

PROGRESS ON GENDER DIVERSITY, BUT STILL WORK TO BE DONE: CSA REPORTS ON COMPLIANCE WITH THE NEW GENDER DIVERSITY DISCLOSURE RULES

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Our readers will recall that last October, the Canadian Securities Administrators (CSA) announced the implementation of [new corporate governance disclosure rules](#) (New Rules) aimed at increasing gender diversity on boards and in senior management. Last December, McMillan provided an [in-depth analysis of the New Rules](#) and suggested possible approaches for compliance. On September 28, 2015, the CSA released [CSA Multilateral Staff Notice 58-307 Staff Review of Women on Boards and in Executive Officer Positions – Compliance with NI 58-101 Disclosure of Corporate Governance Practices](#) (the Report), which reports the findings of its review of compliance with the New Rules and provides guidance to assist issuers in areas where the quality of their disclosure needs improvement.

The New Rules came into effect for financial years ending on or after December 31, 2014 and require non-venture issuers – essentially, companies listed on the Toronto Stock Exchange (TSX) – to disclose on an annual basis:

1. the number and percentage of women on the issuer's board of directors and in executive officer positions;
2. targets for women on boards and in executive officer positions;
3. policies relating to the identification and nomination of women directors;
4. consideration of the representation of women in the director identification and nomination process and in executive officer appointments; and
5. director term limits or other mechanisms of board renewal.

While it is still early days for the New Rules, the CSA found that among the issuer sample:

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

- Over 30% of the issuers with a market capitalization above \$2 billion have adopted a written policy for identifying and nominating women directors;
- Of those with written policies, 48% disclosed that they were adopted or updated this year,
- 60% of the issuers with a market capitalization above \$2 billion have two or more female directors; and
- 19% have adopted director term limits, while 56% have adopted other mechanisms of board renewal.

Scope of the Report

Of the 886 reporting issuers listed on the TSX, 722 had a financial year-end between December 31, 2014 and March 31, 2015 and had filed information circulars or annual information forms by July 31, 2015. The Report therefore covered just over 80% of TSX-listed issuers. While the banking industry has been a gender diversity pioneer, only one bank was included in the review due to the timing of financial year-ends in the banking industry.

Findings of Review and Guidance

Number of Women on Boards and in Executive Officer Positions

The New Rules require issuers to disclose the actual number of women on boards and in executive officer positions with the issuer or its major subsidiaries. Compliance with this requirement was fairly high (88% for boards and 85% for executive officers), although it should be said that this is the most straightforward of the requirements. The Report reveals the following:

- 15% of the issuers sampled added one or more women to their board in the past year;
- 60% of issuers with a market capitalization over \$2 billion had at least two women on their board and 59% disclosed having at least two female executive officers. In contrast, 62% of issuers with a market capitalization under \$1 billion had no women on their boards and 45% had no women in executive officer positions; and
- the utilities and retail industries had the most women on boards while more than 60% of issuers in the extractive and technology industries had no women on their boards.

Targets

The New Rules require issuers to disclose whether they have adopted targets for the number of women on boards and in executive officer positions, and if not, to explain why not. The CSA found that only 7% of issuers had set a target for women directors and only 2% had set a target for women in executive officer roles. Of the issuers with board targets, 39% had already achieved their stated target. For issuers who had not set targets, the major reasons given were that issuers consider all candidates based on merit, targets would not be effective or would be arbitrary, and targets would be unduly restrictive or would reduce flexibility.

Adoption of a Written Policy Regarding the Representation of Women

The New Rules require an issuer to disclose whether it has adopted a written policy relating to the identification and nomination of women directors, to provide details in respect of the policy, and to discuss the implementation of and progress in achieving the policy's objectives. As we suggested in our [December 2014 commentary](#), issuers may wish to consider a diversity policy which substantively addresses the aims of the New Rules. Indeed, the CSA cited in the Report an example of perfunctory disclosure of the existence of a general diversity policy as deficient.

14% of issuers clearly disclosed the adoption of a written policy, whereas 65% disclosed that they had decided not to adopt a written policy. The CSA generally found that the larger an issuer is, the more likely it is to have adopted a written policy. Issuers with a market capitalization in excess of \$2 billion were more than twice as likely to adopt a written policy as issuers with a market capitalization of \$1-2 billion, who were in turn almost twice as likely to adopt a written policy as issuers with a market capitalization of under \$1 billion. Moreover, issuers in the insurance, utility, communications and entertainment industries had the highest adoption policy rates, while those in the oil and gas, technology, biotech, hospitality, and environmental industries had the lowest.

Consideration of the Representation of Women

The New Rules require issuers to disclose whether, and if so how, female representation considerations factor into their director and executive officer selection processes. In general, while a majority of issuers disclosed that they consider the representation of women when identifying new candidates for director (60%) and executive officer (53%) positions, the CSA found that only approximately 40% of these issuers explained how they make this consideration. This shows issuers have work to do to properly address the aims of the New Rules.

For those issuers who do not consider the level of representation of women, the top reason cited was that these issuers consider all candidates based on merit, regardless of gender. Most issuers cited more than one reason. Other reasons included that such consideration would not be in the best interests of shareholders and that the issuer wanted to select candidates from the broadest possible talent pool.

Director Term Limits and Other Mechanisms of Board Renewal

Along with increasing gender diversity, the New Rules aim to facilitate board renewal. The CSA's initial proposal for the New Rules emphasized term limits as the principal mechanism of board renewal. However, in response to comments the CSA revised the New Rules to allow issuers to disclose other board renewal mechanisms they employ, recognizing that term limits are not the only way to achieve board renewal. It appears that this was a savvy change, as the compliance review reveals that only 19% of issuers in the sample adopted director term

limits, while 56% preferred other mechanisms of board renewal. The most commonly cited mechanism was some form of annual board assessment. The Report reminds issuers that descriptions of board assessment processes should discuss how the assessment process relates to board renewal.

Conclusions

In our [2014 analysis of the New Rules](#), we observed that while the New Rules aim to provide transparency to investors for whom gender diversity considerations may be important, TSX issuers would have to fashion a response to the New Rules which best suits their size, operations, and objectives. The Report indicates that issuers, particularly smaller ones, have some work to do to engage with the aims of the New Rules; it may also be the case that they simply lack the compliance resources of larger issuers.

Regulators have expressed concern with issuers' lack of engagement with the aims of the New Rules. Speaking at the annual meeting of the Canadian Coalition of Good Governance, the chair of the Ontario Securities Commission said in June that technically compliant disclosure does not reflect the overall objective or desired outcome of increasing the representation of women and indicated that the regulators may be willing to go further if meaningful change is not achieved.^[1]

The Report does offer hopeful signs for gender diversity in corporate Canada, particularly the finding that TSX issuers have added more women to boards in the past year. It is also important to remember that the New Rules have only been in effect for one proxy season. Over the next few years, with continued guidance from the CSA, we should see more robust disclosure and, hopefully, increased representation of women in the boardroom.

by David Andrews

[1] McFarland, Janet. "[OSC rebukes firms for lack of action on gender-diversity rules](#)." The Globe and Mail. June 10, 2015. Accessed October 21, 2015.

A Cautionary Note

The foregoing provides only an overview and does not constitute legal advice. Readers are cautioned against making any decisions based on this material alone. Rather, specific legal advice should be obtained.

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