GOVERNANCE

Corporate governance: Evolution of existing trends in 2019

Canadian corporate governance developments in 2019 reflected the evolution of a number of existing trends. These include an ongoing focus on environmental, social and governance (ESG) matters, including diversity and climate change, together with the delivery of the Ontario Securities Commission's (OSC) long-anticipated report on regulatory burden reduction. Developments in the U.S. regarding the regulation of proxy advisory firms may also lead to further consideration of that issue in Canada.

Diversity

As reflected in our fifth annual comprehensive report on diversity disclosure practices by TSX-listed companies, Canadian companies this year achieved some key diversity benchmarks. Women accounted for over one-third of the total of newly created or vacated board seats. A majority of all companies disclosing whether or not they have adopted a written diversity policy now state that their policy specifically targets the identification and nomination of women directors.

Over three-quarters of all companies have at least one female director and over one-third have two or more. As a result, women now hold 18.2% of all board seats, and hold over 30% of the available board seats among the S&P/TSX 60 companies – aligning with the goal of the 30% Club.

However, the rate at which women are being added to boards is declining year over year and there is little change in the representation of women at the executive officer level.

Investors continue to be interested in diversity and are reflecting their interest by voting against or withholding from voting for directors on boards that have not taken steps to increase the proportion of women serving on the board.

Legislative initiatives related to diversity picked up pace this year. In 2019, Canada became the first jurisdiction in the world to require diversity disclosure beyond gender. Effective January 1, 2020, publicly traded corporations governed by the *Canada Business Corporations Act*, including venture issuers, are now required to provide shareholders with information on the corporation's policies and practices related to diversity on the board of directors and within senior management. Such information includes the number and percentage of members of the board and of senior management who are women, Aboriginal persons, members of visible minorities and persons with disabilities. In addition, the State of California passed legislation to mandate quotas and the State of Illinois now requires diversity disclosure, in each case by corporations organized under or operating in the state.

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Climate change

On August 1, 2019, the Canadian Securities Administrators concluded its two-and-a-half-year review of climate change disclosure by issuing CSA Staff Notice 51-358 on Reporting of climate change-related risks. The CSA opted to provide guidance rather than changing existing disclosure requirements. The Staff Notice not only confirms that the test for determining whether climate change disclosure is material is the same as for other disclosure items (i.e., likely to influence or change a reasonable investor's decision whether to buy, sell or hold the issuer's securities), but also provides guidance on how to assess materiality for long-term risks like climate change that are difficult to quantify. The Staff Notice also reiterates that voluntary disclosure should be subject to the same rigour as mandated disclosure.

Regulation of proxy advisory firms

In August, the U.S. Securities and Exchange Commission (SEC) issued guidance – as described in our Osler Update entitled "SEC issues guidance regarding activities of proxy advisory firms" on osler.com – in which it expressed the view that voting advice communications from proxy advisory firms is a "solicitation" that is subject to SEC rules prohibiting the making of materially false or misleading statements. The SEC also provided guidance on the responsibilities of investment advisers which use the services of proxy advisory firms to provide research or voting recommendations, including their responsibility to assess the capacity, competency and methodology of the proxy advisors they use, and the proxy advisory firm's policies and procedures respecting conflicts of interest.

In October, Institutional Shareholder Services (ISS) commenced an action in the District Court for the District of Columbia challenging the SEC's authority, arguing that its activities are not solicitations and that the SEC guidance was a substantive change that should have been subject to notice-and-comment review.

On November 5, 2019, the SEC issued proposed amendments to its proxy rules to regulate certain of the activities of such firms which are summarized in our Osler Update entitled "SEC proposes amendments to proxy rules applying to proxy advisory firms" on osler.com. The proposed amendments would change the definition of "solicitation" to expressly include the activities of proxy advisory firms and require such firms to

- disclose conflicts of interest in each of their reports
- provide issuers and certain proxy soliciting persons with an advance draft of their proposed advice and an opportunity to review and comment on it before it is finalized (a review period of five business days if the circular was filed at least 45 days prior to the meeting date, three business days if filed at least 25 days prior to the meeting date and no review period if filed less than 25 days prior to the meeting date)
- provide issuers and certain proxy soliciting persons with a copy of the final advice at least two days prior to issuance and, if requested by the issuer or proxy soliciting person, to include in the proxy advisor's report a hyperlink or equivalent to a written statement by the issuer or proxy soliciting person setting out its views on the advice by the proxy advisory firm

The SEC's guidance and regulatory approach to proxy advisory firms are likely to influence practices by proxy advisory firms and their investment adviser clients in Canada as well as the United States. If the SEC's proposed amendments are adopted, the CSA may choose to revisit the guidance it provided in National Policy 25-201 – *Guidance for proxy advisory firms* and/or adopt measures to regulate the activities of proxy advisory firms which align with any final rules adopted by the SEC.

OSC burden reduction initiative

In November 2019, the OSC published a report summarizing over 100 specific actions it has or will be undertaking to reduce the regulatory burden of Ontario issuers. This report stemmed from a previous OSC Staff Notice published in January 2019 and follows a consultation of market participants by the OSC's Burden Reduction Task Force established in November 2018. The consultations focused on registration, compliance, investment funds, trading, marketplaces, issuer requirements and derivatives rules.

As we have noted in our Osler Update entitled "OSC issues anticipated Report on the Burden Reduction Task Force" on osler.com, the OSC indicated that the report's recommendations were guided by the principle of "proportionate regulation," which it defines as regulation where the costs imposed on stakeholders are commensurate with the benefits. "Proportionate regulation" avoids a "one-size fits all" approach (taking into account how regulations affect entities of different sizes), recognizes there are multiple ways to achieve objectives, includes

stakeholder input and is frequently updated to support innovation. The OSC also confirmed that its ideal regulatory approach involves "combining and balancing principles-based rules, prescriptive rules and guidance."

The report summarizes a variety of initiatives that have been completed, that have been published for comment, that are under consideration or that the OSC has committed to studying in the future. Highlights include

- the establishment of a clearer set of service standards for compliance reviews
- a study of the harmonization of requirements relating to the financial statements that must be included in a long-form prospectus relating to an issuer's "primary business"
- the OSC's request for the ability to issue "blanket orders" (i.e., broad exemptive relief orders applicable to all industry participants, rather than only issuing orders personal to individual issuers)
- the option for registered firms to hire a Chief Compliance Officer from another registered, external and unaffiliated firm
- the introduction of streamlined nationwide crowdfunding rules for emerging companies
- the provision of confidential prospectus review services prior to a company announcing an IPO
- the elimination of redundant filing requirements for investment funds

Whistleblower awards

In February 2019, the OSC announced that it had paid out the first-ever whistleblower awards by any Canadian securities regulator under its Whistleblower Program. The OSC disclosed that in three separate matters, three whistleblowers received a combined total of $7.5 million for providing the OSC with "high quality, timely, specific and credible information, which helped advance enforcement actions resulting in monetary payments to the OSC." Ontario is the only Canadian jurisdiction that offers an economic incentive to individuals to come forward with information on securities-related misconduct, subject to certain limitations. Now that the OSC has a track record of having made payments under its program, other whistleblowers may be encouraged to come forward and report concerns directly to the regulator.

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CBCA amendments

In addition to the CBCA amendments relating to diversity, additional amendments to the CBCA were approved this year. One such amendment requires private companies governed by the CBCA to establish and maintain a register of individuals with significant control. It was effective June 13, 2019. This register must be made available to the police, Canadian taxing authorities and prescribed investigatory bodies if relevant to an investigation. The provinces of British Columbia and Manitoba adopted similar requirements to maintain such a register.

Certain additional amendments passed this year are not yet in force, but could have a potentially significant impact in the future, including

- disclosure respecting the well-being of employees, retirees and pensioners
- disclosure respecting compensation clawback arrangements
- mandatory say-on-pay advisory vote requirements
- amended director fiduciary duty provision that will expressly permit directors to consider specified interests, including the interests of shareholders, employees, retirees and pensioners, creditors, consumers and governments, and the environment and the long-term interests of the corporation. It remains to be seen whether this change will increase the likelihood of a court concluding that any such stakeholders are claimants entitled to the benefit of oppression and derivative action remedies

In Canada, changes in 2019 reflect a grab bag of issues predominantly favouring shareholders and other stakeholders. Changes and proposed changes for CBCA companies and proxy advisory firms, in particular, lay the groundwork for what should prove to be an interesting year ahead.

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