

CSA PUBLISHES REVIEW OF DISCLOSURE OF WOMEN ON BOARDS AND IN EXECUTIVE OFFICER POSITIONS

Posted on November 7, 2017

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On October 5, 2017, the Canadian Securities Administrators (the “CSA”) published Staff Notice 58-309 – *Staff Review of Women on Boards and in Executive Officer Positions – Compliance with NI 58-101 Disclosure of Corporate Governance Practices* (the “Report”). The Report reviews compliance with public disclosure requirements relating to women in leadership positions. Specifically, *NI 58-101 Disclosure of Corporate Governance Practices* (the “WB/EP Rules”) requires non-venture issuers to disclose certain information pertaining to women on their boards and in executive positions.

The Report draws from a sample of 660 issuers that had year-ends between December 31, 2016 and March 31, 2017 and represents the third review that the CSA has conducted following the implementation of the WB/EP Rules. The Report compares the findings of the current year to the findings published in 2015 and 2016, reviewing the progress that has been made since the enactment of the WB/EP Rules.

It should be noted that there are limitations in the Report’s findings due to its sample size: of the 1,500 issuers that were listed on the Toronto Stock Exchange as of May 31, 2017, only 788 were subject to the WB/EP Rules and 660 had year-ends which fit within the time parameters for data collection for the Report. Notably, the larger Canadian banks were not part of the review, although the Report notes that these institutions are generally proactive in adopting diversity initiatives.

Background: Requirements of the WB/EP Rules

The WB/EP Rules were adopted on December 31, 2014 in Manitoba, New Brunswick, Newfoundland and Labrador, the Northwest Territories, Nova Scotia, Nunavut, Ontario, Quebec, Saskatchewan and Yukon, and in Alberta in 2016. The WB/EP Rules are intended to increase transparency regarding the representation of women on boards and in executive officer positions. Non-venture issuers are required to disclose on an annual basis:

1. the number and percentage of women on its board of directors and in executive officer positions;
2. whether it has a written policy relating to the identification and nomination of women directors;
3. whether it has targets for the amount of women directors and executive officers;

4. whether it considers the representation of women in selecting directors and officers; and
5. whether it has director term limits or other mechanisms of board renewal.

Number of Women on Boards and in Executive Officer Positions

Issuers are required to disclose both the number and percentage of women on their board and in executive officer positions each year. The Report found that 97% of the issuers disclosed the number and percentage of women on their boards, while 94% of issuers made this disclosure for women in executive officer positions. The Report found that 61% of issuers had at least one woman on their board, which represents a 6% increase since 2016 and a 12% increase since 2015. The overall percentage of board seats occupied by women was 14%, compared to 12% in 2016 and 11% in 2015.

The Report noted that the representation of women on boards increased with the size of the issuer and also varied by industry. Specifically, the retail industry had the greatest percentage of issuers with one or more women on their boards (89%), followed by the utilities industry (86%) and the manufacturing industry (84%). Issuers with the lowest percentages of women on their boards were those in the mining, oil and gas, and technology industries, with 54%, 45%, and 52%, respectively, of issuers reporting that they had at least one woman director. These figures are consistent with those reported in 2016.

In terms of executive officer positions, 62% of issuers that disclosed executive officer information had at least one woman in an executive officer position, which is consistent with the figures reported in the past two years. Issuers in the real estate and manufacturing industries had the highest percentage of women in executive officer positions, whereas the mining and oil and gas industries had the lowest.

Policies Regarding the Representation of Women

Of the issuers sampled, 35% disclosed that they had adopted a policy relating to the identification and nomination of female directors, compared to 21% in 2016 and 15% in 2015. Issuers with a market capitalization of greater than \$1 billion were more likely to have adopted such policies than issuers with a market capitalization of less than \$1 billion. It was noted that 53% of issuers disclosed that they did not adopt a policy relating to the identification and nomination of female directors, compared to 59% in 2016 and 65% in 2015. The Report concluded that, regardless of issuer size, issuers that had adopted a policy regarding female directors had a higher percentage of women on their boards compared to issuers without such a policy.

Disclosure of Targets for Female Representation on Boards

If an issuer adopts a target for female representation on its board, it must disclose the annual and cumulative progress it has made in achieving it. The Report found that 11% of issuers set targets for the representation of women on their boards, compared to 9% in 2016 and 7% in 2015. The most common reason cited by issuers that

did not adopt targets was that the selection of candidates for board membership was based on merit. Regardless of issuer size, those issuers that had adopted targets had higher female board representation than issuers that did not set targets. The former group had an average of 26% of female representation on their boards, compared to a 12% average for those issuers that did not set targets.

Consideration of Female Representation in Appointments to Director and Executive Officer Positions

Under the WB/EP Rules, if an issuer considers the representation of women when making decisions regarding director and officer appointments, the issuer must disclose how female representation is considered. With respect to selecting directors, 65% of issuers disclosed that they considered the representation of women on their boards as part of their director nominating process; of these issuers, 37% provided disclosure as to how female representation was considered. For executive officer appointments, 58% of issuers considered the representation of women, with 34% also providing disclosure as to how female representation was considered. The Report does not provide any specifics as to how issuers actually considered the issue of female representation (only that it had been considered). Of those issuers that did not consider the representation of women on their board or in executive officer positions, the most common explanation provided was that their selections were based on merit.

Director Term Limits and Mechanisms for Board Renewal

If an issuer has mechanisms for board renewal, it must describe them. The Report notes that 21% of issuers disclosed that they had adopted director term limits, compared to 20% and 19% in 2016 and 2015, respectively. Director term limits took the form of age limits (adopted by 50% of issuers), tenure limits (adopted by 23% of issuers), and both age and tenure limits (adopted by 27% of issuers). If term limits **were not adopted, the most common reason provided by issuers was that such** limits could negatively impact the continuity and experience on the board.

Conclusion

The CSA's annual reports on compliance with the WB/EP Rules provide useful updates on the progress being made by issuers in terms of the representation of women in executive and director capacities. Generally, the WB/EP Rules are modeled on a "comply or explain" approach, whereby issuers must comply with the disclosure requirements or explain why they have not done so. The ultimate goal of the WB/EP Rules is to increase transparency in terms of how issuers make decisions regarding the representation of women at senior levels. Increased transparency in this domain is important as it provides valuable information for investors. The disclosure mandated by the WB/EP Rules allows investors to compare how different companies consider the representation of women in their organization, which may also be indicative of an issuer's approach to diversity. In addition, the disclosure mandated by the WB/EP Rules imposes a level of accountability on issuers, which

may result in increased representation of women in leadership positions.

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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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