A Director's Guide to
EXECUTIVE COMPENSATION

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Updates from the Regulators

This newsletter describes some of the recent publications from the Ontario Securities Commission (OSC) and the Canadian Securities Administrators (CSA). It includes a review of the reports from the regulators of women on boards, continuous disclosure reviews and their enforcement activities. Understanding how public companies and their directors and officers are regulated and the sanctions they may face can help them to put in place proper protocols and procedures to reduce their potential liability exposure and ensure good corporate governance.

CSA Women on Boards & Director Term Limits

On September 28, 2016, the Canadian Securities Administrators (CSA) released Staff Notice 58-308 *Staff Review of Women on Boards and in Executive Positions — Compliance with National Instrument 58-101 Disclosure of Corporate Governance Practices*.[1] This instrument requires the non-venture issuers in participating jurisdictions to disclose information about the women on their boards and in executive positions. The participating jurisdictions are: Manitoba, New Brunswick, Newfoundland and Labrador, Northwest Territories, Nova Scotia, Nunavut, Ontario, Quebec, Saskatchewan and Yukon. As with most instruments, the participating issuers are required to comply with the instrument or explain why they have not complied with it.

Of the 859 issuers on the TSX subject to this instrument, the Staff Notice summarizes its review of 677 of these, whose year ends fall between December 31, 2015 and March 31, 2016. This period excludes the banks, which are generally early adopters of diversity initiatives. This is the second annual review of compliance with this instrument. The results of the first annual review were outlined in our fall 2015 newsletter, "Diversity in the C-Suite", Volume 10, No. 2.

The findings in the second annual review relating to board composition included:

- The number of women on boards has increased for all issuers, with the large issuers leading the way.
- Overall, 12% of the total board seats were held by women, up from 11% the prior year.
- Of the largest issuers (over $1 billion market capitalization), 18% of board seats were held by women,

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 some of the recent publications released by the CSA and the OSC. It is helpful for public companies in Canada and those contemplating going public, along with their executive officers and legal, human resources and compensation advisors to remain current on the requirements and the enforcement findings of the CSA and the OSC to ensure they are satisfying their legal and fiduciary obligations.

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— *Nadine Côté LL.B.*

up from 16% last year (the six largest banks average female board representation of 35%).

- 55% of issuers have at least one woman on their boards, up from 49% the prior year.
- 66% of issuers disclosed that they consider the representation of women on their boards as part of their director identification and nominating process, up from 60% the prior year. The most common reason given by issuers who did not take women representation into account was that they sought the best candidates, regardless of gender (91%).
- 21% of issuers adopted a policy relating to the identification and nomination of women directors on boards, up from 15% the prior year. Issuers with a policy on the representation of women on boards averaged female representation of 18%, compared to 10% for issuers without a policy.
- Issuers with board targets had a greater number of women on their boards, with an average of 25% of female representation, whereas those without targets had an average of 10% of female representation. Formal targets for the representation of women on boards were set by 61 issuers, or 9%, up from 49 issuers or 7% the prior year. Of the issuers with board targets, 57% had already achieved their target.

The findings relating to board composition by industry included:

- Mining (62%), oil and gas (60%) and the technology (48%) industries continued to have the most issuers with no women on their boards.
- These industries also had the greatest percentage of issuers without any female executive officers.

The findings relating to director term limits included:

- 20% of issuers adopted director term limits, up from 19% last year.
- Of the 132 issuers with director term limits, 48% set age limits, 23% had tenure limits and 29% had both limits.
- The most common reason for not instituting limits was that they reduce continuity or experience on the board.

CSA Continuous Disclosure Review

On July 18, 2016, the CSA released the results of Staff Notice 51-346 *— Continuous Disclosure Review Program Activities* for the fiscal year ended March 31, 2016.[2] The CSA completed 902 full and issue-oriented continuous disclosure reviews, down from 1,058 in fiscal 2015. There were 622 (69%) issue oriented reviews, versus 778 (74%) reviews in fiscal 2015. The results of the reviews were as follows:

- 27% of issuers were not required to make any changes to their continuous disclosure, down from 32% in 2015.

- 31% of issuers were requested to enhance their disclosure in future filings, up from 30% in 2015.
- 23% had to amend or re-file certain continuous disclosure documents, up from 21% in 2015.
- 8% of issuers were cease-traded, placed on a default list or referred to enforcement, the same as in 2015.
- 11% of issuers were alerted to specific areas where disclosure enhancements should be considered as part of the CSA's efforts to educate issuers, up from 9% in 2015.

The issue-oriented reviews were further broken down as follows: 33% Mining Oil & Gas Technical Disclosure, 12% Gender Diversity, 9% MD&A, 8% financial statements, 6% Non-GAAP Financial Measures, 5% Press Release/Material Change Report and 27% Other.

The topics of the fiscal 2016 issue oriented reviews varied from the topics of the fiscal 2015 issue oriented reviews, which were: 7% IFRS, 31% NI 52-109, 8% Medical Marijuana, 28% Mining Technical Oil and Gas Disclosure, 10% Mining Investor Presentations and 16% other.

CSA Enforcement Report

In 2016, the CSA released its *2015 Enforcement Report*.[3] The following highlights are of interest.

Proceedings Commenced

The following charts sets out the number of proceedings commenced in total, along with the total numbers of individual respondents and corporate respondents involved, in the years 2013-2015.

	2013	2014	2015
# Proceedings commenced	112	105	108
Proceedings against # individuals	160	189	165
Proceedings against # companies	110	92	101

Proceedings Commenced by Type of Offence

The following chart sets out the number of types of offences involved in the proceedings commenced in years 2013 to 2015.

Offence	2013	2014	2015
Illegal distributions	144	127	123
Fraud	56	81	64
Misconduct by registrants	19	23	15
Illegal insider trading	13	7	14
Disclosure violations	14	4	5
Market manipulation	6	23	18
Other cases	18	16	27
Total	270	281	266

Proceedings Concluded

There were 145 cases concluded in 2015, involving 233 individuals and 117 companies. The cases concluded in 2015

Ontario Court of Appeal — Osgoode Hall

were concluded as follows: 24% by settlement agreement; 52% by contested hearing before a tribunal and 24% by a court decision under the securities legislation.

The cases concluded in the most recent fiscal year resulted in the following orders and penalties:

- Fines and administrative penalties of about $138 million, up from about $58 million in 2014. Illegal insider trading accounted for $5.2 million and disclosure violations about $30,000.
- Restitution, compensation and disgorgement of over $111 million, which included over $850,000 for illegal insider trading and about $49 million for fraud.
- Courts in Ontario, Alberta, British Columbia and Manitoba also ordered jail terms for 15 individuals in 2015, ranging from 30 days to 2 years, totaling about 10 years of jail time, up from a total of about 7½ years of jail time in 2014.

OSC Enforcement Activity

On March 7, 2016, the OSC announced the results of its enforcement activity for 2015.[4] The following results are noteworthy:

- 31 (22 in 2014) proceedings were commenced by the OSC, which included 18 cases before the OSC Tribunal and 13 (8 in 2014) cases before the courts, 10 of which were commenced under s. 122 of the *Securities Act* (Ontario) and 3 under the *Criminal Code* (Canada).
- The proceedings commenced by the OSC involved 46 individual respondents and 27 company respondents, up from 26 individual and 19 company respondents in 2014.
- Proceedings were concluded against 50 individuals and 34 companies in 2015, versus 48 individuals and 43 companies in 2014. Of these, 75 (87 in 2014) respondents had their proceedings concluded before the tribunal of the OSC, 38 (58 in 2014) by means of a hearing and 37 (29 in 2014) by a settlement agreement. Of the other matters, 7 (2 in 2014) defendants had their cases concluded before the court under the *Securities Act* (Ontario) and 2 (same in 2014) defendants by way of court proceedings under the *Criminal Code* (Canada), which resulted in sentences for eight individuals.
- 59 cease trade orders were issued, down from 67 in 2014 and 159 in 2013.
- 41 director and officer bans were issued, versus 37 in 2014 and 67 in 2013.
- About $67 million was the total for the administrative penalties, settlements, disgorgement orders and costs, versus about $73 million in 2014 and $58 million in 2013. The court fines under the *Securities Act* (Ontario) were about $505,000, up from $5,000 in 2014. The court restitution orders under the *Criminal Code* (Canada) were about $110,000, down from nearly $5 million in 2014.
- The OSC received 58 (79 in 2014) requests for assistance, of which 19 (18 in 2014) were international, 27 (39 in 2014) were from the USA and 12 (22 in 2014) were domestic.
- The OSC made 44 (34 in 2014) requests for assistance, of which 19 (10 in 2014) were international, 15 (17 in 2014) were to the USA and 10 (7 in 2014) were domestic.
- As of December 31, 2015, there were 16 (10 in 2014) cases under the *Securities Act* (Ontario) and 4 (2 in 2014) cases under the *Criminal Code* (Canada) going before the courts.

For the second year, the OSC has made use of its no-contest settlements. In November 2015, the OSC approved a no-contest settlement regarding the excess fees that Quadrus Investment Services Ltd. discovered and self-reported to the OSC. Quadrus agreed to compensate clients about $8 million.

The OSC commented on the new Pilot Mediation Program launched in May 2015. This program provides respondents the opportunity to work with an independent third-party mediator to resolve enforcement matters. To date, two enforcement matters have been resolved through mediation.

The OSC commented on how it has strengthened relationships with provincial and federal law enforcement, the Competition Bureau and the Investment Industry Regulatory Organization of Canada (IIROC) to investigate wrongdoing in securities-related market activity and further its abilities to protect investors.

Endnotes:

1 CSA Staff Notice 58-308 — *Staff Review of Women on Boards and in Executive Positions — Compliance with 58-101 Disclosure of Corporate Governance Practices*, online: http://www.osc.gov.on.ca/documents/en/Securities-Category5/sn_20160928_58-308_staff-review-women-on-boards.pdf.

2 CSA Staff Notice 51-346 — *Continuous Disclosure Review Activities* for the fiscal year ended March 31, 2016; online: http://www.osc.gov.on.ca/documents/en/Securities-Category5/csa_20160718_51-346_continuous-disclosure-review-program-fiscal-year-2016.pdf.

3 CSA — *2015 Enforcement Report*, online: http://www.securities-administrators.ca/uploadedFiles/CSA_ER2015_En.pdf.

4 OSC *2015 Enforcement Activity*, online: http://www.osc.gov.on.ca/documents/en/News/nr_20160307_osc-reports-growth-in-enforcement-activity.pdf.