

Diversity disclosure obligations for Canadian firms to expand in 2020

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- Goal is to initiate dialogue between the company and shareholders
- Data likely to be based on self-identification

The Canadian Business Corporation Act (CBCA) starting 1 January 2020 will expand diversity disclosure obligations for Canadian corporations to include data on Aboriginal people, persons with disabilities and visible minorities, in addition to requiring such disclosures from venture issuers for the first time, lawyers told this news service.

Issuers listed on the Toronto Stock Exchange (TSX) Venture Exchange, a "junior exchange," are small and mostly deal with natural resources. They were dispensed from the gender disclosure that is already in place under securities rules, said Bruno Caron, a securities lawyer at Miller Thomson. Companies on the main TSX, however, have been subject to disclosure on participation of women on boards and as senior management officers since 2015.

As of the new year, companies on both exchanges must annually disclose the participation not only of women, but also Aboriginal people, persons with disabilities and visible minorities, Caron said. He noted that firms incorporated under provincial legislation will not be affected.

The CBCA changes will require companies to set targets for representation of the designated groups and consider representation of the designated groups when recruiting new leaders – or to give reasons why the company does not do so.

This is known as "comply or explain," Caron noted, adding that "it's not compulsory" for boards to increase diversity. The law's goal is to "initiate dialogue between the company and shareholders."

Another term for the system is "name and shame," said Bradley Zander, a securities lawyer at Thompson Dorfman Sweatman. "If you're not where you should be, then the public – customers, clients, whatever – will push for increased diversity because they want to work with and deal with companies that are moving forward."

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Zander added that the "most significant" change is the requirement that "if you don't have policies in place ... or targets, you have to explain why." He considered that to be the element most likely to have an impact.

The requirements will put more pressure on some companies than others, said Andrew Burke, a securities lawyer at Stewart McKelvey. "Larger issuers with larger investor bases are going to be more sensitive to this than shell companies that are trying to get going."

There is likely to be a mixed reaction to the upcoming changes, Burke added. "A lot of issuers might say it's red tape and a lot of people who are interested in this particular issue may say it has not gone far enough."

Caron agreed, calling the changes "commendable" but noting that, for issuers, they will create additional work and costs.

"There's a full spectrum of impacts based on what the issuers decide to do," said Matthew Merkley, a securities lawyer at Blake Cassels and Graydon. There will be a minimal impact in terms of work and costs on companies that do not adopt hiring policies or targets, he said.

The current disclosure requirements for gender "are not particularly onerous," said Zander, and have not "raised a significant pushback." The 1 January changes, however, "will definitely require more work by the companies than the existing policy." Determining how many women are on a board is "easy," he argued, but the new system "will require communicating with existing directors, existing senior management, potential nominees to determine who is and who is not one of the identified groups." The new system also requires that directors and nominees "want to self declare and provide that information."

Burke, Merkley and Zander all noted that, since the 2015 requirement that TSX firms disclose on gender, the number of women on Canadian boards has increased. Merkley and Zander noted that 11% of TSX board members were women in 2015 and that the number now is 17%.

That increase was "definitely" a result of the disclosure requirements, Merkley said.

Zander was less certain as to the causation, wondering if the increase would have happened even without the disclosure obligation. He added, "I don't

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think that anyone would say that having 17% of the boards of public companies made up of women is where we need to be."

The designated groups are defined in Canada's Employment Equity Act, Burke explained.

According to that Act, "Aboriginal peoples" are "persons who are Indians, Inuit or Métis," "visible minorities" are "persons, other than Aboriginal peoples, who are non-Caucasian in race or non-white in colour" and "persons with disabilities" are "persons who have a long-term or recurring physical, mental, sensory, psychiatric or learning impairment and who consider themselves to be disadvantaged in employment by reason of that impairment." There is no definition for "women."

All four lawyers agreed that, in practice, the determination of whether a person belongs to a designated group will be made by that person.

Classifications will be "made by the individuals themselves on the basis of the issuer asking for that information," Merkley said. "There's nothing that compels the individual to provide an answer that meets anyone else's expectations." In regards to disability, in particular, some people "may not want to report that, that's up to them."

An issuer is free to collect and provide disclosure about other groups, "based on sexual orientation for example," Caron said. However, "I think issuers will be very careful and they will limit themselves to the groups" that the CBCA has listed, unless pressured by shareholder activists, Caron said.

All four lawyers noted that the disclosure must be provided annually and will be available to the general public.

by Mark Coakley in Toronto

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