

Governance in 3D – Diversity, disclosure and director elections in 2016

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The corporate governance landscape in Canada continued to evolve rapidly on a number of fronts in 2016. Diversity disclosure practices were under the microscope following the first full year of mandated disclosure under securities laws regarding the representation of women on boards and in executive officer positions. Initiatives in this area were also announced by the Ontario and federal governments. The Ontario Securities Commission (OSC) established a program to provide financial rewards to whistleblowers who disclose potential wrongdoing, while the Toronto Stock Exchange (TSX) proposed corporate governance and security-based compensation website disclosure requirements. Proposals by the federal government to change the rules for director elections are a potential cause for concern. Shareholder engagement was a focus of several important initiatives.

Diversity disclosure

As detailed in our “[2016 Diversity Disclosure Practices](#)” report, little progress has been made year-over-year in improving the level of representation of women on boards and in executive officer positions. For companies overall, there was little or no change in the percentage of women directors (13% in 2016 vs. 12% in 2015) and women executive officers (15% both years) or in the percentage of companies without any women on the board (47% in 2016 vs. 46% in 2015). There was some increase in the percentage of companies adopting board diversity policies (34% in 2016 vs. 30% in 2015) and targets for women directors (10% in 2016 vs. 8% in 2015), with Canada’s larger companies taking the lead. However, a few corporate leaders have 50% or more women directors or 50% or more women executive officers.

Meanwhile, Canadian governments have demonstrated their clear interest in board diversity – the Province of Ontario announced a target that women should make up at least 40% of all provincial board and agency appointments by 2019 and the federal government introduced proposed amendments to the *Canada Business Corporations Act* (CBCA) to require CBCA companies to send annual diversity disclosure to shareholders. Unless a significantly higher percentage of TSX-listed companies take meaningful action in this regard soon, there is a very real likelihood that Canadian companies will be confronted with a legislative response that introduces mandatory targets for board diversity.

TSX website disclosure proposals

The TSX tabled proposals to broaden the scope of company website disclosure requirements. These proposals captured certain corporate governance documents that are not currently required to be disclosed and are not commonly disclosed voluntarily, including board mandates, committee charters and whistleblower policies. The proposals would also have

subjected all security based compensation arrangements, including plans and individual awards not granted pursuant to a plan, to disclosure on the company's website. In addition, the TSX's corresponding proxy circular disclosure requirements would have been simplified. However, in light of concerns expressed by stakeholders regarding these proposals, the TSX is expected to introduce revised website disclosure rules in 2017.

For more information, please refer to our Osler Update entitled "[TSX's proposed website disclosure rules will expand corporate governance and security based compensation disclosure](#)".

OSC whistleblower incentives program

The OSC's new Office of the Whistleblower went live in July 2016, offering financial incentives to those reporting potential violations of Ontario securities law to regulators, whether or not such individuals first report their concerns to the company. At the same time, the *Securities Act* (Ontario) was amended to prohibit reprisals against whistleblowers and invalidate contractual restrictions against making whistleblower reports to regulators. Companies should be looking to reinvigorate their whistleblower policies and practices to more effectively encourage internal reporting and facilitate resolution of potential concerns in response to these developments to avoid being taken surprise by a regulatory investigation.

For more information, please refer to our Osler Update entitled "[A review of new whistleblower protections under Ontario's Securities Act](#)".

Director elections

Proposed amendments to the CBCA were tabled in Parliament in September 2016. These would not only eliminate staggered board elections and slate voting (by requiring all directors to be elected annually and each director to be elected separately), but would also introduce a problematic new majority voting standard for director elections in uncontested meetings. Under the new standard, in an uncontested meeting to elect directors, shareholders would be able to vote "against" director nominees and each candidate would be elected only if the number of votes cast "for" the candidate exceeds the number of votes cast "against" the candidate.

Unlike majority voting practices for director elections required under TSX listing rules and voluntarily adopted by other companies, there would be no opportunity for the board to make a determination about whether or not to accept the resignation of a director who failed to receive majority support on election. As a result, the proposed amendments create a risk that those directors who are elected by the requisite majority might not be able to meet quorum requirements, or might fail to comply either with residency requirements under corporate law or independence requirements under securities laws or stock exchange rules and, therefore, be unable to act. Companies who share these concerns should make their views known as soon as possible.

For more information, please refer to our Osler Update entitled "[Significant corporate governance changes in proposed amendments to the Canada Business Corporations Act](#)".

Shareholder engagement

Several initiatives were launched in 2016 with a view to enhancing communications between companies and their shareholders. The Canadian Securities Administrators sought

comments on proposed protocols to improve reconciliation of proxy votes from beneficial owners of shares. The Institute of Corporate Directors declared that boards of directors of Canada's listed companies should directly engage with their significant investors on matters of corporate and board governance and issued guidance on director and shareholder engagement. Among the proposed CBCA amendments were changes to enable CBCA companies to take full advantage of securities law rules which permit delivery of proxy materials to shareholders electronically via notice-and-access. Finally, the report of the Business Law Advisory Council to the Ontario Ministry of Government and Consumer Services recommended amendments to the OBCA that would permit shareholders to resubmit proposals to a corporation if the initial proposal received a prescribed (and minimal) level of support at the previous shareholders' meeting (in lieu of the current two-year wait period for resubmission of proposals). If implemented, this change would align the OBCA and CBCA in this regard.

The past year has been a busy one for corporate governance in Canada and the stage has been set for a number of the issues that emerged this year to come to a head in 2017. This suggests that further important developments are on the horizon and that companies will need to continue to actively monitor the fast-evolving Canadian corporate governance landscape.