AMENDING THE *CANADA BUSINESS CORPORATIONS ACT*- BILL C-25 RECEIVES ROYAL ASSENT

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Bill C-25[1], which will make several significant amendments to the *Canada Business Corporations Act* (the "**CBCA**"), received royal assent on May 1, 2018. The most significant amendments of Bill C-25 and its regulations (collectively, the "**Proposed Amendments**") will come into effect at a later date upon issuances of orders in council.

The Proposed Amendments will amend requirements regarding the election of directors, make mandatory certain diversity disclosure and impact shareholder communications for federally-regulated public companies. While the Proposed Amendments are largely consistent with the existing requirements of the Toronto Stock Exchange ("**TSX**") for its listed companies in respect of corporate governance practices, they expand certain of those requirements. Furthermore, publicly listed CBCA companies that are not listed on the TSX will soon be required to comply with TSX-level corporate governance and disclosure measures.

(A) Amendments Regarding Election of Directors

Majority Voting

Currently, the CBCA provides for a "plurality" voting regime, such that shareholders may either cast a vote for or withhold their vote from director nominees. Since a "withheld" vote does not count as a vote against a director, a nominee in an uncontested election is elected upon receiving a single vote "for", regardless of how many "withheld" votes that nominee received.

The Proposed Amendments will impose a majority voting requirement, with elections for directors requiring a vote either "for" or "against" each nominee. TSX-listed companies are currently required (with a few limited exceptions) to have a majority voting policy, pursuant to which a director nominee who is elected in an uncontested election with a greater number of votes "withheld" than votes "for" will be considered not to have received the support of shareholders and must then submit his or her resignation from the board of directors. The board of directors is required to accept the resignation, except where "exceptional circumstances" warrant the director continuing to serve on the board. It should be noted that this majority voting policy does not apply to contested elections in which the number of director nominees for election is greater than the number of

director positions on the board.

Under the Proposed Amendments, a nominee will only be elected as a director if the majority of the votes cast are in favour of the nominee. Accordingly, pursuant to the Proposed Amendments there will no longer be a need for resignations of directors to be tendered following the outcome of a vote and a board of directors will no longer have discretion to accept or reject a resignation.

Annual Director Elections & Prohibition of Slate Elections

Although uncommon in Canada, the CBCA currently permits directors to be elected for a term of up to three years. The Proposed Amendments will require annual elections for federally regulated companies, consistent with the current requirements of the TSX.

In addition, the Proposed Amendments will require that each director be elected on an individual basis and not as part of a slate, which is also consistent with TSX requirements. This avoids the conundrum shareholders face where they do not wish to support one director but are supportive of the other nominees.

Interim Appointments by Directors

Currently, the CBCA provides that boards of directors may appoint additional directors between shareholder meetings without shareholder approval (with a limit up to one third of the number of directors elected by shareholders), but only if permitted by the articles of the corporation.

The Proposed Amendments makes this discretionary ability a right unless the articles of the corporation state otherwise. The number of directors appointed by the board of directors will continue to be limited to a number not greater than one third of the number of directors elected at the previous annual shareholders meeting. However, the Proposed Amendments will impose a further limitation on this right, in that a directorial nominee who receives a majority of "against" votes at the preceding shareholders meeting cannot be appointed by the board, 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 corporation.

(B) Enhanced Requirements for Diversity Disclosure to Shareholders

The Proposed Amendments will adopt a "comply or explain" model with respect to disclosure of diversity policies and practices. As a means to encourage diversity at the executive officer and board of director levels, CBCA companies will be required to disclose at each annual meeting of shareholders their achievement of diversity outcomes and any policies or practices in place in respect of diversity. This model, which has also been adopted by Canadian securities regulators for TSX-listed companies, has been lauded by some, and critiqued as going too far or not far enough by others. Comply or explain has been met with success in the UK and

Australia and is considered less intrusive compared to the implementation of mandatory diversity targets or quotas (which have been instituted in some jurisdictions like Norway). This move towards increased diversity stems in part from the increasing global awareness that, over time, having gender and ethnic diversity in a company's leadership team and board of directors typically translates to higher returns for shareholders.

The Proposed Amendments, while similar to the existing reporting requirements applicable to TSX-listed companies under National Instrument 58-101 - *Disclosure of Corporate Governance Practices,* expand those requirements beyond disclosure of gender diversity. Specifically, requisite disclosure will apply to members of "designated groups", which will include (as per the *Employment Equity Act* [2]) aboriginal peoples, persons with disabilities and members of visible minorities in addition to women. The Proposed Amendments clarify that the definition of "designated groups" includes, but is not limited to, the definition set out in the *Employment Equity Act*, thereby leaving open the possibility for additional groups to be designated by future regulations.

The Proposed Amendments will require a federally regulated public company to disclose the current level of representation of designated groups and whether:

i. it has adopted a target regarding representation of designated groups on its board or in executive positions; and
ii. it has adopted policies related to identifying, nominating and selecting designated groups for director and senior management positions.

If no targets or policies relating to the representation of designated groups have been adopted, the company will have to disclose this fact and explain why it has not done so (hence the title "comply or explain").

The Proposed Amendments relating to diversity disclosure will come into force on a future date to be set by order in council (not on royal assent). The Proposed Amendments also call for a review of these provisions by a governmental committee five years from the date on which they come into force.

(C) Notice and Access

Canadian securities regulators permit public companies to deliver proxy materials and financial statements electronically to shareholders through the use of "notice and access", whereby materials are posted online and notice of the posted materials is provided to shareholders, in accordance with applicable securities laws. However, due to a number of technical issues, including the requirement to obtain the express written consent of shareholders before sending electronic materials, notice and access has generally been unavailable to CBCA companies. The Proposed Amendments will allow public companies to use electronic communication as the primary means of providing proxy materials and financial statements to shareholders. However, CBCA

companies that are not public will continue to be required to send financial statements and proxy materials to shareholders unless shareholders inform the company that they do not wish to receive them.

The Proposed Amendments relating to notice and access will come into force on a future date set by order in counsel (not on royal assent).

If you require assistance with respect to any information above please do not hesitate to reach out to the Capital Markets and M&A Group.

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[1] *An Act to Amend the Canada Business Corporations Act, the Canada Cooperatives Act, the Canada Not-for-profit Corporations Act, and the Competition Act.*
[2] *Employment Equity Act,* S.C. 1995, c. 44.

A Cautionary Note

The foregoing provides only an overview and does not constitute legal advice. Readers are cautioned against making any decisions based on this material alone. Rather, specific legal advice should be obtained.