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April 1, 2019

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CORPORATE

THE BIG REVEAL: CHANGES TO THE CBCA END AN ERA OF ANONYMITY FOR BENEFICIAL OWNERS OF PRIVATE CORPORATIONS

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The federal government's omnibus bill, the *Budget Implementation Act, 2018 No. 2* (Bill C-86) received royal assent on December 13, 2018. Bill C-86, among other things, amended the *Canada Business Corporations Act* ("CBCA") to require non-distributing corporations governed by the CBCA ("private corporations") to maintain records of beneficial owners.

In keeping with the global trend to increase transparency regarding the ownership of corporations and trusts, the amendments to the CBCA conform to the November 2018 report of the Standing Committee on Finance, which urges the creation of a "pan-Canadian beneficial ownership registry."¹ In its endeavor to safeguard against money laundering and non-compliance with Canada's tax laws, the new CBCA directive requires all private corporations to maintain a central securities register that names "individuals with significant control" over the corporation.

Tracking Individuals with "Significant Control"

Currently, private corporations only have to maintain a securities register of the names of its registered security holders (i.e., the individuals named on its share certificates) and the number and particulars relating to the issuance and transfer of each security. Starting in June 2019, the new regime will require private corporations to expand their central securities register to also include information about individuals that hold "significant control" over the corporation.

Subject to the regulations that have not yet been published, an individual has "significant control" over a corporation if such individual (i) is a registered holder or beneficial owner of, or (ii) has a direct or indirect control over, a "significant number" of shares of the corporation. The number of shares held by an individual is "significant" if it:

- carries 25% or more of the voting rights attached to all of the corporation's outstanding shares; or
- is equal to 25% or more of all of the corporation's outstanding shares measured by fair market value.

"Significant control" will also include the interest held by each individual who, jointly with one or more other individuals, holds a significant number of shares.

The New Securities Register

The securities register of private CBCA corporations must include the following information with respect to each individual with "significant control" over the corporation:

1. the name, date of birth and latest known address;
2. the jurisdiction of residence for tax purposes;
3. the date on which the individual became or ceased to be an individual with "significant control";
4. a description of the individual's rights and interests in respect of the shares it holds in the corporation;
5. any other prescribed information; and
6. a description of all of the steps taken by the corporation to both identify such an individual and that the information in the registry is accurate, complete and up-to-date.

In this regard, the securities register will need to be updated (i) at least once every fiscal year, and (ii) within 15 days of the corporation becoming aware of any new information relating to such individuals. It is noteworthy that the new amendments also impose obligations on shareholders to provide to the corporation information "as soon as [is] feasible" and that is, to the best of their knowledge, both accurate and complete.

In accordance with the retention guidelines under the *Personal Information Protection and Electronic Documents Act*, corporations must dispose of this personal information within one year after the sixth anniversary of the day on which an individual ceases to hold "significant control".

Companies Exempt from the Requirements

The requirement to maintain the new securities register does not apply to provincially incorporated companies or federal corporations that are listed on a stock exchange designated under the *Income Tax Act*. Additionally, federal corporations that may fall under a "prescribed class", as determined by the future regulations, will also be exempt. Canadian reporting issuers are also exempt from the requirement to maintain the new securities register since such companies are already required under Canadian securities laws to publicly disclose information about their significant shareholders.

Who Will Have Access to this Information?

The new securities register will not be directly available to the public. The CBCA provides that only directors, shareholders and creditors of the corporation may have access to the securities register. To gain access to the securities register, an applicant must submit an affidavit containing the individual applicant's or corporation's name and address and a statement that the information obtained will be used solely in connection with:

1. an effort to influence the voting of shareholders of the corporation;
2. an offer to acquire securities of the corporation; or
3. any other matter relating to the affairs of the corporation.

Practical Implications

The regulations to the CBCA, when drafted, will set out the particulars relating to the form of the register and may impose additional

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obligations on corporations for the purposes of compliance. In light of these stringent requirements and the associated penalties for non-compliance, private corporations are encouraged to implement enhanced record-keeping protocols prior to the amendments coming into effect this upcoming June. In addition to corporate fines, directors and officers who “knowingly authorize, permit, or acquiesce in the contravention” of the new provisions will be found to have committed an offence and will be subject to a fine not exceeding \$200,000 or imprisonment for a term not exceeding six months.

Given that access will be granted in connection with “any other matter relating to the affairs of the corporation,” it remains to be seen how far these permissions will eventually extend. For example, will auditors have access to information as they conduct a review of the corporation’s financial statements? In the absence of new rules that permit access to the securities register by law enforcement, it is also unclear at this time how the policy objective of bringing about greater transparency to beneficial ownership will be achieved. For now, what is certain is that these amendments represent a notable shift in the Canadian corporate governance landscape in hopes of achieving greater transparency and increasing the ease of doing business in Canada. While this is strictly at the federal level for now, we expect that provincial and territorial finance ministers will soon follow suit and participate in the creation of a “pan-Canadian beneficial ownership registry.”



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¹ Report of the Standing Committee on Finance, “Confronting Money Laundering and Terrorist Financing: Moving Canada Forward”, November 2018, 42nd Parliament, 1st Session, online: <<http://www.ourcommons.ca/Content/Committee/421/FINA/Reports/RP10170742/finarp24/finarp24-e.pdf>>.

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*The authors are grateful for the input and support of Mark S. Redinger and Elliot Y. Rand in the preparation of this Client Alert

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