A Director's Guide to
EXECUTIVE COMPENSATION

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Diversity in the C-Suite

The status of women on boards of directors and in senior officer positions continues to garner significant attention, especially in recent months. The Ontario Securities Commission (OSC) embarked on an extensive and informative review of best practices regarding the representation of women in various markets around the world to arrive at its new instrument on corporate governance. Our 2013 newsletter Vol. 8 No. 2 titled "Updates from the Regulators" outlined to OSC's review.

This newsletter outlines the final version of the recent amendments to National Instrument 58-101 *Corporate Governance Disclosure*. The instrument was amended to require public companies to disclose how they are addressing the representation of women on boards of directors and in senior officer positions. This newsletter also outlines the results of recent reviews of how public companies in Canada are meeting their new disclosure obligations.

As well, this newsletter comments on the continuing pay gap between men and women, even in the most senior positions. This issue has exploded in the press in recent weeks, especially with some of Hollywood's leading actors commenting on the issue, such as Jennifer Lawrence and Patricia Arquette. President Barack Obama has also commented on this issue.

Gender Disclosure

Diversity Requirements

Securities regulators in Canada have adopted new disclosure requirements regarding the representation of women on boards of directors and in senior officer positions. The new disclosure requirements were adopted to increase transparency and to provide additional meaningful information investors can consider when making investment and shareholder voting decisions.

On December 31, 2014, amendments to *National Instrument 58-101 Disclosure of Corporate Governance Practices* and *Form 58-101F1 Corporate Governance Disclosure* came into effect.[1] The amendments currently apply to non-venture issuers in Manitoba, New Brunswick, Newfoundland and Labrador, Northwest Territories, Nova Scotia, Nunavut, Ontario, Quebec, Saskatchewan and Yukon.

Consistent with the existing corporate governance disclosure requirements in National Instrument 58-101, issuers are required to comply with the new disclosure requirements or explain why they have not complied with them. The new disclosure requirements include the following:

These quarterly newsletters provide practical advice and current legal comments on executive compensation and compensation governance and disclosure. These newsletters will be of interest to directors, executives, lawyers and human resources professionals.

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From the Editor

This newsletter reviews recent regulatory changes and industry commentaries on the representation of women on boards of directors and in senior officer positions, as well as recent commentary on gender pay disparity. These issues are garnering significant attention in the press and internally within organizations. Organizations that understand these issues can take positive measures to better position and promote themselves as industry leaders, and enhance their employee and executive recruitment and retention, along with their reputation, with the goal of achieving greater success.

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— *Nadine Côté LL.B.*

- Disclose if the issuer has adopted a written policy relating to the identification and nomination of women directors with a description of the policy and, if not, why not.
- Disclose if and how the board or the nominating committee considers the level of representation of women in the director identification and nomination process and, if not, why not.
- Disclose if and how the issuer considers the level of representation of women in executive officer positions when making executive officer appointments and, if not, why not.
- Disclose if the issuer has adopted targets, in the form of a target number, range of numbers or percentage, of the women on its board or in executive officer positions by a specified date and, if not, why not. If it has, disclose the annual and cumulative progress in reaching its target.
- Disclose the number and proportion of women on the board and in executive officer positions.

The amendments also require the annual disclosure of the director term limits and other mechanisms for the renewal of the board and if there are none, then they must explain why.

Diversity Results

The OSC noted in its Corporate Finance Branch 2014-2015 Annual Report that it was conducting a comprehensive issue-oriented review of compliance with the new rule amendments and it would publish the results when they are available.[2] On September 28, 2015, the OSC announced the results of its review.[3] The Staff reviewed the disclosure of over 700 TSX-listed issuers with year-ends between December 31, 2014 and March 31, 2015. The following highlights are noteworthy:

- 49% of issuers have at least one woman on their board
- 60% of issuers have at least one woman in an executive officer position
- 15% of issuers have added one or more women to their boards this year

The most significant indicators of whether issuers adopted initiatives to increase the representation of women on their boards or in executive officer positions were its size and industry.

Issuers with a market capitalization of \$1-2 billion were almost twice as likely as issuers with a market capitalization of less than \$1 billion to adopt a written policy relating the identification and nomination of women directors. Further, issuers with a market capitalization above \$2 billion were more than twice as likely as those with a market capitalization between \$1-2 billion to adopt such a written policy. Almost half of the written and disclosed policies were adopted or amended in the past year.

Issuers in the insurance, utility, communications and entertainment industries had the highest policy adoption rates, at approximately 30%. Issuers in the oil and gas, technology, biotech, hospitality and environment industries had the lowest adoption rates, at less than 10%.

The number of women on boards and in executive officer positions also varied significantly by an issuer's size and industry. Of the issuers with a market capitalization of over \$2 billion, at least 60% had at least two women on their board and 59% had at least two female executive officers. Of the issuers with a market capitalization of less than \$1 billion, 62% had no women on their boards. Of these smaller issuers, 48% also had no women in executive positions, though 21% had two or more women in executive officer positions.

The industries with the most women on their boards were utilities, where 57% had two or more women board directors and only 14% had none, along with retail, where 43% had two or more women on their boards and only 22% had none. The industries with the most issuers having no women on their boards were mining, oil and technology, where at least 60% had no women on their boards. Approximately 50% of the issuers in the biotechnology, mining, oil and gas and technology industries had no female executive officers.

Torys LLP, one of Canada's preeminent law firms, recently reviewed this disclosure in the proxy circulars of Canadian reporting issuers that had been filed by May 10, 2015 in its publication "Women in the C-Suite: Can Securities Law Advance Gender Equality".[4] The review analyzed the proxy circulars of 179 reporting issuers who were bound by the new disclosure rules, along with those of Canada's largest financial institutions who, although they were not yet bound by the new disclosure rules, often lead the way in best practices. The review noted the following:

- 56% of the 179 issuers adopted formal policies on the representation of women on boards, the vast majority of which were adopted between 2014 and 2015; 77% of the financial institutions adopted such policies.
- Women comprised 16.4% of the boards of the 179 issuers, and 34% of the boards of the financial institutions.
- 13% of the 179 issuers adopted objective, measurable targets on the representation of women on boards, most of whom had already met the targets.
- The most common reason given for not adopting a formal policy on women representation on boards, not considering gender in the board nomination process and not adopting targets, was that candidates were selected based on merit.
- 74% clearly disclosed the number of women in executive positions, and among them 24% was the average number of women in such positions, at those issuers and at the financial institutions. The review notes that this disclosure often captured statistics covering more than executive officer positions, perhaps tailoring their disclosure to reflect a more balanced gender group or to show a robust pipeline of women in the management ranks.

Corporate Knights

Corporate Knights, a prominent magazine for clean capitalism, continues to measure the performance of corporate citizens based on the percentage of women on their boards of directors. In Corporate Knights Summer 2015 issue, it noted that diversity in the c-suite had slightly improved among its best 50 corporate citizens in Canada from 2014 to 2015. It noted that the percentage of women on boards of directors increased to 23% from 20% and the percentage of women in senior management increased to 24% from 22%. In 2011, the average number of women on their boards was only 17%. Of the top 50, only two companies continue to have no women on their boards of directors: Pacific Rubiales Energy and Yamana Gold.[5]

Catalyst

Catalyst, a leading research and advisory organization working to advance women in business, released the results of its gender diversity study, sponsored by BMO Financial Group, in January 2014.[6] Catalyst noted that companies with a higher representation of women in senior management positions financially outperform companies with proportionally fewer women at the top. Catalyst examined 353 companies that remained on the F500 list for four out of five years between 1996 and 2000 and found the following:

- Companies with the highest representation of women on their senior management teams had a 35% higher return on equity (ROE) than companies with the lowest women's representation.
- Companies with the highest representation of women on their senior management teams had a 34% higher total shareholder return (TSR) than companies with the lowest women's representation.

Harvard Business Review

In February 2015, the Harvard Business Review released an article by Laura Liswood on women on boards titled, "Women Directors Change How Boards Work".[7] The article notes the United States seems to have hit a 'ceiling' with boards of directors consisting of approximately 16% women.

The article comments on the research of Aaron A. Dhir, an associate professor at York University's Osgoode Hall Law School. Professor Dhir interviewed 23 Norwegian directors, where it is mandatory that women comprise at least 40% of the board. Professor Dhir's observations of diverse boards included the following:

- Enhanced dialogue
- Better decision making
- More effective risk mitigation and crisis management
- Higher quality monitoring of and guidance to management
- Positive changes to boardroom environment and culture

Professor Dhir also noted some of the challenges of diverse boards included more prolonged decision-making, less initial bonding and additional conflicts due to the different perspectives. Thus, the article notes, having more women on boards does change the dynamics of a board and its governance.

Gender Pay Gaps

In recent weeks, the issue of gender pay gaps has garnered significant attention, including comments from Hollywood's leading actors Jennifer Lawrence and Patricia Arquette. In October 2015, The Wall Street Journal noted that men's earnings are growing


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this year at twice the rate of women's.[8] It noted that the median weekly earnings for full-time male workers was $889 in the third quarter, a 2.2% increase from the prior year. However, full-time female workers' earnings were $721, which is only a 0.8% increase from the prior year. Women working full-time earned 81.1 cents for every dollar earned by a man from July through September 2015. The data from the U.S. Labor Department marks the third straight quarter the increase in male earnings was at least double that of female workers.

In fact, even President Obama has commented on this issue. President Obama supports the passage of the Paycheck Fairness Act, a comprehensive and commonsense bill that updates and strengthens the Equal Pay Act of 1963, which made it illegal for employers to pay unequal wages to men and women who perform substantially equal work.[9]

A recent Globe and Mail article by Tavia Grant published on October 9, 2015, commented on how progress has stalled on narrowing the gender pay gap.[10] The article notes that Canadian women earn an average of 73 cents for every dollar men earn, even as educational attainment has surpassed their male counterparts. Canada's gender wage gap is well above the average of the Organization for Economic Co-operation and Development (OECD) and the UN's measure shows Canada slid 11 ranks from 1995 to 2013. Women are lagging both at the bottom and the top of the pay scales.

The article provides insights on international efforts at addressing gender pay gaps. In Australia, recent legislation requires employers with 100 or more employees to report on gender-equality indicators, such as workforce composition and pay gaps. The first results released in November 2014 show a 19.9% gap in base pay and a wider gap of 24.7% in total compensation.

The United Kingdom is also pressing ahead with measures to require large companies to publish the difference in average pay of male and female employees. Some UK organizations are leading the way and disclosing their pay gaps ahead of the implementation of the regulations. For example, PricewaterhouseCoopers LLP UK's division published its gender pay gap at 15.1% when comparing people in the same job grade. Deloitte's UK division disclosed it pays women 17.8% less on average than its male workers.

Northern European countries are noted as the leaders in equality. Iceland tops the World Economic Forum's global gender gap list, followed by Finland, Norway (where everyone's income, tax return, net worth and date of birth is publicly available), Sweden and Denmark.

McKinsey Global Institute released its report in September 2015 titled "How advancing women's equality can add $12 trillion to global growth".[11] The report notes that gender inequality is not only a pressing moral and social issue, but also a critical economic challenge. The report notes there is a strong link between gender equality in society, attitudes and beliefs about the role of women, and gender equality at work; namely, the latter is not achievable without the former two elements.

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Endnotes:

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2 OSC Staff Notice 51-725 *Corporate Finance Branch 2014-2015 Annual Report* (2015 July 14), online: http://web1.osc.gov.on.ca/en/48758.htm.

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4 R. Ramchandani, G. Johnson, M Cousens, "Women in the C-Suite: Can Securities Law Advance Gender Equality?" (16 June 2015) Torys LLP Capital Markets Mid-Year Report 2015, online: http://www.torys.com/insights/publications/2015/06/capital-markets-2015-mid-year-report, page 14.

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