

Bill C-97: Parliament Seeks to Encourage Long-Term Thinking in Business

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Bill C-97, *An Act to implement certain provisions of the budget tabled in Parliament on March 19, 2019 and other measures* (Bill C-97) received Royal Assent on June 21, 2019.¹ Bill C-97 includes several amendments to the *Canada Business Corporations Act* (CBCA) that were developed in response to concerns about the well-being of employees, retirees, and pensioners, with a focus on the security of workplace pensions and enhancing retirement security.

Say-on-pay, Clawbacks, and Disclosure on Employees', Retirees', and Pensioners' Well-being

While some of the amendments have already been added to the CBCA, most require details to be set out in regulations to complete the provisions of Bill C-97. The amendments that have yet to be put into force include those requiring prescribed corporations to:

- develop a policy regarding executive compensation that is placed before shareholders at each annual meeting for a non-binding vote (often referred to as “say-on-pay” votes);
- disclose whether the corporation has developed a policy for the recovery of executive compensation (known as “clawbacks”); and
- disclose information regarding the well-being of employees, retirees, and pensioners at each annual shareholder meeting.

Say-on-pay Voting

Bill C-97 would require prescribed corporations to develop an approach to the remuneration of directors and members of senior management that is then placed before shareholders at each annual meeting for a non-binding vote, the results of which are subsequently disclosed to shareholders (say-on-pay voting). The stated purpose of mandating say-on-pay voting is better oversight of executive compensation and to raise expectations for corporate behavior, with the goal of “making clear that the best interests of the corporation can include consideration of more than short-term profit and interests.”²

The say-on-pay voting amendment would require prescribed corporations to report results of the vote at the

annual shareholders meeting, post the results on the corporation's website no later than 30 days after the meeting, and set out the results in the next annual shareholder meeting's management proxy circular.

Clawbacks

Bill C-97's proposed amendments to the CBCA would also require prescribed corporations to divulge, in the management proxy circular for each annual meeting of shareholders, whether they have put in place a written policy for taking back undeserved incentive payments to directors and members of senior management (clawbacks). Where a corporation does not have a clawback policy in place, they would be required to include the reasons why such a policy has not been adopted. Where a corporation has adopted a clawback policy, Bill C-97 would require that certain prescribed information about the policy be included in the management proxy circular.

Information Related to the Well-being of Employees, Retirees, and Pensioners

Lastly, Bill C-97's proposed amendments to the CBCA would require that prescribed corporations provide information about the well-being of employees, retirees, and pensioners at each annual meeting, with the aim of motivating boards of directors to consider the interests of these groups in their decision-making, and to annually report on their policies in this regard. The stated goal of these requirements is to promote the interest of prescribed corporations' current and former human resources. If a corporation does not have a policy regarding the well-being of its employees, retirees, and pensioners, this must be disclosed along with reasons as to why it does not.

Determining the Details of the Regulations to Bill C-97

Innovation, Science and Economic Development Canada (ISED) has launched a public consultation regarding the regulations that will accompany the amendments described above.³ Specifically, ISED is seeking feedback and suggestions from stakeholders in relation to the following issues:

- the corporations that are subject to the new obligations;
- the definitions of "members of senior management," "retirees," and "pensioners";
- the time and manner for disclosing the results of the say-on-pay vote;
- the information that needs to be disclosed to shareholders about clawbacks; and
- the information that needs to be disclosed to shareholders about the well-being of employees, retirees, and pensioners.

Prescribing the Corporations that are Subject to the Amendments

ISED states that the new obligations are currently intended to apply to distributing corporations, which is

defined as publicly-traded CBCA corporations. ISED seeks comments on whether distributing corporations should be subject to the new obligations.

Defining “Members of Senior Management,” “Retirees,” and “Pensioners”

The new obligations for prescribed corporations in Bill C-97 include provisions regarding members of senior management, retirees, and pensioners. While the term “members of senior management” is defined under section 172.1(1) in respect of a distributing corporation under the CBCA, “retirees” and “pensioners” are not defined. ISED proposes and seeks comments on the following definitions to be included as part of the regulations to accompany Bill C-97:

- Retiree: a person who has concluded their working or professional career with a corporation, and receives or will receive post-employment benefits other than a pension from that corporation; and
- Pensioner: a person who receives regular payments from a corporation from a fund accumulated during that person's employment with that corporation, or a spouse or dependents of such a person receiving the payments after the person is deceased.

Determining the Time and Manner for Disclosing the Results of Say-on-pay Votes

ISED seeks comments on the proposed time and manner for providing the results of say-on-pay voting, and whether stakeholders have any other suggestions for the time and manner of disclosure of the results of the say-on-pay votes.

Determining what Information Must be Disclosed to Shareholders Regarding the Recovery of Incentives and Other Benefits (Clawbacks)

ISED proposes that the prescribed information required to be disclosed as part of a prescribed corporation's clawback policy should include a summary of the written policy, including the policy's objectives and key provisions (such as which incentives and other benefits are covered in the policy), what factors triggers a recovery and any discretion attached to it, the period that is established to determine whether a recovery is needed, who makes the decision that a recovery is required, and information on the recoveries made, if any, in the previous fiscal year.

ISED seeks comments on whether stakeholders agree with the information that should be disclosed regarding clawbacks, and whether stakeholders have any other suggestions for information that should be included or excluded in the disclosure to shareholders on a prescribed corporation's clawback policy.

Determining the Information that Needs to be Disclosed to Shareholders About the Well-being of Employees, Retirees, and Pensioners

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ISED proposes that the prescribed information required to be disclosed about the well-being of a prescribed corporation's employees, retirees, and pensioners include a summary of the corporation's policy on well-being (with objectives, key provisions, and elements, a summary of activities taken pursuant to the policy), a description of the corporation's progress in achieving the objectives of the policy, and an indication of whether or not the corporation measures the effectiveness of the policy – and if so – a description of how it is measured.

ISED seeks comments from stakeholders as to whether they agree with the prescribed information, and if they have any other suggestions for what should be included or excluded as part of disclosure.

Public Comment

ISED is requesting comments by March 31, 2021. Stakeholders wishing to make comments are asked to send their written submissions to Corporations Canada.

Cassels encourages any party with concerns or thoughts regarding the proposed amendments to contact the authors of this article for any assistance they may need in making their submission.

Additional resources related to securities legislation amendments can be found here.

¹ Bill C-97, *An Act to implement certain provisions of the budget tabled in Parliament on March 19, 2019 and other measures* 1st Sess, 42nd Parl, 2019, (as passed by the House of Commons 6 June 2019).

² Innovation, Science and Economic Development Canada, "Consultation on regulatory proposals," *Government of Canada* (last modified January 29, 2021), online: <<http://www.ic.gc.ca/eic/site/cd-dgc.nsf/eng/cs08918.html>>.

³ Innovation, Science and Economic Development Canada, "Public consultations concerning executive compensation and the well-being of employees, retirees and pensioners," *Government of Canada* (last modified January 29, 2021), online: <<http://www.ic.gc.ca/eic/site/cd-dgc.nsf/eng/cs08920.html>>.