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Bill 50: Diversity Disclosure in Ontario

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Introduction

On November 29, 2022, Stephanie Brown, representing Don Valley West riding, introduced Bill 50, *Building Better Business Outcomes Act, 2023* (“Bill 50”). Bill 50 would amend the *Securities Act* (Ontario), proposing that publicly traded companies adopt and make publicly available a written policy respecting the director nomination process. This policy would require the identification of candidates belonging to diverse groups, including women, persons who are Black, Indigenous, or racialized, persons with disabilities, and persons identifying as LGBTQ+.

Brown noted that the creation of a policy regarding diversity disclosure was one of the outstanding recommendations of the Capital Markets Modernization Taskforce (“Taskforce”).

As of March 1, 2023, on second reading, the bill did not pass a vote in the Legislative Assembly of Ontario.

Background

Since 2014, TSX-listed companies have been required to disclose their approach to gender diversity.¹ As of January 1, 2020, the ‘comply or explain’ approach was replaced with legislative requirements governing corporate disclosure for companies governed under the *Canada Business Corporations Act* (“CBCA”). Under the CBCA, all public companies must report the representation of the aforementioned groups on the board of directors and in senior management to their shareholders and Corporations Canada.

Bill 50 sought to introduce similar requirements at the provincial level, through amendments to the *Securities Act* (Ontario). Although Bill 50 failed in the legislature, leaving the ‘comply or explain’ regime intact, continued efforts and discussion are likely to take place. If future amendments succeed, the CBCA requirements will presumably serve as a template for said implementation.

Disclosure Requirements under the CBCA

Under the CBCA, distributing corporations must report on the representation of four designated groups defined in the *Employment Equity Act*, on their board of directors and senior management teams. The four designated groups are: women, Indigenous peoples (First Nations,

¹ Walied Soliman, Rupert Duchesne, Wes Hall, Melissa Kennedy & Cindy Tripp, “Capital Markets Modernization Taskforce - Final Report” (January 2021). Retrieved from: <https://www.ontario.ca/document/capital-markets-modernization-taskforce-final-report-january-2021>

Inuit, and Métis), persons with disabilities, and members of visible minorities. Under Bill 50, the disclosure would expand to include individuals identifying as LGBTQ+. Although not required, companies are encouraged to disclose information about any other groups they believe contribute to the diversity of their boards and senior management teams.²

Further, under the *CBCA*, companies are required to disclose whether they have adopted a written policy relating to the identification and nomination of directors from the designated groups, and if such policy is adopted, it must disclose the following information:

- A summary of the policy's objectives and key provisions;
- The measures taken to ensure that the policy is effectively implemented;
- A description of progress made toward achieving the objectives of the policy during the year, and since implementation; and,
- Whether the board or its nominating committee measures the effectiveness of the policy and, if so, a description of how it is measured.³

A company that does not adopt a written policy bears the onus of explaining the reasons for their failure to do so.

In addition to the written policy requirement, companies must disclose their targets for representation on the board and amongst senior management, the expected timeframe for achieving their targets, and the progress made towards achieving said targets during the year and since adoption.

By the Numbers

In its first year of implementation, 2020, Innovation, Science and Economic Development Canada (“ISED”) identified 669 distributing corporations and reviewed 469 proxy circulars filed between January 1, 2020, and December 31, 2020. These findings have been published in the Diversity of Boards of Directors and Senior Management of Federal Distributing Corporations - 2020 annual report.⁴ Among the findings, ISED noted that:

- 50% of corporations have at least one woman on the board of directors, 16% have at least one member of a visible minority, 1.7% have at least one Indigenous person, and 1.7% have at least one person with a disability;
- Women hold 17% of board seats, members of visible minorities hold 4%, and persons with disabilities and Indigenous persons hold 0.3% each;

² Government of Canada, “Diversity of boards of directors and senior management” (July 2022). Retrieved from: <https://ised-isde.canada.ca/site/corporations-canada/en/business-corporations/diversity-boards-directors-and-senior-management#s2>

³ *Ibid.*

⁴ Innovation, Science and Economic Development Canada, “Diversity of Boards of Directors and Senior Management of Federal Distributing Corporations - 2020 annual report” (May 2021). Retrieved from: <https://ised-isde.canada.ca/site/corporations-canada/en/data-services/diversity-boards-directors-and-senior-management-federal-distributing-corporations-2020-annual#s1>

- Women hold 25% of all senior management positions, members of visible minorities hold 9%, persons with disabilities hold 0.6%, and Indigenous persons hold 0.2%;
- 14% of distributing corporations have set targets for the representation of women on their boards, and 1% have set targets for at least one of the other designated groups; and
- 32% of distributing corporations have adopted written policies relating to the identification and nomination of women on their boards, and 26% have adopted similar policies relating to Indigenous peoples, members of visible minorities and persons with disabilities.⁵

The 2020 annual report established a baseline to measure future progress. In the 2021 annual report, the findings showed slight improvements to the levels of diversity on the boards and amongst senior management of federal distributing corporations. Additionally, there was a 6% increase in for corporations adopting written policies for identifying and nominating women for directors.⁶

Impact of the *CBCA* On Future Amendments to the *Securities Act*

The impact of the *CBCA*'s requirements regarding disclosure of the diversity of boards and senior management will have considerable influence on any future legislation and regulations relating to diversity disclosures under Ontario law. The recommendations of the Taskforce include diversity targets and maximum tenure limits, with strict timelines following any legislative amendment. While Bill 50 is not progressing at this time, the operation of the *CBCA* model, and the data obtained since its implementation, will provide a blueprint for future adoption of subsequent models in Ontario.

⁵ *Ibid.*

⁶ Innovation, Science and Economic Development Canada, "Diversity of Boards of Directors and Senior Management of Federal Distributing Corporations - 2021 annual report" (April 2022). Retrieved from: <https://ised-isde.canada.ca/site/corporations-canada/en/data-services/diversity-boards-directors-and-senior-management-federal-distributing-corporations-2021-annual>