board diversity policy:** Whether or not the distributing corporation has adopted a written board policy relating to the identification and nomination of directors who are members of designated groups, including a summary of the policy's objectives and key provisions,

measures taken to implement it and assess its effectiveness and the annual and cumulative progress made in achieving its objectives, whether or not the board of directors or its nominating committee measures the effectiveness of the policy and, if so, a description of how it is measured, or the reasons for not adopting such a policy;

- **Consideration of diversity in nominating directors:** Whether or not the board of directors or its nominating committee considers the level of representation of designated groups on the board in identifying and nominating candidates for election or re-election to the board and, as the case may be, how that level is considered or the reasons why it is not considered;
- **Consideration of diversity in appointing members of senior management:** Whether or not the distributing corporation considers the level of representation of members of designated groups when appointing members of senior management and, as the case may be, how that level is considered or the reasons why it is not considered;
- **Targets for diversity on the board and in senior management:**
 - Whether or not the distributing corporation has, for each group referred to in the definition of designated groups, adopted a “target” number or percentage (or range) for members of the group to hold positions on the board of directors by a specific date and (i) for each group for which a target has been adopted, the target and the annual and cumulative progress for achieving that target and (ii) for each group for which a target has not been adopted, the reasons why the corporation has not adopted that target;
 - Whether or not the distributing corporation has, for each group referred to in the definition of designated groups, adopted a target number or percentage (or range) for members of the group to be members of senior management by a specific date and (i) for each group for which a target has been adopted, the target and the annual and cumulative progress of the corporation in achieving that target, and (ii) for each group for which a target has not been adopted, the reasons why the corporation has not adopted that target;
- **Number and percentage of directors and members of senior management who are designated group members:**
 - For each group referred to in the definition of designated groups, the number and proportion expressed as a percentage of members of each group who hold positions on the board of directors; and
 - For each group referred to in the definition of designated groups, the number and proportion, expressed as a percentage, of members of each group who are members of senior management of the distribution corporation, including all of its major subsidiaries.

For disclosure purposes, “designated groups” is defined to include, but not be limited to, designated groups as defined by the *Employment Equity Act*. The designated groups in the *Employment Equity Act* are:

- women,
- Aboriginal peoples,

- persons with disabilities, and
- members of visible minorities.

For purposes of the CBCA diversity disclosure requirements, “senior management” has the same meaning as “executive officers” as defined under provincial and territorial rules in subsection 1.1(1) National Instrument 51-102 *Continuous Disclosure Obligations*.

With these new requirements scheduled to come into force in less than six months, CBCA corporations subject to the new requirements do not have long left to prepare. It will be interesting to watch further developments in this area in Canada and abroad among both regulators and those institutional investors who have led the charge with respect to gender diversity in recent years.