DAVIES INSIGHTS

2015

GOVERNANCE

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Davies Governance Insights

2015

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Table of Contents

1 Executive Summary

3 Database and Methodology

6 CHAPTER 1
Board Composition and Compensation
8 Director Profile
8 Board Size
9 Board Tenure and Refreshment
16 How Directors Are Compensated
20 CEO Compensation Trends
27 Say on Pay

35 CHAPTER 2
Gender Diversity Initiatives and Trends
37 Canadian Regulators' New "Comply or Explain" Regime
38 Women in the Corporate Boardroom
40 Progress of Women in Board Leadership Positions
41 Recent Developments in Leadership Diversity
43 Trends in Diversity Policies, Targets and Disclosure Practices
46 Diversity Disclosures in 2015
52 Corporate Law Changes to Advance Diversity
52 Next Steps and Considerations for Canadian Boards

55 CHAPTER 3
Shareholder Issues
57 Shareholder Engagement
60 Majority Voting in Canada
65 Shareholder Proposals on the Rise
68 Advance Notice Requirements Face Increased Scrutiny
73 Forum Selection

75 Proxy Access

77 Universal Proxies

79 CSA Adopts Guidance for Proxy Advisory Firms in Canada

81 Proxy Voting Reform Initiative and Developments

82 Trends in 2015 Proxy Contests

85 **CHAPTER 4**

Selected Issues in Board Risk Management

87 Risk Management

93 Leading-Edge Practices in Governing Subsidiaries

97 Bridging the Cyber Confidence Gap

104 New Developments in Anti-Corruption Investigations

109 **CHAPTER 5**

Changes to Rights Plans, Takeover Bid Amendments and Corporate Law Reform

111 Update on Rights Plans and Takeover Bid Amendments

114 Proposed Amendments to the *Canada Business Corporations Act*

115 Ontario Business Law Reform

117 **Appendix**

139 **Key Contacts**

Executive Summary

This fifth annual edition of ***Davies Governance Insights*** presents our analysis of the important trends and developments in corporate governance for Canadian public companies during 2015. In addition to providing guidance to boards and senior management of public companies and their investors on emerging or recurring governance themes, the report contains our independently gathered empirical data and analysis on the prevalence of various governance practices among Canadian issuers on the Composite and SmallCap indices of the Toronto Stock Exchange.

In Chapter 1, we focus on issues regarding Board Composition and Compensation of Canadian public companies. Following brief discussions of the profile of directors and the size of boards, we explore board tenure and turnover. This year, more issuers disclosed having retirement policies and/or term limits. The apparent increase in the adoption of fixed limits on directors' board tenure may largely be the product of the new Canadian Securities Administrators (CSA) disclosure requirements, although robust assessment processes remain the most popular cited means for fostering board renewal. We also review the empirical data regarding director and CEO compensation. We observe the trend in "say on pay" advisory votes in Canada, for which there is continued momentum as a result of the adoption of this practice by a growing number of small and mid-cap issuers.

In Chapter 2, we examine Gender Diversity Initiatives and Trends. We summarize Canadian securities regulators' "comply or explain" disclosure regime relating to the representation of women on boards and in executive officer positions. We also investigate the modest progress of women in being elected to boards of directors and appointed to senior management positions of Canadian public companies. Across all indices examined, the percentage of board seats held by women has increased, with the TSX 60 leading the way. However, the percentage of women holding board leadership positions remains relatively low. We examine Canadian issuers' different diversity practices and disclosure approaches, concluding with a discussion of further expected developments in this area. We anticipate more prescriptive disclosure requirements and regulatory guidance, as well as increased investor pressure to take meaningful steps to foster diversity, particularly with respect to the adoption of written gender-diversity policies and aspirational targets.

In Chapter 3, we turn to a discussion of new developments and trends affecting Shareholder Issues under Canadian law and practice. Shareholder engagement continues to increase, with a small but growing number of issuers adopting formal engagement policies. We review majority voting policies, now a TSX requirement, and consider two controversial related topics: the carve-out for "exceptional circumstances" and adoption of enhanced quorum requirements in such policies. Shareholder proposals were also on the rise in 2015, along with shareholder support for these proposals. Another development we observe is the increased scrutiny from proxy advisory firms over advance notice requirements (ANPs), with new guidelines from Institutional Shareholders Inc. and Glass Lewis & Co., rendering many issuers' existing ANPs problematic. We also discuss two emerging issues in Canada: forum selection by-laws and proxy access. Next is a review of the Canadian Coalition for Good Governance's recommendation that universal proxies be mandated. We consider the CSA's guidelines for proxy advisory firms and its report on the needed improvements to the proxy voting infrastructure. Chapter 3 ends with our examination of proxy contests in Canada in the last 12 months, which shows that they have been most common in the mining and energy sectors, and most frequently involving smaller cap issuers.

Oversight of risk management is an increasingly important responsibility for boards. In Chapter 4, we highlight **Selected Issues in Board Risk Management**. We review the rise of securities class actions and look at some recommended disclosure practices, the consistent application of which may enhance a company's credibility with investors and analysts; this approach may also minimize the risk of non-compliance with securities laws. We also explore recent cases of Canadian courts being asked to hold parent companies liable for the actions of their subsidiaries, and we discuss key governance issues relevant to the parent-subsidiary relationship and potential parent company liability. Cybersecurity breaches are another risk that will only grow as companies become increasingly dependent on technology. We offer some practical steps that boards should consider in this area to help bridge the so-called cybersecurity gap. We conclude the chapter by detailing some high-profile anti-corruption investigations launched or continuing under the *Corruption of Foreign Public Officials Act*, and offer some advice for boards.

Finally, in Chapter 5, we provide updates on **Changes to Rights Plans, Takeover Bid Amendments and Corporate Law Reform**. Canadian securities regulators have proposed significant changes to the way in which unsolicited bids are carried out. These proposed amendments will extend the bid period, providing target boards with considerably more time to respond to a hostile bid and making the process more costly and difficult for potential acquirers. The amendments will also limit the practical use of rights plans, although they will continue to be relevant for some purposes, such as regulating shareholders' accumulation of large positions in a company through transactions that are exempt from the takeover bid rules. We review proposed amendments aimed at modernizing the *Canada Business Corporation Act* and recommendations for updating the *Business Corporations Act* (Ontario) to reflect technological advancements and legislative and case law developments.

If you would like to discuss any of the issues raised in *Davies Governance Insights 2015* or our previous annual governance reports, please contact any of the Davies partners listed on the Key Contacts page at the end of the report.

Database and Methodology

Unless otherwise noted, the quantitative analysis in this report for the 2015 proxy season is based on data provided by ISS Corporate Solutions, Inc. and drawn from the 2015 management information circulars of 404 issuers on the Toronto Stock Exchange (TSX), which are included in one (or both) of the Composite Index and the SmallCap Index as at May 31, 2015. Data for previous years are based on Davies' review of the relevant information circulars of the issuers listed on those indices as at May 31 of the respective year.

The 404 Composite Index and SmallCap Index issuers included in our study represent 17% of the 2,319 TSX-listed issuers, but 85% of the total market cap on the TSX.[1]

Descriptions of the relevant indices as at May 31, 2015, are set out below.

Composite Index: The S&P/TSX Composite Index (referred to as the Composite Index) comprises 247 issuers. It is the "headline index" and the principal broad market measure for the Canadian equity markets. It includes common stock and income trust units. Three of the 247 Composite Index issuers did not issue proxy circulars for the relevant time period discussed; accordingly, our analysis is based on 244 Composite Index companies.

Two components of the Composite Index are referred to in this report:

- **TSX 60:** The S&P/TSX 60 Index (referred to as the TSX 60) is a subset of the Composite Index and represents Canada's 60 largest issuers by market capitalization.
- **Completion Index:** The S&P/TSX Completion Index (referred to as the Completion Index) is the Composite Index excluding the TSX 60 issuers. It comprises 187 issuers. (Our analysis includes only 184 of the issuers on the Completion Index because, as noted above, three issuers did not issue proxy circulars.)

SmallCap Index: The S&P/TSX SmallCap Index (referred to as the SmallCap Index) comprises 221 issuers, 60 of which also meet the market capitalization eligibility criteria and are part of the Composite Index.[2] (Our analysis includes only 219 of the issuers on the SmallCap Index because two issuers did not issue proxy circulars.)

1 As at May 31, 2015.

2 To qualify for the Composite Index, an issuer must, at the time of determining eligibility, (a) represent a minimum weight of 0.05% of the index and (b) have a minimum volume-weighted average share price of at least $1.00. To qualify for the SmallCap Index, an issuer must have a market capitalization that is at least $100 million, but not more than $1.5 billion.

The number of issuers and specific constituents of the two indices covered in our study sample change periodically. This is a factor that may in some cases affect comparisons of data points year over year.

Where we reference a corporate statute in this report, we are referring to the *Canada Business Corporations Act*, unless otherwise stated.

01 Board Composition and Compensation

01 Board Composition and Compensation

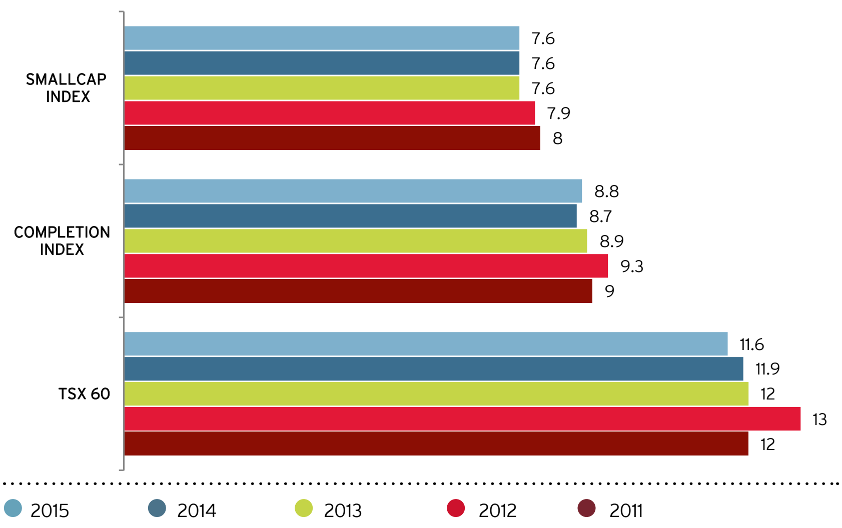
1. Director Profile

Davies Governance Insights 2014[3] provided a detailed examination of certain aspects of the profile of the typical director of a TSX company, such as age, gender, residency, service on other boards and independence. With the exception of gender, which is addressed in detail in Chapter 2 of this report, the attributes of the typical director have remained relatively constant this proxy season. The most common profile of a director of an issuer from our study sample remains a male in his early 60s; however, the number of female directors is on the rise. The median and average age of male directors is 61, whereas the typical age for a female director is 58.

2. Board Size

The appropriate size for a board is a question of balance and depends on a number of factors, including market cap, the complexity of the issuer's business, representation by significant or controlling shareholders and the need to populate board committees. Larger issuers typically have larger boards and all but five TSX 60 issuers have nine or more directors. Issuers on the Completion Index and SmallCap Index tend to be smaller, with boards having on average between seven and nine directors (see Figure 1-1).

FIGURE 1-1: AVERAGE SIZE OF BOARDS (NUMBER OF DIRECTORS)



3 http://www.dwpv.com/en/Resources/Publications/2014/Davies-Governance-Insights-2014.

The industries with boards that have an average of 12 members or more are banking, insurance and telecommunications. At the other end of the spectrum, where boards have an average of eight directors or fewer, are the technology hardware & equipment, energy, pharmaceuticals, biotechnology & life sciences and real estate industries.

None of the issuers in our 2015 study had boards exceeding 20 directors (the two largest boards consist of 18 and 20 directors, and both are boards of issuers on the Composite Index). Only one company has a three-member board (part of the SmallCap Index), compared with two in 2014; five issuers have four-member boards (four on the SmallCap Index and one on the Composite Index).

3. Board Tenure and Refreshment

Over the past few years, there has been continued focus from market participants on the measures adopted by issuers in Canada and abroad to maximize the effectiveness of their boards. To date, most market participants, corporate governance activists and proxy advisory firms in Canada have favoured the use of robust assessment processes over mandatory term limits or retirement policies as the preferred means for fostering high-performing boards. Other than now requiring annual disclosure of term limits or other mechanisms of board renewal under the recently amended "comply or explain" regime of NI 58-101 (discussed further in Chapter 2), Canadian corporate and securities regulators do not require issuers to have term limits or retirement policies.

Tenure is increasingly being used as a gauge of a director's independence, suggesting that long-serving board members may be perceived as non-independent.

However, debate continues in this area, and some institutional shareholders, particularly south of the border and in other foreign jurisdictions, are increasingly pressing issuers to implement term limits and/or retirement policies. The results of a recent CSA (Canadian Securities Administrators) review of issuers' governance disclosure practices in this area and the commentary provided at a related Ontario Securities Commission (OSC) roundtable suggest that issuers may start to experience more pressure from regulators and the investor community to implement formal renewal mechanisms beyond assessment processes. Moreover, tenure is increasingly being used as a gauge of a director's independence, suggesting a growing likelihood that long-serving board members may be perceived as non-independent and, therefore, not qualified to serve on audit and compensation committees. In light of these trends, Canadian boards should evaluate their policies and practices for fostering board renewal and effective decision-making to assess whether changes are appropriate.

BOARD ASSESSMENT V. TENURE RESTRICTIONS

As discussed in *Davies Governance Insights 2014*,[4] the debate over whether there should be fixed limits on the number of years an individual serves on a public company board splits into two camps. On the one side, organizations such as the Canadian Coalition for Good Governance (CCGG), as well as proxy advisory firms Institutional Shareholder Services Inc. (ISS) and Glass Lewis & Co. (Glass Lewis), prefer robust assessment processes over term limits or retirement policies as a means of maximizing board effectiveness. Advocates of this line of thinking argue that although boards benefit from the fresh and diverse perspectives that result from board turnover, they also need directors who have served for long periods of time and are familiar with a business. The loss of a seasoned and knowledgeable director at a critical juncture in an issuer's business could have negative results. Some also argue that long-serving directors may be more independent because in many cases they served on the board prior to the current CEO's appointment. Rather than imposing one-size-fits-all rules such as term limits or retirement policies, which are viewed as blunt instruments that arguably serve as a crutch to avoid tough decisions about removing ineffective directors, these firms recommend routine director evaluation by the board and/or its nominating and governance committee, based on defined skills matrices, as the best means for assessing the effectiveness of a board and its members.

On the other side are those, still a minority, who advocate for fixed term or age limits. In this camp, proponents argue that board chairs and/or nominating committees can lack the grit or means necessary to take steps to remove underperforming members. Additionally, some governance activists argue that, in the absence of tenure requirements, fostering an appropriate level of refreshment on the board can be challenging, given the clubby nature of many boardrooms. On this basis, fixed limits can contribute to improved effectiveness and accountability, reduce the "board capture" by management that is associated with long-serving directors and foster independent decision-making by boards. Proponents of term limits and similar policies also promote them as an effective means of fostering diversity on the board. And because greater diversity improves board effectiveness and company performance, having mechanisms in place to force renewal can be beneficial, if not crucial.

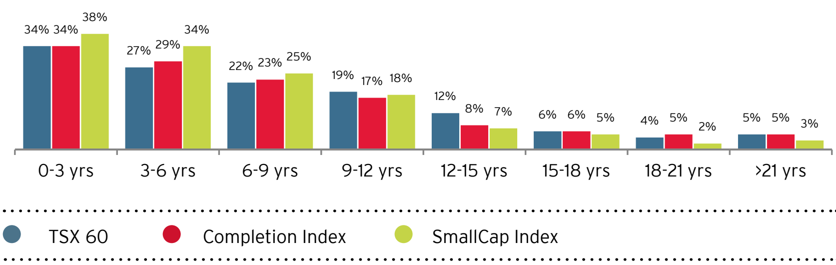
Some institutional shareholders are increasingly pressing issuers to implement term limits and/or retirement policies.

Evidence suggests that the majority of Canadian issuers' boards comprise directors who have less than nine years of service. One might therefore argue that there does not appear to be a factual basis for advocating mandatory tenure limits. However, as Figure 1-2 depicts, a number of issuers have directors who have served for much longer tenures, which may provide some evidence that, at least for some issuers, refreshment and renewal do not come naturally

4 http://www.dwpv.com/en/Resources/Publications/2014/Davies-Governance-Insights-2014.

even if robust assessment processes are in place. For example, in 2015, there are 42 Canadian directors on the Composite Index and SmallCap Index who each have more than 30 years of service on an issuer's board.

FIGURE 1-2: PERCENTAGE OF NON-EXECUTIVE DIRECTORS BY TENURE (2015)



DISCLOSED RETIREMENT POLICIES AND TERM LIMITS ON THE RISE

Retirement policies and term limits are the two principal means of forcing board renewal. Retirement policies fix upper age limits on directors, and term limits impose a maximum time a director is eligible to serve on a board. Typically those policies require the subject director to resign on reaching the upper threshold of either limit, although we note that such policies commonly provide exceptions, preserving board flexibility to waive the applicable requirement.

In 2015, the number of Canadian issuers that disclosed having retirement policies or term limits for directors has risen. We also observe an increase in the number of Canadian issuers that disclose having both tenure requirements in place. However, we cannot assume that this means that the number of issuers with such policies has actually risen. As we discuss in Chapter 2, comply-or-explain disclosure requirements were amended for the 2015 proxy season in Canada. Under these amended rules (set out in NI 58-101), 2015 is the first year that Canadian issuers must disclose whether they have term limits or other mechanisms of board renewal. It is probable that the 2015 increase in the disclosure of board renewal policies is largely a result of these disclosure requirements.

We have summarized below the results of our review of the issuers we sampled on the TSX 60, Composite and SmallCap indices as they relate to retirement policies and term limits. Since that review, and as we discuss in Chapter 2, the

CSA released a report[5] summarizing the results of its review of 722 TSX-listed issuers. In addition to reviewing other areas, the CSA Report summarized the practices of the sampled issuers as they relate to the requirement under NI 58-101 to disclose whether the issuer has adopted director term limits or other mechanisms for board renewal or, if not, disclose why those mechanisms have not been adopted. Consistent with the results of our study discussed below, the CSA Report confirms that term limits and retirement policies are not commonplace, but does suggest they are on the rise. For example, of the issuers sampled, the CSA Report indicates that only 19% of issuers adopted director term limits, and 56% indicated that they had adopted some other mechanism of board renewal, most commonly an annual board assessment process. The CSA Report also reveals that larger cap issuers (over $2 billion) are more likely to adopt term limits. Among issuers with market capitalizations below $1 billion, the incidence of board term limits is less prevalent, with assessment processes as the sole means for fostering renewal being more prevalent. Of the issuers sampled by the CSA that reported having tenure limits, these were more commonly in the form of age limits (53%), less so in the form of term limits (24%), with even fewer having both term and age limits (23%).

What does this all mean? The CSA Report, as well as our data outlined below, appears to indicate that most issuers still favour robust assessment processes over fixed limits; however, the incidence of fixed tenure limits is rising. There may be growing support for term and age limits, according to commentary made by OSC representatives and other panelists at the September 2015 OSC roundtable that was held to discuss the CSA Report and issuers' practices regarding diversity-related initiatives.

19%

ISSUERS THAT HAVE ADOPTED TERM LIMITS

56%

ISSUERS WITH ANOTHER MECHANISM FOR BOARD RENEWAL

Retirement Policy Trends

According to our quantitative data analysis, the percentage of issuers on the Composite Index and the SmallCap Index that disclosed having retirement policies for directors has increased to about 26.0% (up from 24.2% in 2014 and 23.1% in 2013). Consistent with prior years' trends, the incidence of retirement policies is highest among the largest cap issuers on the TSX 60, although the overall percentage on that index remains flat compared with 2014 (about 53.3%). Similarly, the number of SmallCap issuers that have disclosed having retirement policies also remains flat compared with 2014, at approximately 13.7%.

However, we see an increase on the Completion Index: in 2015, the number of issuers on that index that disclosed having retirement policies increased to

5 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* [CSA Report].

about 31.0%, compared with 26.1% in 2014 and 23.1% in 2013. Again, however, this increase may at least partially be attributable to the new requirement to disclose such policies, not necessarily to an increase in the number of issuers with such policies.

Table 1-1 illustrates the percentage of issuers on the various indices that disclosed having retirement policies in the 2015 proxy season compared with 2014.

TABLE 1-1: CANADIAN ISSUERS WITH RETIREMENT POLICIES (2015 V. 2014)

Index	% of Issuers with Policies in 2014	% of Issuers with Policies in 2015
Composite and SmallCap Combined	24.2%	26.0%
TSX 60	53.3%	53.3%
Completion	26.1%	31.0%
SmallCap	13.7%	13.7%

70+

AVERAGE RETIREMENT AGE UNDER ISSUERS' RETIREMENT POLICIES

Consistent with prior years, the average retirement age under issuers' retirement policies continues to be 70 years or older. For all Canadian issuers canvassed that disclosed having retirement policies in 2015, *all* had mandatory retirement for directors at age 70 or higher. Among Composite Index and SmallCap Index issuers combined, the average mandatory retirement age was about 72.8 years, consistent with 2014.

As previously mentioned, for issuers that have a retirement policy, it is common for the board or a committee to have the discretion to permit the director to remain on the board for a period of time after reaching the upper age limit. These exceptions or waivers are typically applied when the retirement of the director in question would impair the board's ability to act or would result in the loss of a needed independent director. Important to note, however, for issuers that have retirement policies or term limits, is that although the practice may be to preserve some flexibility to waive the requirement, proxy advisory firms such as ISS and Glass Lewis generally take the view that if such requirements are in place, they should not be waived, except in special circumstances.

Term Limit Trends

Consistent with prior years and with the results of the CSA Report, our study sample shows that term limits for directors continue to be less common than retirement policies among Canadian public companies. However, the number of issuers that have disclosed term limits has risen since 2014. In 2015, about 13.6% of issuers on the Composite Index and SmallCap Index disclosed having term limits. This is up from 8.3% in 2014. Term limits are most prevalent among the largest cap issuers. Among TSX 60 issuers, 28.3% disclosed having term limits, compared with 26.7% in 2014. Among these issuers, term limits (as well as retirement policies) have been adopted by Canadian Schedule I banks, including BMO, Bank of Nova Scotia, CIBC, Royal Bank of Canada and TD Bank. However, issuers in other industries, including energy, materials and utilities, have also adopted such requirements – for example, Cameco Corporation, Enbridge Inc., Fortis Inc., Kinross Gold Corporation and SNC-Lavalin Group Inc.

13.6%

ISSUERS ON THE COMPOSITE INDEX AND SMALLCAP INDEX THAT DISCLOSED TERM LIMITS

As illustrated in Table 1-2, the proportion of issuers with term limits on the Completion and SmallCap indices is considerably lower than the proportion of issuers on the TSX 60. However, we do see an increase in the number of those issuers that disclose having term limits in 2015 compared with 2014. In addition, we see variation in sizes (by market cap) and industries among issuers that use term limits. Issuers on the Completion and SmallCap indices within the energy, materials, capital goods, real estate, telecommunications and other industries have disclosed having term limits.

TABLE 1-2: CANADIAN ISSUERS WITH TERM LIMITS (2015 V. 2014)

Index	% of Issuers with Term Limits in 2014	% of Issuers with Term Limits in 2015
Composite and SmallCap Combined	8.3%	13.6%
TSX 60	26.7%	28.3%
Completion	7.2%	13.6%
SmallCap	2.9%	8.7%

The average tenure limit for issuers that have disclosed term limits in 2015 is fairly consistent with the limits in 2014 – about 14 years. A significant portion of those are fixed at 12 or 15 years.

Lastly, although the number of Canadian issuers with both retirement policies and term limits still remains quite low, in 2015 we saw a rise in the number that disclosed having both (7.7% of all issuers on the Composite and SmallCap indices, compared with just 4.8% in 2014). These issuers include the Canadian Schedule I banks, as well as AECON Group Inc., Cameco Corporation, Enerflex Ltd., Maple Leaf Foods Inc., RioCan Real Estate Investment Trust, Thompson Creek Metals Company Inc., TransAlta Corporation, Trican Well Service Ltd. and Genworth MI Canada Inc.

WHERE IS BOARD TENURE GOING IN THE FUTURE?

Given the trends in other countries such as France, where tenure is increasingly viewed as relevant to determining a director's independence, we expect discussion will continue about the relative utility of board tenure requirements, in terms of both maximizing board effectiveness and assessing director independence.

At the September OSC roundtable on board diversity and related issues, some commentators suggested that efforts to promote diversity should not stop at diversity policies and targets and that tenure limits are an essential aspect of achieving gender parity in senior corporate roles. They stated that without term limits in place, boards will become stagnant and efforts to increase leadership diversity will prove less effective. Other commentators recognized that achieving the right balance between board continuity and renewal is unique to each board, although the absence of formal renewal mechanisms may undermine efforts to have boards comprise the best mix of skills to tackle the rapidly evolving micro and macro environments in which issuers operate.

> Boards should consider developing and implementing skills matrices to assist with identifying and evaluating the competencies most needed to maximize the effectiveness of board decision-making.

Canadian issuers that have not yet implemented a robust assessment process for evaluating the effectiveness of their boards, committees and individual directors will increasingly find themselves falling short in corporate governance best practices and trends. As part of those processes, boards should consider developing and implementing skills matrices to assist with identifying and evaluating the competencies most needed to maximize the effectiveness of board decision-making. Those skills should include some consideration of different elements of diversity, including gender and age. Boards should also at least consider whether term and age limits may be appropriate. In the absence of formal tenure policies, boards that find themselves unable to maximize refreshment or remove underperforming directors in the usual course might also consider the use of external consultants or "board doctors", as well as engagement with shareholders, as tools to better understand the relative strengths and weaknesses in their boardrooms.

4. How Directors Are Compensated

Under Canadian corporate law, directors have the authority to determine their own compensation, absolved from conflict of interest rules that would otherwise apply to matters in which they have a personal interest. In most cases, a director receives an annual retainer, plus a fee for each meeting attended (referred to as a *per diem*, which is a meeting fee or attendance fee). It is also common for directors to receive some form of share-based compensation. In some cases, directors may choose to have some or all of their cash compensation paid out in shares (or, as discussed below, some type of phantom stock unit). In other cases, the share-based compensation is in addition to their retainers and *per diems*. Directors who are also officers or employees of the issuer (such as the CEO) typically do not receive board compensation in addition to their executive compensation.

DIRECTOR RETAINERS

The annual retainer is generally intended to compensate directors for committing themselves to service on the board and for much of the board-related activity that occurs outside meetings (and is therefore not covered by the *per diem*). Directors may also receive an additional retainer for committee membership.

The amount of the annual retainer paid to TSX 60 directors remains relatively constant year over year, with 92% of TSX 60 directors receiving at least $50,000 per year and approximately 60% receiving over $100,000 per year (see Figure 1-3). An upward trend is observed among the rest of the Composite Index issuers: in 2011 over 75% of directors on the Completion Index received annual retainers of $50,000 or less, but that percentage decreased to 57% in 2013, 48.9% in 2014 and 42.4% in 2015. As a result, more than two-thirds of issuers on that index now pay retainers of more than $50,000. On the SmallCap Index, the proportion of directors who receive annual retainers of $50,000 or less also decreased — from 78% in 2013 to 67% in each of 2015 and 2014.

FIGURE 1-3: PERCENTAGE OF TSX 60 DIRECTORS RECEIVING RETAINERS OF AT LEAST $50,000 PER YEAR

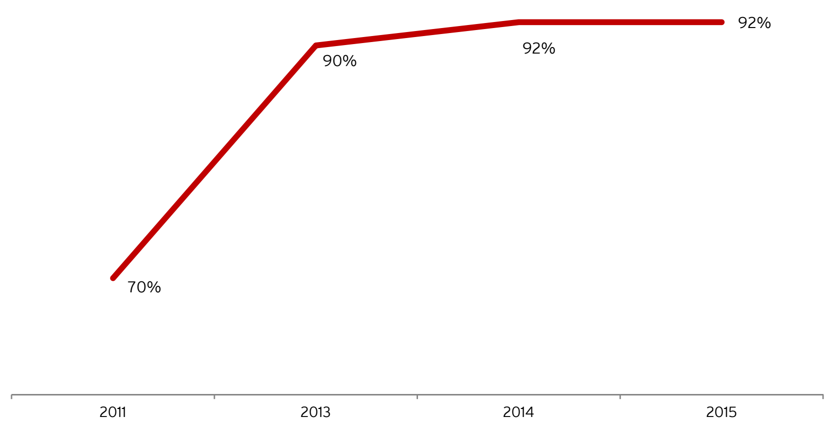
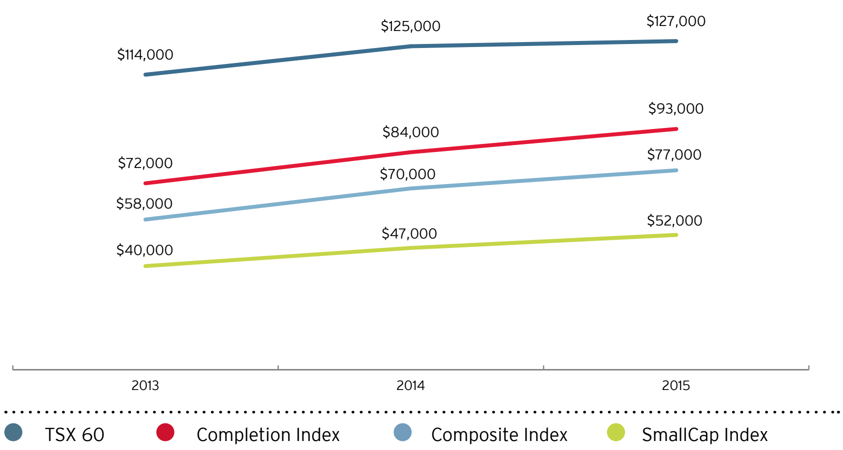


Figure 1-4 demonstrates the upward trend in the average amount of retainers for each of the TSX 60, Composite, Completion and SmallCap indices from 2013 to 2015. As the data show, the rate of increase is higher among issuers on the Completion and SmallCap indices (12.5%), than among issuers on the TSX 60 (1.6%), indicating that smaller issuers are catching up to their larger counterparts – a trend we expect to continue in 2016.

FIGURE 1-4: AVERAGE RETAINER AMOUNTS



BOARD CHAIR RETAINERS

A board chair typically receives a larger annual retainer than other directors, reflecting the additional time the chair is expected to invest in planning and chairing meetings and coordinating with management on behalf of the board.

Chairs of TSX 60 Issuers:

- The percentage of chairs who are paid annual retainers of more than $550,000 has been steadily increasing over the last three years (from 5% in 2013 to 6.7% in 2014 and 11.7% in 2015).
- The proportion of chairs who are paid annual retainers of more than $350,000 has similarly increased (from 23% in 2013 to 30% in 2014 and 38% in 2015.
- In 2015, one-half of chairs are paid annual retainers of at least $250,000 (58% in 2013 and 61.7% in 2014).

11.7%

TSX 60

CHAIRS PAID MORE THAN $550,000

Chairs of Completion Index Issuers:

- Five chairs received an annual retainer of more than $350,000 in 2015 (six in 2013 and 2014).
- The percentage of chairs who received annual retainers of less than $100,000 has decreased (from 56% in 2013 to 52% in 2014 and 48% in 2015).

FIVE

COMPLETION INDEX

CHAIRS RECEIVED AN ANNUAL RETAINER GREATER THAN $350,000

Chairs of SmallCap Index Issuers:

- The percentage of chairs receiving over $50,000 increased in 2015 (to 55%, compared with 46% in 2013 and 45% in 2014).
- The percentage of chairs receiving no additional compensation has decreased (from 35% in 2013 to 28% in 2014 and 26% in 2015).

ATTENDANCE FEES

An attendance fee (or meeting fee or *per diem*) is an amount paid to a director for each meeting attended. Some issuers pay committee chairs an additional *per diem* if they are engaged in committee work between meetings; or issuers may pay a director a *per diem* if he or she takes on a special assignment. Some issuers also pay a travel fee to compensate directors for their time if they travel a significant distance to attend meetings of the board or committees.

The average amount paid by the 250 Composite Index and SmallCap Index issuers that disclosed they paid their directors *per diems* is about $1,500. The lower percentage of issuers disclosing attendance fees this year (62% compared with 69% in 2014) suggests a trend away from meeting fees to all-inclusive retainers.

SHARE-BASED COMPENSATION

Directors may receive some type of share-based compensation either in lieu of cash (if they so choose) or in addition to cash payments. In line with the investor community's view that options do not align the interests of directors with the interests of shareholders, granting options to directors remains unusual among large Canadian issuers, with only two TSX 60 issuers disclosing this practice (compared with three issuers in 2011, two issuers in 2013 and one issuer in 2014). Although options continue to be used by smaller issuers that may not have the resources to pay directors entirely (or at all) in cash, we are seeing a continued decline in this practice: the percentage of Completion Index companies issuing stock options to directors decreased from 34% in 2013 to 21% in 2014 and 20% in 2015; on the SmallCap Index, the decrease was from over 50% in 2011 to 46% in 2013, 31% in 2014 and 32% in 2015.

DSUs continue to be the most common form of share-based compensation for TSX 60 issuers, and their use is rising among smaller issuers.

Deferred Share Units (DSUs) continue to be the most common form of share-based compensation for directors of TSX 60 issuers (a constant rate of adoption of 87% in 2015 and 2014). The use of DSUs among the smaller issuers is less prevalent but has steadily increased over time (for Completion Index issuers, 50% in 2011, 58% in 2013, 59% in 2014 and 63% in 2015; and for SmallCap Index issuers, 26% in 2011, 36% in 2013, 41% in 2014 and 48% in 2015).

DIRECTOR SHARE-OWNERSHIP REQUIREMENT

Issuers now typically adopt share-ownership guidelines that require directors to own shares or receive share-based compensation, such as DSUs, with a value equal to a multiple of their annual retainers. This practice has been adopted by all TSX 60 issuers for three consecutive years now and, as demonstrated in

Table 1-3, we are observing a steady increase in the rate of adoption by smaller issuers.

TABLE 1-3: CANADIAN ISSUERS REQUIRING DIRECTORS TO OWN SHARES OR RECEIVE SHARE-BASED COMPENSATION

	Completion Index	SmallCap Index
2015	84%	57%
2014	82%	53%
2013	78%	46%
2011	69%	44%

The average ownership multiple requirement (expressed as a multiple of the retainer fee) has remained relatively constant (5.25x for TSX 60 issuers, 3.65x for Completion Index companies and 3.17x for the SmallCap Index). The average number of years to achieve the director share-ownership requirement in 2015 was 4.78 for the TSX 60; 4.24 for the Completion Index; and 4.06 for the SmallCap Index.

5. CEO Compensation Trends

In 2015, the discussion relating to compensation issues continues to focus mainly on the link between performance and compensation, in addition to pay levels, with investors scrutinizing whether there is an appropriate balance between short- and long-term incentives, and whether those incentives are aligned with maximizing shareholder value. Pay for performance is at the centre of CCGG's Executive Compensation Principles, as well as a guiding factor for proxy advisory firms ISS and Glass Lewis in their evaluation of issuers' compensation practices.

South of the border, new rules requiring increased disclosure on the link between the company's financial performance and executive compensation are expected to be implemented, following an announcement by the Securities and Exchange Commission (SEC) on April 29, 2015. The proposed rules, which would implement a requirement mandated by the *Dodd-Frank Wall Street Reform and Consumer Protection Act* (Dodd-Frank Act), would be aimed at providing greater transparency and allow shareholders to be better informed when they vote to elect directors and consider advisory votes on executive compensation.[6]

Canadian securities regulation requires significant disclosure about executive compensation, with particular emphasis on CEO compensation. Typically, a CEO will receive a salary, cash bonus and stock-based long-term compensation. Other forms of compensation, such as car allowances, insurance and other benefits and perquisites, are also provided.

Total compensation levels have been on the rise for CEOs at smaller issuers, pointing to a narrowing gap between executive compensation based on company size.

In 2015, the levels of total CEO compensation remained relatively flat among Canada's largest issuers, but have been on the rise for CEOs at smaller issuers, pointing to a trend of a narrowing gap between executive compensation based on company size. The median CEO pay increase from 2014 to 2015 was 0.9% for TSX 60 companies, 10.2% for Composite Index issuers and 5.9% for non-Composite Index companies.[7] We are also, however, observing a shift in the composition of the overall compensation package, with cash-based and stock option components declining and performance-based components rising.

CASH-BASED COMPENSATION

The previously observed upward trend in the reported average cash compensation (salary plus bonus) paid to CEOs of issuers continued into 2015 for issuers on the TSX 60, but was reversed among smaller issuers. The cash compensation of CEOs of issuers on the TSX 60 increased by a modest 1.3%, but decreased by 5.2% on the Completion Index and 1.1% on the SmallCap Index. On each of these indices, the split between base salary and bonus remained relatively constant year over year (40% on the TSX 60 and 41% on the Completion Index. See Table 1-4).

TABLE 1-4: CEO CASH COMPENSATION (IN $ MILLION)

	TSX60	Completion Index	SmallCap Index
2015	$3.10	$1.46	$0.86
2014	$3.06	$1.54	$0.87
2013	$2.76	$1.34	$0.83
2011	$2.88	$1.37	$1.22

6 http://www.sec.gov/news/pressrelease/2015-78.html.

7 ISS ExecComp Analytics data based on a sample of 606 companies in total with same CEO for full year 2014 and 2015, including 43 TSX 60, 156 Composite Index and 407 non-Composite Index issuers.

STOCK-BASED COMPONENTS

In addition to providing CEOs with base salaries and bonuses, issuers typically award CEOs some form of stock-based compensation that may be subject to time vesting, performance vesting or both. CEOs receive share-based compensation in a variety of forms. Options and share units (usually in the form of restricted share units (RSUs) or performance share units (PSUs)) are the most common form of share-based compensation for CEOs.

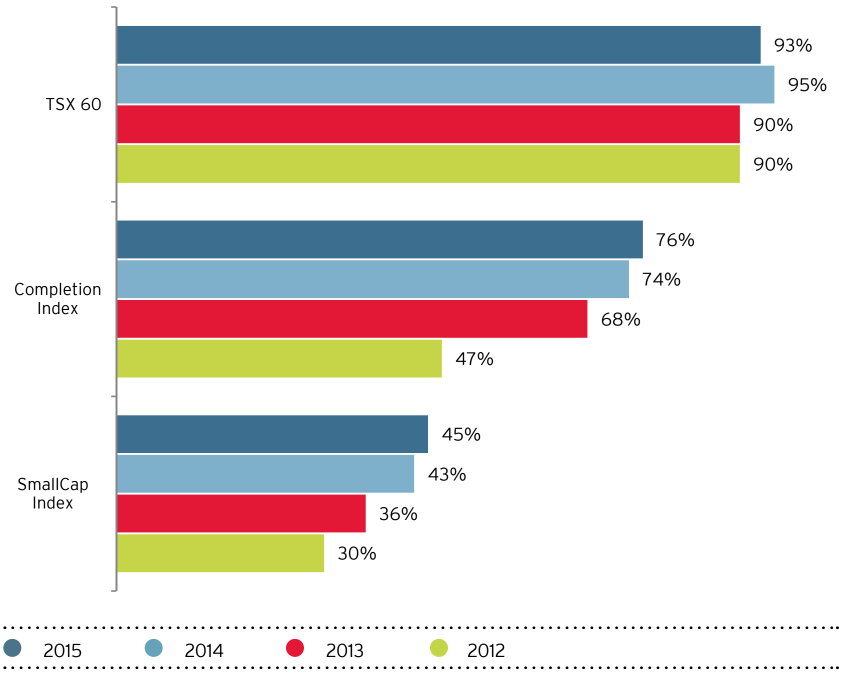
CCGG discourages the use of time-vested-only (as opposed to performance-vested) stock options as a significant component of executive compensation on the basis that those stock options may encourage inappropriate risk-taking and lead to unintended reward outcomes that are not well aligned with long-term performance. That form of stock option may also allow management to participate in any upside of share performance while not suffering any consequences on the downside. The practice of granting options to CEOs by issuers on the Composite Index and the SmallCap Index combined remained relatively steady year over year (58% in 2014 and 59% in 2015). On the TSX 60, this practice decreased from 77% in 2014 to 71% in 2015; it increased on the Completion Index (from 62% in 2014 to 64% in 2015) and on the SmallCap Index (from 50% in 2014 to 52% in 2015).

We have observed a clear upward trend with respect to the practice of including PSUs, RSUs and DSUs as part of CEOs' compensation packages to partially or fully replace the use of stock options. The number of issuers granting their RSUs to their CEOs increased from 34.9% in 2014 to 42.1% in 2015. Similarly, the number of companies granting PSUs increased from 32.0% to 38.6%, and those using DSUs from 9.9% to 12.9%.

CEO SHARE-OWNERSHIP REQUIREMENTS

The vast majority of TSX 60 issuers require their CEOs to hold shares. Although this number falls significantly for issuers on the Completion Index and SmallCap Index, Figure 1-5 demonstrates a steady upward trend by issuers in those indices. The number of shares that CEOs are required to hold is generally a multiple of their salary, a formula that has remained relatively constant since 2011. The average multiple this year was 5.5x for TSX 60 companies (4.7x in 2014, 4.6x in 2013 and 4.5x in 2011), compared with 3.5x for Completion Index companies (3.4x in 2014, 3.3x in 2013 and 3.2x in 2011) and only 3x for SmallCap Index issuers (3x in each of 2014, 2013 and 2011).

FIGURE 1-5: SHARE OWNERSHIP REQUIREMENTS

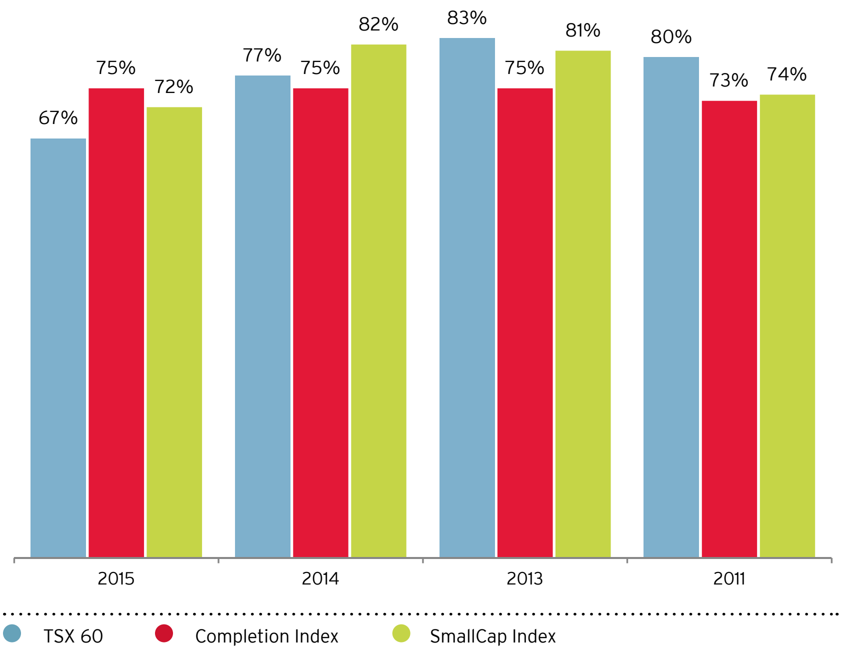


CHANGE OF CONTROL CONTRACTS

Most issuers on the Composite Index and the SmallCap Index contract with their CEOs to provide them with payments upon a change of control. Substantially all change of control arrangements are "double trigger", requiring both a change of control and the termination of the executive's employment following that change of control. Single-trigger change of control arrangements are now rare.

The incidence of change of control arrangements dropped slightly in 2015 for issuers on the Completion Index and SmallCap Index generally, from roughly 75% in the last three years to 71% in 2015. As Figure 1-6, below, shows, this slight decline is driven by a lower percentage of issuers that provide change of control payments on the SmallCap Index and the TSX 60, whereas the prevalence of these arrangements has remained constant among Completion Index issuers. Change of control payments generally range from 200% to 250% of the executive's cash compensation (base salary and bonus), depending on the size of the issuer. On average, these payments are 2.23x cash compensation for TSX 60 issuers (2014: 2.33x); 2.19x for Completion Index issuers (2014: 2.15x); and 2.03x for SmallCap Index issuers (2014: 2.04x).

FIGURE 1-6: CHANGE OF CONTROL PROVISIONS



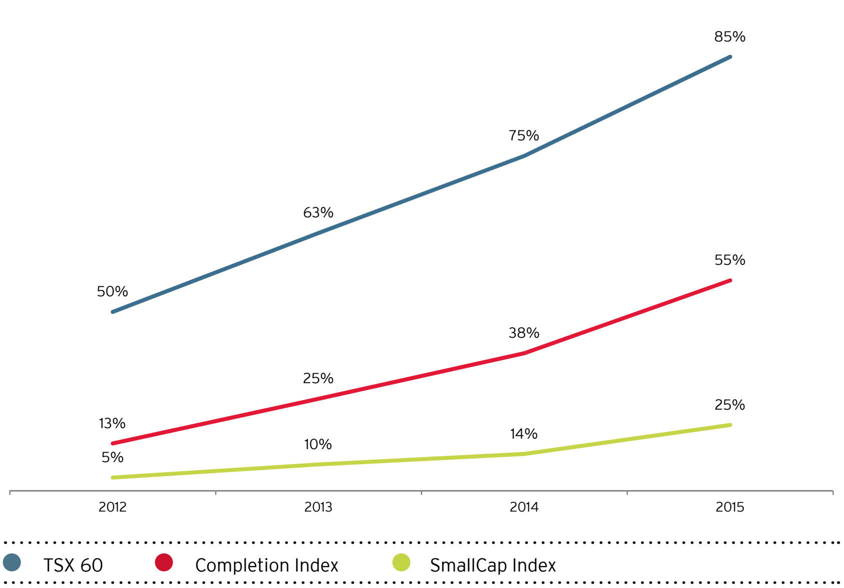
CLAWBACKS

Clawback provisions require CEOs to either repay some or all of their bonuses or relinquish some or all of their equity-based awards in situations in which the award would have been lower if based on a subsequent restatement of the financial statements that the company was required to do, or in cases of gross negligence, intentional misconduct or fraud. Canadian public issuers listed in the United States are subject to statutory clawbacks for certain employees under the *Sarbanes-Oxley Act of 2002*. In addition, Canadian multijurisdictional disclosure system filers will be affected by the SEC's proposed amendment, on July 1, 2015, to stock exchange rules that would require listed companies to adopt policies for "recovery of erroneously awarded compensation". Under the proposed rule, listed companies would be required to develop and enforce policies that, in the event of an accounting restatement, recover or claw back from current and former executive officers any incentive-based compensation they would not have received, based on the restatement.

Canadian corporate governance monitors continue to advocate for the voluntary adoption of clawback policies by Canadian public issuers because they view clawbacks as one of a handful of governance tools that discourage management from taking excessive risks that could potentially harm the company's financial position. ISS has indicated that it will consider clawback provisions when evaluating executive compensation practices and determining its advisory vote recommendations.[8] CCGG encourages companies to disclose details of their executive compensation schemes through a risk oversight lens and to explain how compensation plans discourage risk-taking, including through the use of a clawback policy that allows the issuer to recoup compensation already awarded in certain circumstances. In addition, in its 2014 statement of executive compensation principles, CCGG stated that if a company pays a bonus to an executive on the apparent achievement of performance metrics in a particular year, and it later becomes clear that the metrics were not achieved, the company should ensure that it has a specific right to require the return of the bonus and to cancel unvested compensation awards. Under the principles, it also may be appropriate for boards to require the return of compensation previously awarded to an executive in the event of a material earnings restatement or other company-specific change that significantly reduces shareholder value.

As Figure 1-7 demonstrates, the steady upward trend that we observed in the last three years in the use of clawback provisions related to the payment of bonuses and/or stock-based compensation continued into 2015.

FIGURE 1-7: PERCENTAGE OF ISSUERS WITH CLAWBACKS



8 https://www.issgovernance.com/file/files/2013ISSCanadianTSXGuidelines.pdf.

CONCERNS OVER RISING EXECUTIVE COMPENSATION: SEC ADOPTS CEO PAY RATIO RULE

In response to voiced concerns in the United States over the rising levels of executive compensation and the widening gap between CEOs' and workers' pay, the SEC adopted, in August 2015, a final rule to amend Item 402 of Regulation S-K under the *Securities Act of 1933*. This rule will require most SEC-registered U.S. companies to disclose the ratio of the compensation of their CEO (or any equivalent position) to the median compensation of their other employees. Beginning January 1, 2017, the new rule, mandated under the Dodd-Frank Act, will apply to most registrants but exempt small businesses and foreign-based firms (including Canadian multijurisdictional disclosure system filers). These registrants, in addition to disclosing the annual total compensation of the CEO, are required to disclose the following under the final rule, subject to certain exemptions:

- the median of the annual total compensation of all other employees (the Median Compensation); and
- the ratio of the CEO compensation to the Median Compensation expressed either as a ratio in which the Median Compensation equals one or, narratively, as the multiple that the CEO compensation bears to the Median Compensation.

The SEC rule has attracted both supporters and detractors. Proponents say that it will reveal a potentially embarrassing disparity between the compensation of CEOs and employees, which will increase pressure on corporations to reduce executive pay. Pay ratios may also assist investors in evaluating management and in making informed decisions when casting say on pay votes. On the other hand, the rule has also attracted opposition from certain corporate lobbying groups, including the U.S. Chamber of Commerce. Some of the reasons cited are the high compliance costs and lack of clarity and consistency in methodologies used.

Although Canadian securities regulation requires significant disclosure about executive compensation, institutional investors and proxy advisory firms have been silent on the issue of pay ratio disclosure. However, some Canadian banks have, in their 2015 proxy circulars, addressed vertical pay comparisons as a factor that they have considered. Issuers should be aware of this concern and continue to monitor the response of the CSA and the Canadian governance community to these developments in the United States.

For further details and analysis on the new SEC rule, consult Davies' bulletin "SEC Adopts CEO Pay Ratio Rule".[9]

9 http://www.dwpv.com/en/Resources/Publications/2015/SEC-Adopts-CEO-Pay-Ratio-Rule.

01
Board Composition and Compensation

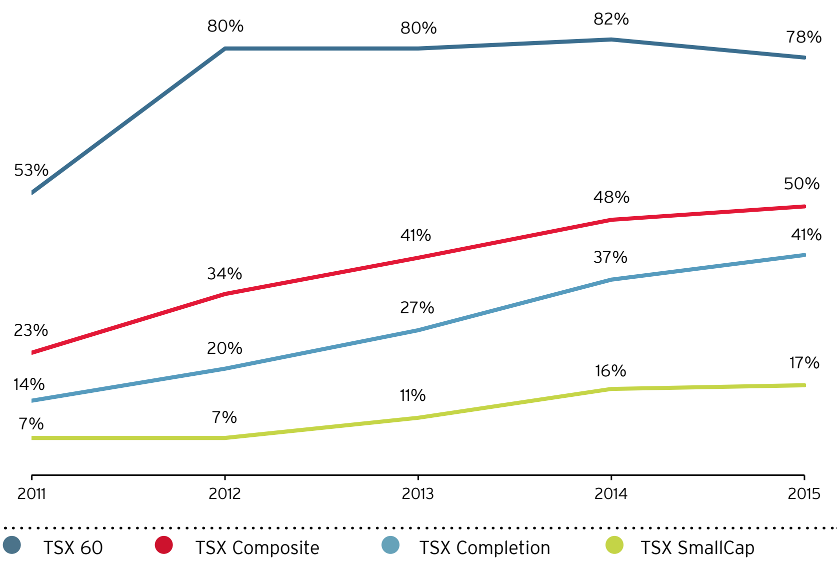
6. Say on Pay

The incidence of non-binding say on pay shareholder votes on executive compensation in Canada has continued to rise since their emergence in 2009. As predicted in *Davies Governance Insights 2014*[10] and earlier reports, the sustained momentum behind this trend is attributable largely to the adoption of say on pay votes by smaller issuers, which are often slower to implement corporate governance best practices.

The incidence of non-binding say on pay shareholder votes on executive compensation has continued to rise, largely due to the adoption of say on pay votes by smaller issuers.

Figure 1-8 illustrates the adoption rates of say on pay votes by issuers on the TSX 60, Composite, Completion and SmallCap indices. As can be seen, adoption of say on pay by Canada's largest issuers has stalled, with about 78% of TSX 60 issuers having put forward say on pay resolutions in 2015 (compared with about 82% in 2014 and 80% in 2013). Say on pay voting among small and mid-cap issuers, however, has continued to gain traction, with roughly 50% of Composite Index, 41% of Completion Index and 17% of SmallCap Index issuers having now adopted say on pay votes, representing year-over-year increases of 5%, 11% and 4%, respectively.

FIGURE 1-8: INCIDENCE OF SAY ON PAY AMONG COMPOSITE INDEX AND SMALLCAP INDEX ISSUERS (2011–2015)



10 http://www.dwpv.com/en/Resources/Publications/2014/Davies-Governance-Insights-2014.

We expect to continue to see year-over-year increases in the number of say on pay votes in future years, predominantly due to broad-based support for improving transparency on the alignment of pay for performance and compensation disclosure practices by institutional investors, shareholder advisory firms such as ISS and Glass Lewis, and governance advisers such as CCGG.

SAY ON PAY RESOLUTIONS AND FREQUENCY

Say on pay resolutions in Canada continue to be in the model form recommended by CCGG in 2009, with slight variations. Say on pay votes on executive compensation are put forward to shareholders on an advisory basis. For this reason, the vote outcome does not bind issuers. That said, boards remain ultimately responsible for executive compensation decisions and may be adversely affected if they fail to adequately address executive compensation practices, including making excessive awards or misleading disclosures on the practices, or if they fail to seriously consider dissatisfaction expressed by investors for such practices.

Canadian issuers predominantly hold say on pay votes annually, although this practice is not mandatory. Other jurisdictions, including the United States, the United Kingdom and Australia, impose an obligation on issuers to hold periodic say on pay votes.

RECENT TRENDS AND NEW DEVELOPMENTS IN SAY ON PAY IN 2015

Consistent with prior years, say on pay resolutions tabled by Canadian issuers typically enjoyed strong support in 2015. On average, say on pay resolutions put forward by TSX issuers were supported by approximately 92% of shareholders that voted on them. Nearly 89% of the resolutions were supported by shareholder approval levels of 85% or more, and over half of the TSX-listed issuers canvassed that held say on pay votes were supported by shareholder votes of 95% or more.

In 2015, only 18 TSX-listed issuers holding say on pay votes received approval levels under 85%, compared with 25 issuers in 2014 and 30 in 2013. Three (or 17%) of those 18 issuers experienced failed votes in 2015: Barrick Gold Corporation, Yamana Gold Inc. and Canadian Imperial Bank of Commerce, each of which is discussed further below. In contrast, in 2014 only one TSX issuer received less than 50% approval, whereas in 2013, three issuers had failed say on pay votes. The issuers receiving less than 85% support in 2015 are listed in Table 1-5.

TABLE 1-5: TSX-LISTED ISSUERS RECEIVING LESS THAN 85% SHAREHOLDER APPROVAL ON A 2015 SAY ON PAY RESOLUTION.

Issuer	Say on Pay Approval (%)	ISS Recommendation
Barrick Gold Corporation	27%	Against
Yamana Gold Inc.	37%	Against
Canadian Imperial Bank Of Commerce	43%	Against
MDC Partners Inc.	53%	Against
IMAX Corporation	63%	Against
Thompson Creek Metals Company Inc.	67%	Against
Ur-Energy Inc.	69%	For
DirectCash Payments Inc.	69%	For
Rampart Energy Ltd.	70%	For
Primero Mining Corp.	70%	For
Penn West Petroleum Ltd.	74%	For
Transat A.T. Inc.	77%	For
Agnico Eagle Mines Limited	77%	For
Ballard Power Systems Inc.	80%	For
Baytex Energy Corp.	82%	For
Aimia Inc.	84%	For
New Flyer Industries Inc.	84%	For
Industrial Alliance Insurance and Financial Services Inc.	84%	For

Source: ISS Voting Analytics Database.

As highlighted in Table 1-5, the issuers with the lowest levels of support in 2015 (*i.e.*, over 50% but under 70% approval) constituted a relatively small proportion. These were MDC Partners Inc. (54%), IMAX Corporation (63%) and Thompson Creek Metals Company Inc. (67%), all of which also received negative vote recommendations from ISS on their say on pay resolutions, as well as Ur-Energy Inc. (69%) and DirectCash Payments Inc. (69%). This is relatively consistent with 2014 trends we observed, suggesting that shareholders continue to express high levels of support on advisory say on pay resolutions, absent exceptional circumstances.

Both ISS and Glass Lewis routinely scrutinize the compensation practices of TSX issuers. In 2014, Glass Lewis introduced a quantitative pay-for-performance model to rank issuers' pay for performance alignment using performance-oriented metrics, including total shareholder return, earnings per share, growth and return on equity. ISS relies on a two-step model, comprising an initial quantitative screening and, in instances in which a potential pay-for-performance misalignment has been identified, a qualitative analysis. Unlike Glass Lewis, ISS focuses exclusively on CEO pay, ostensibly because a CEO's pay package is viewed as setting the "compensation pace" at most companies. In conducting its qualitative analysis, ISS considers a number of compensation practices to be problematic, including poor disclosure, excessive severance or change of control payments, overly generous new-hire packages, excessive perks, the payment of dividends on performance awards, backdating or springloading options and the absence of pay practices that mitigate excessive risk-taking. We see ISS and Glass Lewis increasingly recommending that shareholders vote against say on pay resolutions that they identify as endorsing some of these compensation practices. In 2015, ISS recommended that shareholders vote against the say on pay resolutions of six TSX-listed issuers (refer to Table 1-5). These issuers ultimately received the six lowest say on pay approval ratings in 2015, evidencing the significant weight many shareholders give to the guidance of proxy advisory firms.

STRONGER SHAREHOLDER VOICE

Shareholders appear increasingly willing to vote against an issuer's compensation practices and disclosure (or to withhold votes from directors that serve on the issuer's compensation committee or, in some cases, the whole board) if pay and performance are not perceived to be appropriately aligned, if disclosure on executive compensation practices is perceived to be misleading and/or if there appears to be too much discretion afforded to a board in making executive awards. As discussed in greater detail below, in 2015 three prominent TSX 60 issuers experienced failed say on pay votes. Common to the three issuers was an anomalous increase in executive compensation, matched with either poor share performance or little perceived justification for the increases.

THREE

ISSUERS EXPERIENCED FAILED SAY ON PAY VOTES

Barrick Gold Corporation

For the second time in three years, Barrick Gold Corporation's shareholders voted against the company's say on pay resolution, with only 26.6% of the shareholders that voted at its 2015 shareholders' meeting supporting Barrick's compensation practices and the rest voting against.

In 2013, after receiving a failed say on pay vote with only 14.8% of shareholder support, Barrick redesigned its executive compensation policies to enshrine pay-for-performance principles and tie compensation to long-term shareholder value creation, following consultation with its investors and others. Barrick adopted, among other things, a long-term scorecard designed to evaluate performance and guide incentive-based compensation, all of which was disclosed extensively in its 2014 management information circular. The proxy advisory firms responded favourably to Barrick's revamped policies and recommended that shareholders vote in favour of Barrick's 2014 say on pay resolution, which was approved by over 80% of the votes.

Notwithstanding the overhauled compensation policies, ISS and Glass Lewis took issue with Barrick's perceived high executive compensation level in 2014 and had concerns regarding the application of its long-term performance-based compensation component, resulting in negative recommendations from both advisory firms. Several institutional shareholders echoed these concerns,[11] and shareholders voted against Barrick's 2015 say on pay resolution. In addition, some of Barrick's investors went further and expressed discontent by withholding their votes for some or all of the directors standing for re-election.

In response to the failed vote, Barrick representatives have said the company is consulting with institutional shareholders and expects to refine its executive compensation practices.[12]

Yamana Gold Inc.

Yamana Gold Inc. also experienced a failed say on pay vote at its 2015 annual general meeting, at which only 37% of shareholders voted in favour of the resolution. Criticism of Yamana's compensation practices centred on the size and disclosure of special cash bonuses and performance share unit incentives awarded to certain executives following a 2014 acquisition transaction. The bonuses and incentives, disclosed separately from the summary compensation table in Yamana's management information circular, drew criticism and a negative recommendation from Glass Lewis. Institutional investors were

11 http://www.theglobeandmail.com/report-on-business/teachers-bcimc-object-to-barrick-cibc-compensation/article24009241/.

12 http://www.wsj.com/articles/barrick-gold-shareholders-vote-against-executive-compensation-1430235757.

concerned not only about a lack of disclosure, but also by the perceived misalignment between compensation and performance.

Yamana responded publicly to the failed vote, announcing, "[We] regret this result, although we have clearly understood the message," and that the contentious performance share units were being returned.[13] Yamana also disclosed its intention to engage with shareholders in an effort to improve the alignment between performance and compensation, including considering ways to increase the share-ownership requirements for its executives.

Canadian Imperial Bank of Commerce

Owing to perceived excessive payments to departing senior executives, CIBC became the first Canadian financial institution to succumb to a failed say on pay vote. Only 43% of its shareholders voted in favour of the resolution at its 2015 shareholders' meeting. The aggregate of approximately $25 million in compensation payments to former executives was viewed unfavourably by institutional shareholders, particularly because those executives were benefiting from accelerated departures after they had recently signed agreements.

> **Boards that have not yet adopted a say on pay policy and practice will find themselves lagging behind other issuers.**

EMERGING COMPENSATION TRENDS AND GUIDANCE FOR BOARDS

We expect say on pay to continue receiving broad endorsement by investors and their advisers. Boards that have not yet adopted a say on pay policy and practice will find themselves lagging behind other issuers and will increasingly be viewed as out of step with governance best practices. Canadian issuers and their boards can expect to continue to be held to a high standard in making and explaining their compensation decisions and ensuring that such decisions are aligned with performance. This is especially likely given the following:

- new rules introduced in the United States by the SEC earlier this year that would compel issuers to disclose a single compensation table to make it easier for shareholders to compare executive pay to an issuer's overall performance;
- Canadian securities regulators' watchful eye on issuers' disclosure practices; and
- heightened media attention cast on issuers that suffer failed say on pay votes or face criticism of their compensation practices from investors or proxy advisory firms.

13 http://www.theglobeandmail.com/report-on-business/industry-news/energy-and-resources/yamana-ceo-giving-back-special-share-units-after-say-on-pay-vote/article24169620/.

01 Board Composition and Compensation

Enhanced scrutiny over issuers' compensation practices may also be bolstered by the recent trend of directors and officers being sued for breach of fiduciary duty and on other grounds by investors unhappy with compensation decisions. For example, as we reported in *Davies Governance Insights 2014*,[14] in the 2014 Ontario Court of Appeal decision in *Unique Broadband Systems, Inc. (Re)*,[15] the Court held that a CEO had breached his fiduciary duties as a member of the board and its compensation committee in participating in a decision to grant certain executive compensation in the context of the sale of the company's primary asset. The Court further held that the business judgment rule or indemnification rights would not apply. Although often not successful, litigation in both the United States and Canada has been commenced against directors and/or officers in the context of problematic pay practices, making it even more important that directors take compensation decisions and investors' feedback seriously.

Moreover, boards should ensure that they understand the relative strengths and weaknesses of their compensation practices. A failure to identify and explain problematic pay practices, poor disclosure or other compensation deficiencies or excessive risk-taking may not only result in a failed say on pay vote, but increasingly prompt shareholders to express their dissatisfaction by withholding votes against the re-election of compensation committee chairs, compensation committee members and/or even entire boards.

> **Compensation decisions will attract investor, media, advisory and perhaps also regulatory and/or judicial scrutiny, so boards should consider the issues carefully.**

This does not mean that all compensation decisions must be tied to stock price as a performance metric; nor does it mean that boards' discretion to make special awards or decisions should be entirely fettered. However, it does mean that compensation decisions will attract investor, media, advisory and perhaps also regulatory and/or judicial scrutiny; accordingly, boards should consider the issues carefully.

The following are some steps that a board should consider:

- Obtain regular reports from the issuer's investor relations professionals about the feedback they are receiving from shareholders, particularly on the issuer's compensation practices and, more generally, on its corporate governance policies and practices.
- Be aware of the recommendations of leading proxy advisory firms such as ISS and Glass Lewis in this area, including these firms' use of quantitative metrics to track pay for performance and identify misalignments and their increased propensity to make negative recommendations when perceived misalignments or problematic compensation practices exist. When possible,

14 http://www.dwpv.com/en/Resources/Publications/2014/Davies-Governance-Insights-2014.

15 2014 ONCA 538.

it may be prudent to engage with the proxy advisory firms to explain compensation decisions, particularly when discretionary or unusual awards are made.

- Consider getting advice from a proxy solicitor about investors' overall sentiment toward the issuer and its compensation and governance practices and the perceived responsiveness of the issuer to investors' views.
- For boards of issuers that do not maintain a dialogue or have other means of directly engaging with their investors, consider implementing procedures to facilitate ongoing shareholder communication. Obtaining shareholders' views on compensation and other practices can serve as a useful barometer for their relative satisfaction or dissatisfaction on a multitude of issues. Moreover, engagement is increasingly expected by investors, as discussed in Chapter 3 of this report under "Shareholder Engagement".
- If a say on pay policy is not already in place, consult with legal counsel regarding the appropriateness of implementing such a policy and vote.

These steps will help a board avoid being surprised by shareholder discontent or activism in respect of its compensation practices or by the results of a say on pay vote. Taking the time to discuss the issues surrounding compensation and to engage with shareholders when appropriate will also provide guidance on how best to anticipate investor concerns and respond before investors feel as though they must resort to more aggressive tactics.

02 Gender Diversity Initiatives and Trends

02 Gender Diversity Initiatives and Trends

1. Canadian Regulators' New "Comply or Explain" Regime

On January 1, 2015, the Ontario Securities Commission (OSC), along with the securities regulatory authorities of every other Canadian province and territory except Alberta, British Columbia and Yukon, introduced increased disclosure requirements relating to the representation of women on boards and in executive officer positions. The amendments to Form 58-101F1 *Corporate Governance Disclosure* (the Disclosure Amendments) under National Instrument 58-101 *Disclosure of Corporate Governance Practices* (NI 58-101) establish a "comply or explain" disclosure model. Under the Disclosure Amendments, issuers listed on the Toronto Stock Exchange (TSX) and other non-venture issuers must annually disclose various aspects of their efforts to promote gender diversity at corporate leadership levels.

The Disclosure Amendments are intended to bring about more effective boards and better corporate decision-making by requiring greater transparency for investors and other stakeholders regarding the representation of women on boards and in senior management. The transparency is, in turn, intended to assist investors in their investment and voting decisions. The underlying rationale for increasing leadership diversity is that corporate decision-making benefits from a diversity of opinions and viewpoints: having more women on boards and in executive officer positions is a public good that, according to various studies and reports, is consistent with the private good.

The underlying rationale for increasing leadership diversity is that corporate decision-making benefits from a diversity of opinions and viewpoints.

For the first time in the 2015 proxy season, TSX-listed and other non-venture issuers were required to make the following disclosures in their proxy circulars or annual information forms:

- the number and percentage of women on the board and in executive positions;
- the issuer's written policy on the representation of women on the board (including for identifying and nominating female directors), or an explanation for the absence of such a policy;
- if a diversity policy has been adopted, disclosure of its objectives and key provisions, the measures taken to ensure its implementation, the progress made on achieving objectives and whether (and how) the effectiveness of the policy is measured;
- the board's (or relevant committee's) consideration of the representation of women in the director identification and selection process, or an explanation for the absence of such consideration, including whether

the issuer considers the level of female representation in identifying and nominating candidates and if not, why not;

- the consideration given to the representation of women in executive positions when making appointments or an explanation of the absence of such consideration; and
- any targets adopted by the issuer regarding female representation on the board or in executive positions and if none, an explanation for their absence.

2. Women in the Corporate Boardroom

Some modest but promising improvements were made in this area in 2015. Spurred largely by the Disclosure Amendments, a meaningful increase has been made in the overall representation of women on boards and in executive officer positions. For many observers, at this early stage, just over nine months after implementing the Disclosure Amendments, the results are positive – dialogue has been generated within corporate Canada and there is a sense that change is occurring and momentum is building. For example, out of the 3,500 board seats of issuers on the Composite Index and the SmallCap Index, 15.1% were held by women, an increase over 12.3% in 2014. The level of improvement this past year, nearly 3%, is greater than the year-over-year increase in overall female representation on boards in prior years (1.8% in 2014 compared with 2013). Similarly, the percentage of board seats on the TSX 60 held by women increased to 23.1% in 2015, compared with 20.1% in 2014 and 18.4% in 2013. On the SmallCap Index, women held 11.4% of board seats in 2015, compared with 7.8% in 2014 and 6.4% in 2013 (see Table 2-1).

TABLE 2-1: PERCENTAGE OF BOARD SEATS HELD BY WOMEN (2013, 2014 AND 2015)

Year	Composite Index and SmallCap Index Combined	TSX 60	SmallCap Index
2015	15.1%	23.1%	11.4%
2014	12.3%	20.1%	7.8%
2013	10.5%	18.4%	6.4%

Similarly, the proportion of issuers with no female board representation declined significantly this year – 23% for the Composite Index, compared with 32% in 2014 and 40% in 2013; and 42% on the SmallCap Index compared with 58% in 2014 and 65% in 2013.

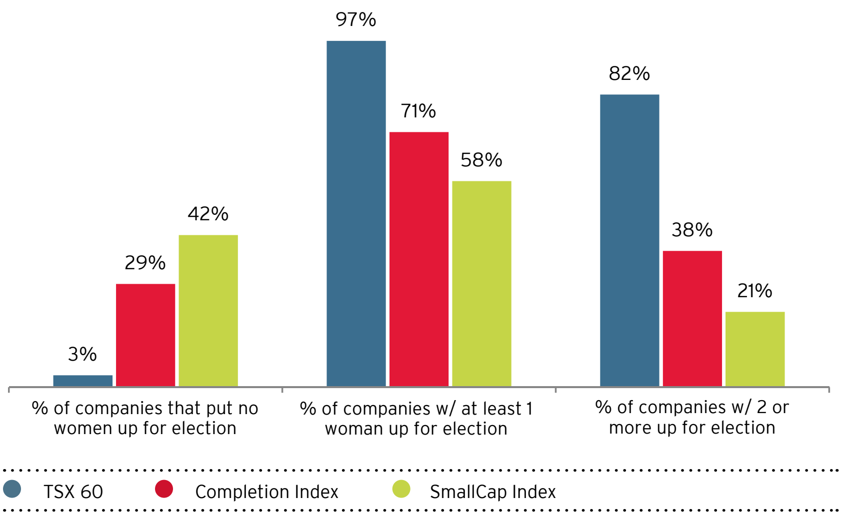
Another positive indicator of the steady upward trend in female board representation is the fact that although only 15.1% of board seats on the Composite Index and SmallCap Index are held by women, 26% of issuers on these indices have a newly elected female director this year. The proportion of companies with newly elected women on the board was 43% on the TSX 60, 28% on the Completion Index and 22% on the SmallCap Index.

The largest cap issuers on the TSX 60 have taken the lead in putting forward more women for election this past year, as demonstrated by Figure 2-1, below. Evidently, the Disclosure Amendments and the developments leading up to their implementation have encouraged these issuers to think about creative ways to address gender disparity in the boardroom.

37.1%

COMPOSITE INDEX AND SMALLCAP INDEX ISSUERS WITH DIVERSITY POLICIES

FIGURE 2-1: PERCENTAGE OF ISSUERS WITH WOMEN UP FOR ELECTION



Not surprisingly, the number of issuers that adopted written diversity policies regarding female representation has also increased. Among all Composite Index and SmallCap Index issuers, 37.1% of issuers had adopted written diversity policies, compared with only 8.6% in 2014. Similarly, in 2015, about 65.0% of

3.7%

BOARDS OF COMPOSITE INDEX AND SMALLCAP INDEX ISSUERS WITH FEMALE CHAIRS

TWO

FEMALE BOARD CHAIRS ON THE TSX 60

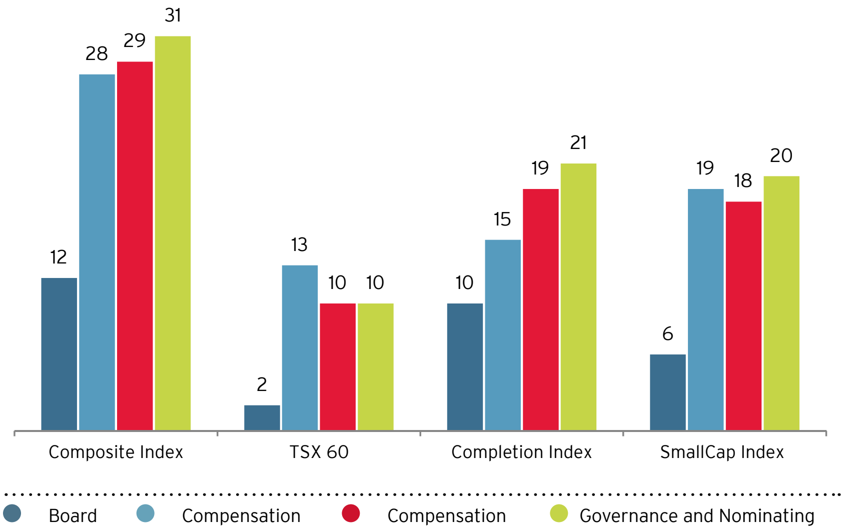
TSX 60 issuers (20% in 2014), 44.0% of Completion Index issuers (8.3% in 2014) and 26.0% of SmallCap Index issuers (6% in 2014) had implemented a policy or guidelines regarding the representation of women on the board or on diversity more generally.

3. Progress of Women in Board Leadership Positions

Although the level of female representation on boards generally has been rising over the past several years, the percentage of women holding board leadership positions with TSX-listed companies remains relatively low, despite continuing pressure from the government, regulators and other market participants. Only 3.7% of boards of Composite Index and SmallCap Index issuers have female chairs – a marginal increase from 3.2% in 2014 – and there continue to be only two female board chairs on the TSX 60.

At the board committee level, we have witnessed a year-over-year increase in the percentage of women holding chair positions, although their representation on some committees is more prevalent than on others. For example, in 2011, there were only 12 instances among TSX 60 issuers of women chairing the audit, the compensation, the governance or the nominating committees. By 2015, this number had risen to 33, up from 29 in 2014 and 25 in 2013. Among Completion Index issuers, the number of female chairs on those committees also increased in 2015 to 55, up from 37 in 2014 and 32 in 2013. Similarly, on the SmallCap Index, the number of women chairing the audit, the compensation, the governance or the nominating committees increased in 2015 to 57, significantly higher than prior years (32 in 2014 and 28 in 2013). (See Figure 2-2.)

FIGURE 2-2: WOMEN AS BOARD AND COMMITTEE CHAIRS



A positive trend in the overall leadership of women on boards is also evidenced by the fact that in 2015, of the total of 1,354 committees across both the Composite Index and the SmallCap Index, 141 committees (10.4%) were chaired by women, up from 102 of almost 1,200 committees (8.6%) in 2014 and only 85 of almost 1,200 committees (7.1%) in 2013.

Despite these positive trends in board committee leadership positions, female representation among board chairs saw minimal progress. Year over year, we have seen an increase of only two additional female board chairs among the Composite Index and SmallCap Index issuers included in our study. Compared with 13 female chairs of issuers on these indices in 2014, in 2015 there are 15 issuers with boards chaired by women.

4. Recent Developments in Leadership Diversity

The responses from corporate Canada to endeavours to promote women to corporate leadership positions have generally been positive. For example, Catalyst has released its *Catalyst Accord: Call to Action*,[16] which urges Canadian

16 http://www.catalyst.org/knowledge/catalyst-accord-call-action.

companies to boost the number of board seats held by women to 25% by 2017. The Accord notes that Canada "is noticeably lagging in the global boardroom diversity movement". A number of companies, including banks and other market participants, have signed on to the Accord. Signatories of the Catalyst Accord pledge to increase the percentage of women on their boards of directors to 25% by 2017, as well as to provide Catalyst with interim representation goals, which will be kept confidential. Participating companies also contribute names to a list of "board-ready" women that is maintained by Catalyst and made available to any company that commits to the Accord.

Similarly, the Canadian Board Diversity Council (CBDC) continues its efforts to educate companies on board diversity, including working with executives on corporate governance education and developing prospective directors through its Get on Board program. Additionally, the CBDC's Diversity 50 initiative connects corporate directors with potential new directors, identifying men and women who are considered board-ready on the basis of their knowledge, skills and behaviour.

Another development designed to promote women into senior corporate roles is the 30% Club, whose Canadian chapter was launched in June. The 30% Club was founded in the United Kingdom in 2010 and has spread to eight other countries as local chapters. The name of the group refers to its goal of boosting the proportion of women on boards of directors to 30% in the coming years. The founding members of the Canadian chapter consist of chairs and CEOs of 22 different companies and business organizations. In Canada, the group has set a target of 30% female representation on public company boards by 2020. However, that target may be aspirational as the group does not favour imposing mandatory quotas or policies regarding the representation of women.

Most issuers remain strongly opposed to the imposition of mandatory gender diversity targets or quotas.

Despite the initiatives to increase the representation of women in senior corporate positions, most issuers remain strongly opposed to the imposition of mandatory targets or quotas, typically not distinguishing between the two. Although some institutional investors are supportive of voluntarily adopted targets, at this stage there is not strong support for mandatory targets or quotas. For example, earlier this year, BCE Inc. urged its shareholders to reject a shareholder proposal that would impose a strict quota of having at least 40% women on its board. The proposal was put forward by the Mouvement d'education et de defense des actionnaires, a Montréal-based shareholder-activist group. At BCE's 2015 annual shareholders' meeting, the topic of board diversity was the subject of a long shareholder question period that stretched for more than an hour. The proposal was defeated by a resounding 94.45% of shareholder votes against.

However, the tide may be shifting. Recently, at a September 2015 OSC roundtable to discuss Canadian issuers' progress on the representation of women on boards and in executive officer positions, several panelists highlighted the difference between targets and quotas, advocating for the adoption of targets. Unlike quotas, which would require a certain percentage of members to be female, targets reflect aspirational goals that would prioritize the desired level of female representation but not require that it be achieved. Commentators questioned the discomfort that issuers appear to have with targets, suggesting that it seems inconsistent for businesses to set targets for every other important objective, but resist doing so in the context of gender diversity. Many attributed this disconnect and issuers' resistance to setting gender targets to their mistakenly treating targets as being analogous to quotas. Within this context, some panelists suggested that targets are an important aspect of fostering diversity, and encouraged the OSC to consider requiring issuers to establish and report on targets. At the same event, CIBC's chief executive officer announced that CIBC plans to set formal targets this year for the number of women on its board and in executive officer positions, stating, "In business, people respond to targets."[17] More details about the OSC roundtable and the results of the Canadian Securities Administrators' (CSA's) recent review of Canadian issuers' disclosure practices under the Disclosure Amendments are discussed in the following section.

OSC roundtable commentators suggested that it seems inconsistent for businesses to set targets for every other important objective, but resist doing so in the context of gender diversity.

5. Trends in Diversity Policies, Targets and Disclosure Practices

Although the 2015 proxy season revealed significant improvements in Canadian issuers' overall disclosure regarding the representation of women at the board and executive levels in response to the Disclosure Amendments, early reviews of issuers' disclosure practices suggest varying degrees of compliance, with many issuers falling short of the intended best practices. The disclosure requirements in the Disclosure Amendments were intended to increase board diversity and transparency in order to allow investors to make informed investment and voting decisions. In his remarks at the 2015 annual meeting of the Canadian Coalition for Good Governance (CCGG) in Toronto, Chair Wetston stated, "This type of disclosure leads us to believe that the boards of these companies are not taking the issue as seriously as we had intended."[18] Moreover, he warned that legislation may be needed to get more women on boards.

17 "CIBC to set target numbers for women on board, in senior executive roles: CEO; CIBC to set target numbers for women", The Canadian Press, September 29, 2015.

18 *Ibid.*

02
Gender Diversity Initiatives and Trends

The CSA Report concluded that the level and detail of disclosure of many issuers fail to satisfy the requirements of the Disclosure Amendments.

CSA REVIEW AND REPORT CARD

In late September 2015, the CSA released its "report card" in the form of 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 CSA Report). Although the CSA Report outlined some positive trends in Canadian issuers' diversity practices and disclosures, including some progress made in achieving the regulators' objectives of improved transparency, ultimately, it concluded that the level and detail of disclosure of many issuers fail to satisfy the requirements of the Disclosure Amendments. The results of this review suggest that many issuers are falling short of what is expected, despite the fact that the Disclosure Amendments are, strictly speaking, a comply-or-explain regime, not a comply-*and*-explain regime.

The commentary by OSC representatives and other panelists at the OSC roundtable discussion held the next day reinforced that conclusion. There was general consensus that the implementation of the Disclosure Amendments facilitated an increase in the number of women on boards and in executive officer positions; moreover, these very early results indicated a cultural shift toward increasing female representation. However, most roundtable participants expressed the view that too few issuers (i) have adopted written policies relating to the identification and nomination of women directors or targets, and (ii) have taken steps to effectively implement such a policy and to measure its effectiveness and the progress in achieving its objectives.

The CSA reviewed 722 TSX-listed issuers with year-ends between December 31, 2014 and March 31, 2015, and that released their corporate governance disclosure by July 31, 2015. Based on this review, the CSA Report reveals the following results for the sampled issuers:

- 49% had at least one woman on their board;
- 60% had at least one woman in an executive officer position;
- 15% 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 a policy was adopted or updated this year;
- about 65% of all sample issuers disclosed that they had not adopted a written policy;
- 60% of issuers with a market capitalization above $2 billion have two or more female directors; and

- only 19% of sampled issuers have adopted director term limits (more commonly issuers with a market capitalization over $2 billion), and 56% have adopted other mechanisms of board renewal (most commonly, some form of annual board assessment).

Importantly, consistent with our findings based on our review of a random sampling of Canadian issuers' disclosures, discussed further under "Diversity Disclosures in 2015", the following key issues or deficiencies were identified in the CSA Report and at the OSC roundtable:

- Generally, larger cap issuers led the pack in terms of the quality of their diversity practices and disclosure, with issuer size and industry having the most significant impact on the quality of issuers' practices.
- Of the issuers sampled, only 14% disclosed that they had adopted a written policy relating to the identification and nomination of female directors, falling short of expectations.
- For those that adopted written policies, considerable industry variation is apparent: insurance, utility, communications and entertainment industries are leaders in this area, with the highest policy-adoption rate at about 30%; oil and gas, technology, biotech, hospitality and environmental industries (including mining) had the lowest rates (below 10%).
- Those issuers with diversity policies in many cases fell short of specifically identifying how their policies relate to the identification and nomination of female directors.
- Many issuers with diversity policies failed to satisfy the requirement to explain their policy's objectives and key provisions. Many also failed to detail the steps taken to effectively implement the policy and measure its effectiveness and failed to disclose their progress in achieving the policy's objectives.
- Although many issuers disclosed that they considered the representation of women on the board, many did not explain how this was considered.
- Additionally, issuers were generally less compliant with the corresponding requirement to disclose whether they considered the representation of women when making executive officer appointments.

- Too few issuers adopted targets for the appointment of women to the board or executive officer positions (only 7% set board targets and 2% set executive targets). Of those with targets, over 33% had already achieved their target, suggesting that issuers are fixing targets that are easily achievable or already achieved.
- Subject to some industry variation, as outlined above, overall, larger cap issuers have a higher incidence of women serving on boards and in executive positions and compliance with the Disclosure Amendments, with mid- and smaller-cap issuers needing to do more.

The CSA's issuer sample differs from the issuers canvassed in our study, which is discussed under "Diversity Disclosures in 2015", and therefore reveals different numbers and percentages. Overall, however, the relative strengths and weaknesses in issuers' diversity practices and disclosures are consistent. Therefore, as discussed under "Next Steps and Considerations for Canadian Boards", boards of issuers can start drawing some meaningful conclusions from these studies to evaluate what they are doing, or ought to be doing better, as regulators and others continue to focus on diversity issues in the coming years.

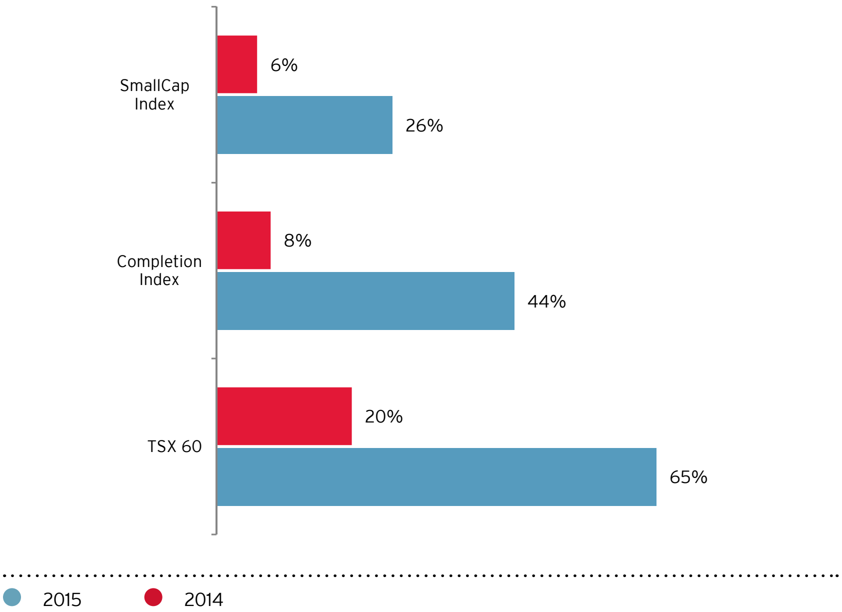
65%

TSX 60 ISSUERS THAT HAVE ADOPTED WRITTEN DIVERSITY POLICIES

6. Diversity Disclosures in 2015

The number of issuers canvassed in our study that adopted a diversity policy has significantly increased this year. Among all 404 Composite Index and SmallCap Index issuers included in our study, 150 (37.1%) have now adopted written diversity policies, up from just 8.6% in 2014. The proportion was highest among TSX 60 issuers at 65.0% (20% in 2014), followed by the Completion Index issuers at 44.0% (8.3% in 2014) and lowest among SmallCap Index issuers at 26.0% (6% in 2014). (See Figure 2-3.) These trends suggest that the Disclosure Amendments have prompted many issuers to consider more carefully the issue of gender diversity and to take formal steps through the implementation of some form of written policy to address diversity generally or gender diversity specifically.

FIGURE 2-3: PERCENTAGE OF ISSUERS WITH DIVERSITY POLICIES – 2014 AND 2015



As previously discussed, under the Disclosure Amendments, issuers that adopt written diversity policies must also disclose the steps taken to ensure that the policy is effectively implemented, as well as how the issuers will measure the effectiveness of the policy. Only 26 issuers among those that disclosed having written diversity policies, or 17%, have disclosed both how their policies would be implemented and how they would be measured for effectiveness. It remains clear from the CSA Report that this is one area of deficiency that regulators will be expecting issuers to address in the future.

The Disclosure Amendments also require issuers to disclose the number of women on the board and in executive officer positions, both as a number and as a percentage. The majority of issuers across all indices reviewed in our study reported the number and proportion of women on the board and in executive officer positions: 62% and 57%, respectively (with some reporting number or percentage only). However, 42 issuers (or 10.4%) did not disclose either the number or proportion of women on the board, and 55 issuers (or 13.6%) did not disclose either the number or proportion of women in executive officer positions.

02 Gender Diversity Initiatives and Trends

Prior to the release of the CSA Report, we reviewed a random sampling of management information circulars to assess the disclosure approaches of Canadian issuers in response to the Disclosure Amendments during the 2015 proxy season. Selected excerpts of some of the most detailed or responsive disclosures provided by 30 SmallCap Index issuers, 30 Composite Index issuers and 30 TSX 60 issuers under each of the new disclosure requirements are set out in the appendix at the end of this report.

Overall, our qualitative review of the surveyed management information circulars revealed a range of disclosure practices by issuers. These can be roughly categorized into three levels of disclosure: minimal, middle-of-the-road and detailed. The largest-cap issuers tended to provide the most detailed or responsive disclosures, with mid- and smaller-cap issuers tending to fall within the other two categories. However, the issuers' industry also affected the quality of their disclosures. Consistent with the CSA Report, issuers in the retail, financial services, utilities, communications and entertainment industries tended to provide more detailed disclosure, whereas issuers in the oil and gas, mining, technology, biotech and environmental industries tended to provide significantly less disclosure or disclosure that was not responsive to all of the requirements of the Disclosure Amendments.

DIVERSITY POLICIES

Turning from disclosure to the adoption of policies, we see a marked increase in the number of issuers across all indices that have adopted board diversity policies. This increase suggests that more issuers are actively engaged in considering the issues and in taking steps to foster or promote diversity, at least in principle. In articulating their policies regarding the representation of women on boards, most issuers have adopted definitions of diversity extending beyond just gender. Issuers have stated that they hope to attract board members who reflect the diversity of the clientele they serve – and therefore, in addition to gender diversity, also include diversity regarding race, nationality, ethnicity, religion, Aboriginal identity, age, disability and sexual orientation. Moreover, most issuers indicate they do consider the representation of women on the board and in executive officer positions, although in many cases it remains unclear as to precisely what that process entails.

However, consistent with the CSA Report findings, there are areas of disclosure in which issuers tend to have weaker practices. For example, some issuers have opted to use vague statements such as, "It is our policy to...," as opposed to clearly stating whether or not they have adopted a written policy relating to the identification and nomination of female directors.

Moreover, although it is encouraging that many issuers have adopted broader concepts of diversity, this broader definition appears to have resulted in vaguer objectives, a lack of clarity about the steps to be taken to implement these policies and intangible measurement of the effectiveness of such policies. As set out in the appendix to this report, the most detailed disclosures typically included clear objectives related to gender diversity and concrete steps to implement and measure the effectiveness of the policy; a number of disclosures included a website link to the issuer's written policy. However, in many cases, the middle-of-the-road or minimal disclosures adopted by some issuers provided very little, if any, information about how the policy is implemented and how its effectiveness is measured; relatively few provided any details about the annual or cumulative progress made by the issuer in achieving its objectives. For issuers that have not adopted a written policy regarding the representation of women on the board, the most common stated explanation is that they are "committed to meritocracy" and/or do not want to compromise flexibility in selecting the most qualified board members.

CONSIDERATION OF WOMEN ON THE BOARD AND IN EXECUTIVE POSITIONS

The Disclosure Amendments also require issuers to disclose whether (and if so how) they consider the representation of women on the board and in executive officer positions. As was evident from our qualitative review of a random sampling of management information circulars, a number of issuers, especially those listed on the SmallCap Index in resource-based and technology industries, do not state clearly (or at all) how they will consider the representation of women in these roles. Among companies with a detailed level of disclosure responsive to these requirements, common methods for issuers to advance female representation on boards include the following:

- ensuring that there are qualified female candidates considered for these roles;
- hiring external firms to produce a list of board-ready or qualified women for senior corporate positions;
- having sufficient training and professional development opportunities to encourage the promotion of women internally; and/or
- producing an annual report for the board or nominating committee regarding progress in the representation of women.

Generally, disclosures about whether and how issuers consider the representation of women in executive positions tended to be less detailed or clear, suggesting issuers may confront more challenges or obstacles in finding concrete ways to promote women to executive ranks.

Issuers may confront more challenges or obstacles in finding concrete ways to promote women to executive ranks.

02

Gender Diversity Initiatives and Trends

DISCLOSURE OF TARGETS

The requirement to disclose whether the issuer has adopted targets regarding the representation of women on the board and in executive officer positions has resulted in all Composite Index and SmallCap Index issuers included in our study stating whether they have adopted a target. When targets have been fixed, they generally range from 12.5% to 33.3%, with the most common target levels being 25%, 30% and 33%, consistent with 2014. These findings are also consistent with the results of the CSA's review, which revealed that within its issuer sample, for those issuers that adopted targets (only 7% of those they surveyed), the targets were most commonly 25%, 30% and 33%.

Among the issuers we sampled that disclosed targets for female board representation, on average about 25% of board seats were held by women, compared with an average of 12% of board seats held by women among issuers that had no targets. Although these figures may suggest that setting targets is more likely to promote a higher representation of women on the board, we believe that the more plausible explanation is that issuers that already have a meaningful percentage of women on the board are more likely to adopt specific targets and, moreover, are adopting targets that are consistent with their existing level of representation. Issuers that chose not to adopt targets stated that they had not done so because of a commitment to meritocracy and maintaining flexibility, which was often the same reason given by issuers for not adopting formal written policies regarding the representation of women.

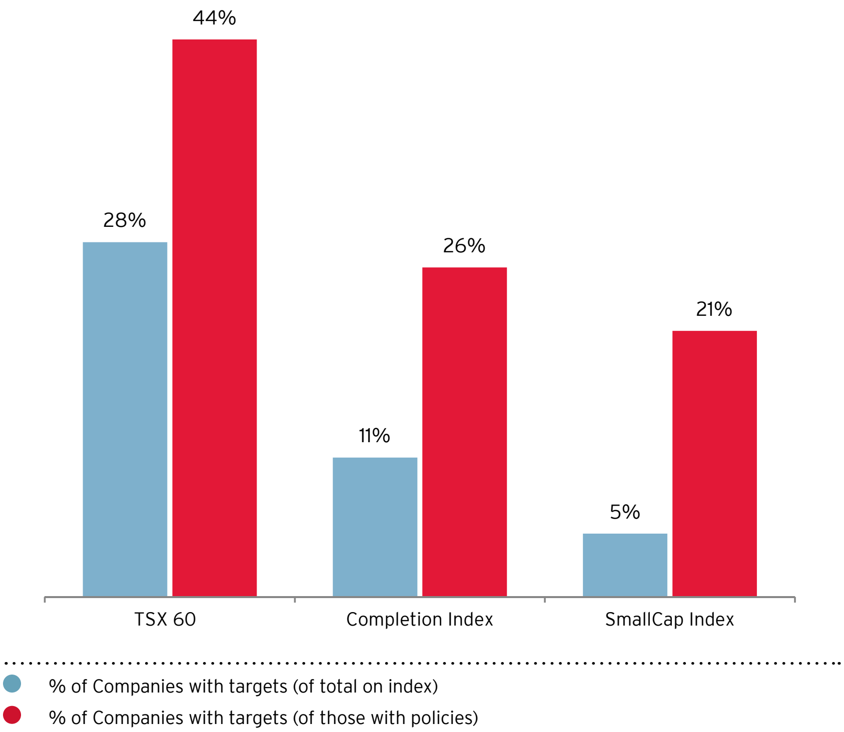
11.4%

COMPOSITE INDEX AND SMALLCAP INDEX ISSUERS DISCLOSED A TARGET FOR THE REPRESENTATION OF WOMEN ON BOARDS

In 2015, 45 (11.14%) of all Composite Index and SmallCap Index issuers disclosed a target for the representation of women on boards. This represents a significant increase in comparison with 2014 when only 12 of the 372 companies studied (3.2%) disclosed targets. The proportion of issuers with targets was highest among TSX 60 issuers, at 28.3%, representing an 18% increase over 2014 (10%), followed by the Completion Index (11%) and SmallCap Index (5%). Among issuers on the Composite Index and SmallCap Index that adopted written policies regarding board diversity, 30% had also adopted targets (see Figure 2-4, below). This proportion is slightly lower than in 2014, when 37.5% of issuers on those indices that had adopted written diversity policies had also adopted targets regarding the representation of women on their boards.

There are two likely reasons for these trends. First, only 32 issuers included in our study in 2014 had adopted written diversity policies (because it was voluntary), as opposed to 150 this year. Second, issuers are likely opting to address gender diversity issues through policies, which are a more flexible tool for promoting diversity, as opposed to targets. Depending on the size of the board, required expertise, industry knowledge and other factors, a fixed proportion of female representation, whether mandatory or merely aspirational, may be viewed as being unduly restrictive, which many issuers have disclosed they believe to be the case. For this reason, the consensus among securities regulators and the majority of market participants has historically been to resist mandatory targets or quotas for the representation of women in leadership roles.

FIGURE 2-4: PERCENTAGE OF ISSUERS WITH TARGETS REGARDING REPRESENTATION OF WOMEN ON BOARDS



Across all indexes, far fewer issuers set targets for the representation of women in executive positions than at the board level. In 2015, only eight of the issuers canvassed had disclosed that they had adopted such targets at the executive level.

7. Corporate Law Changes to Advance Diversity

On April 21, 2015, the federal government announced that as part of its 2015 budget, the 2015 Economic Action Plan would include proposed amendments to the *Canada Business Corporations Act* (CBCA) to promote gender diversity in public companies, using the comply-or-explain model of disclosure. As discussed in Chapter 5 under "Proposed Amendments to the *Canada Business Corporations Act*" it is expected that the amendments to the CBCA will include some provisions that will require Canadian issuers to abide by the CSA's comply-or-explain Disclosure Amendments. The CBCA Amendments may also contain some other features that are aimed at enhancing diversity on corporate boards. Possible amendments to Ontario's corporate statute, the *Business Corporations Act* (Ontario), are also under discussion.

8. Next Steps and Considerations for Canadian Boards

Issuers can expect continued scrutiny by regulators in the coming years over their diversity practices and disclosures.

At the OSC roundtable, panelists urged the OSC to take more action to improve diversity – a challenge that it appears prepared to take on. On the basis of the comments at the OSC roundtable, issuers can expect continued scrutiny by regulators in the coming years over their diversity practices and disclosures. We will also likely see more prescriptive disclosure requirements, particularly with respect to the adoption of written gender-diversity policies and targets. Issuers can also expect more guidance on the content and formatting of their disclosure to make it simpler and more transparent for investors. And although the Disclosure Amendments are presented as a comply-or-explain regime, many interested stakeholders seem to be taking issue with corporations that do not comply. Comments at the OSC roundtable suggest that increasing the number of women and implementing clear policies and practices to do so are expectations rather than just part of a disclosure regime.

It would therefore be prudent for those issuers that adopted minimal or middle-of-the-road disclosure practices in response to the Disclosure Amendments or that are falling short of compliance with the disclosure requirements to consider meaningful changes in their corporate governance and disclosure practices.

Boards of Canadian issuers should consider taking the following steps:

- If not already done, boards should carefully consider and evaluate what, if any, steps and policies they have adopted, or should adopt, to foster diversity on their boards and to maximize their effectiveness and the effectiveness of their corporate decision-making.

- Boards should consider establishing measurable and defined objectives that can be articulated, setting plans for meeting those objectives and implementing practices for monitoring and reporting on the company's progress against those objectives.
- Boards should regularly evaluate their effectiveness and the effectiveness of their committees and individual directors, as well as the appropriateness of the director and executive screening and selection processes. As part of those assessments, boards should consider implementing skills matrices that include gender and other diversity criteria, and implement procedures for reporting on, and addressing the results of, those assessments. This will help ensure that the right candidates with the appropriate mix of experience, skills and attributes constitute their leadership.
- Boards should start reviewing and considering whether modifications are needed to the annual disclosures under the Disclosure Amendments. Boilerplate disclosure or vague or generic statements are likely to attract scrutiny from regulators and, for some issuers, from their shareholders. To assist issuers in this process, we have set out in the appendix to this report examples of more detailed disclosure options from a range of issuers of different sizes, practices and industries.
- Boards should consult with their legal advisers and, if deemed advisable, other external advisers to craft the appropriate policies or processes that best meet the needs of the business, and to prepare accurate and transparent disclosure that reflects those policies and processes.

Although the past couple of years have seen increased attention on diversity within Canadian corporate leadership, commentators continue to urge regulators to go further and strengthen the rules to make them less voluntary and, in some cases, to impose targets. Many commentators have also suggested that the rules should go beyond gender, recommending that Canadian regulators expand the initiative to include reporting on diversity in areas such as race, ethnicity and Aboriginal status. In the medium- to long-term, we expect there will be calls for further reforms to encourage diversity on boards and in management more broadly, including promoting ethnic diversity among the leadership of Canada's public companies. We also expect continued scrutiny by Canadian corporate and securities regulators over issuers' policies and practices. Further reforms are also likely, particularly if Canadian issuers' disclosure practices do not improve in response to the CSA's recent guidance or if significant gender disparity continues to persist without meaningful improvements in the next couple of years.

We expect there will be calls for further reforms to encourage diversity on boards and in management more broadly, including promoting targets, gender diversity policies and ethnic diversity.

03 Shareholder Issues

03 Shareholder Issues

1. Shareholder Engagement

Shareholder engagement for publicly traded companies, in all of its many forms, has continued to grow unabated over the past 12 months. Commentators point to three macro influences that have driven this trend. First, institutional investors have become far more important to capital markets in the last two decades.[19] In the United States, for example, institutions are three times more likely to vote their shares than is an individual investor.[20] Additionally, a number of global initiatives have resulted in the development of codes for the stewardship role of institutional investors. For example, the introduction to the U.N. Principles for Responsible Investment (UNPRI) states, "As institutional investors, we have a duty to act in the best long-term interests of our beneficiaries. In this fiduciary role, we believe that environmental, social, and corporate governance issues ... can affect the performance of investment portfolios." Accordingly, signatories to UNPRI commit to incorporating environmental, social and corporate governance issues into their investment analysis, decision-making process and ownership policies and practices, among other things. Similarly, stewardship codes applicable to institutional investors have been developed in Japan and in the European Union, which strongly encourage direct engagement between investors and the corporations in which they invest.

The second principal factor in the growth of shareholder engagement has been the increased interest in corporate governance prompted by notable challenges that have affected global markets over the last few decades. These challenges include the burst of the IT/dot.com bubble in 2000; the 2008 global financial crisis; the large scale corporate frauds at Enron, WorldCom and other corporations; and the financial service industry improprieties that have led to numerous enforcement penalties being imposed for breaches of regulatory principles. These events have focused particular attention on executive compensation and ensuring that compensation structures do not encourage excessive risk taking behaviour at the senior executive level. The clearest governance result from these market events has been the tremendous growth in advisory say on pay votes in all major Western jurisdictions.

Third, a significant factor in the growth of direct shareholder engagement has been the rise of activist investors. It is currently estimated that activist shareholder funds have close to US$200 billion under administration. "Activist investors" is a broad label that covers a wide range of market participants with diverse goals and strategies.

Activist investor funds have close to US$200 billion under administration.

19 S. Celik and M. Isaksson, "Institutional Investors as Owners: Who Are They and What Do They Do?" (Dec. 3, 2013), *OECD Corporate Governance Working Papers*, No. 11 (Paris: OECD Publishing), available at: http://dx.doi.org/10.1787/5k3v1dvmfk42-en.

20 Anthony Goodman and Richard R.W. Fields, "Board-Shareholder Engagement: Current & Future Trends", *Ethical Boardroom*, April 2015.

03
Shareholder Issues

THE VALUE TO BOARDS OF ENGAGING WITH SHAREHOLDERS

Balanced against the increased, and increasingly global, actions of activist shareholders, has been the emergence of long term institutional investors as more active shareholders. The chairs of both BlackRock and Vanguard, two of the largest institutional investors in the world, have been very public in their campaign to encourage corporations to adopt policies and procedures that promote direct shareholder engagement. Clearly, direct engagement with the largest institutional shareholders of a corporation will assist the board and senior management greatly when, as is almost invariably the case, they face activist shareholders proposing specific changes either in the company's governance systems or in its strategic direction. Direct shareholder engagement over the course of the year permits the board and senior executives to understand far better the concerns of their institutional investor base and to be in a position to consider the specific demands of activist shareholders against that background. Continued engagement will therefore enable the board and senior executives to better assess whether the concerns of the activist shareholder are widely shared by the corporation's institutional investors.

> Direct shareholder engagement over the course of the year permits the board and senior executives to better understand the concerns of their institutional investor base.

THE U.S. SHAREHOLDER-DIRECTOR EXCHANGE

The Shareholder-Director Exchange (SDX), a U.S. working group comprising leading independent directors and representatives from large and influential institutional investors released in 2014 the SDX Protocol, a framework for direct engagement between non-executive directors and long-term institutional investors. The Protocol encourages boards to adopt a clear policy on the way they will approach investor engagement, identify potential engagement topics and seek out and prepare for such engagement. In July 2014, the SDX sent a letter to all companies in the United States included in the Russell 1,000, encouraging them to adopt or endorse the SDX Protocol or to develop and adopt their own specific procedures and protocols to encourage and improve the quality of shareholder engagement.

The SDX Protocol, which is intended as a guideline for the types of protocols that corporations should develop and adopt in the context of their specific circumstances, sets forth 10 key points to consider in formulating corporate policy on shareholder engagement. These points are summarized as follows:

- **Establish the scope of protocol.** Focus the corporation's shareholder engagement protocol on real time, two-way interactions between non-executive directors and long-term institutional investors; design the protocol to supplement management's investor-relations efforts.

- **Adopt an engagement policy.** Develop a clear policy on how the company will approach shareholder engagements; make decisions on requesting an engagement or accepting an engagement request on a case-by-case basis.
- **Identify topics.** Agree on topics in advance, the most appropriate being those for which the board is directly responsible – that is, board structure and composition; board performance; CEO performance; executive compensation; succession planning; governance practices and disclosure; and material strategic discussions.
- **Request engagement.** Establish and publicize a primary contact for engagement requests, which should identify topics proposed for discussion.
- **Select participants.** Encourage two or more individuals from each party to attend; minimize involving third parties (e.g., advisers); take topics into account in selecting participants.
- **Decide on how to engage.** Note that most investors prefer one-on-one engagements but group meetings may be successful; consider "listen only" engagements, which are still productive.
- **Prepare for engagements.** Prepare by reviewing relevant materials, receiving training as needed and agreeing with investors on topics to be discussed.
- **Participate in engagements.** Agree with investors on specific next steps and communicate the information to colleagues that are absent; note that change in policy or practice is not essential for successful engagement, but careful listening is.
- **Review and revise approaches.** Review the company's approach to engagement on an annual basis and revise as necessary.
- **Customize the SDX Protocol.** Note that the specific terms of mutually beneficial engagement will be influenced by company specific or investor specific contexts; be judicious and modify engagement practices as needed.

SHAREHOLDER ENGAGEMENT DEVELOPMENTS IN CANADA

The Canadian Coalition for Good Governance (CCGG) has recommended that boards adopt a written policy describing the way they intend to engage with shareholders and disclose this policy to their shareholders. In its model engagement policy, CCGG encourages adoption of engagement practices, including meeting with the company's larger shareholders and creating conduits for communication with smaller shareholders on an ongoing basis.

Shareholder engagement, in its many forms, is on the rise.

In a non-exhaustive survey of Canadian public issuers, we have found that a number of large-cap issuers have adopted formal engagement policies. Although this number is growing, it still remains a relatively small percentage of Canadian public companies. It is clear from reviewing those policies that companies are adopting a wide range of practices to engage with their shareholders beyond the basic approaches advocated by the SDX Protocol. Examples of these practices are live audio webcasts of general meetings; "investor days" at which not only senior management but also board members participate; investor perception surveys; discussions with shareholders who vote against say on pay proposals; and meetings with shareholders' advocacy groups.

We expect that as direct shareholder engagement evolves, we will see an increasing use of innovative technology to enhance the quantity and quality of direct shareholder engagement, including through the use of social media.

2. Majority Voting in Canada

As reported in our previous editions of *Davies' Governance Insights*, under the Toronto Stock Exchange (TSX) rules, all TSX-listed and non-venture listed issuers are required to implement majority voting in the election of each individual director and to have a majority voting policy, subject to limited exceptions for "majority controlled" companies.

MAJORITY VOTING POLICIES

TSX issuers, other than "majority controlled" issuers, are required to adopt a majority voting policy providing that a director who fails to receive a majority of the votes cast must immediately tender his or her resignation to the board and that within 90 days of the meeting, the board of directors must accept the resignation effective immediately, barring any exceptional circumstances.

Individual director voting and reporting have become the norm, with the vast majority of issuers complying with the TSX rules and governance standards.

Since the adoption of the TSX majority voting requirements, all issuers on the Composite and SmallCap indices now formally hold individual director elections. The number of issuers reporting the results of their director elections has increased since last year, with 100% of TSX 60 issuers, 98.3% of Completion Index issuers and 95.4% of SmallCap Index issuers publishing such information (2014: 100%, 93.9% and 83.8%, respectively). Individual director voting and reporting have therefore become the norm, with the vast majority of issuers complying with the TSX rules and governance standards.

Among issuers on the Composite and SmallCap indices that reported their voting results for individual director elections in 2015, the average percentage of votes withheld from an individual was 3.7% (2014: 3.5%). Although this is a slight increase over 2014, reversing the previous downward trend, it still remains uncommon for a majority of votes to be withheld from an individual director.

Among the issuers reporting the director election results in 2015, approximately 89% of the directors received more than 90% of the votes cast "for" — an outcome consistent with prior years. The breakdown by TSX Index for those issuers that reported the voting results for director elections is as follows:

- **TSX 60.** In contrast to 2013 and 2014, when all directors received 69.9% or more votes cast "for" them, two directors in 2015 received less than 69.9%. However, consistent with prior years, no directors received less than 51% approval. Just over 95% of directors received 91% or more votes cast in their favour, which represents a slight decline from just over 96% in 2014.
- **Completion Index.** As in 2013 and 2014, all but two directors received 51% or more votes cast "for" them and about 87% received 91% or more votes cast in their favour (down from 90% in 2014).
- **SmallCap Index.** All but six directors received 51% or more votes cast "for" them (up from one in 2014) and 85.6% received 91% or more votes cast in their favour (up from 82% in 2014).

During the 2015 proxy season, 21 directors from 11 companies (five on the Composite Index, five on the SmallCap Index, and one not listed on any TSX index) received less than 60% support from shareholders. Ten of these directors from three issuers received less than 50% + 1 votes "for" and were thus required to submit their resignations under their company's majority voting policy. Nine of the 10 directors who failed to receive the required support from shareholders were permitted to remain on the board of directors after their resignations were rejected. This is consistent with the trend that we have observed over the last two years.

In its 2015 Canada Proxy Voting Guidelines, ISS states that boards are allowed to keep nominees on the board even though a majority of shareholders withheld their votes for that nominee, provided that the company publicizes its reasons for doing so within a reasonable time and the decision represents the best interests of shareholders.[21] CCGG published its model form of a majority voting policy in 2011, which it continues to advocate today. Its model policy allows for a board to consider the advice of its corporate governance committee if a nominee has submitted a resignation following a failed vote. The policy mandates that the board always accept a nominee's resignation unless the corporate governance committee advises otherwise on the basis of extraordinary circumstances relating to the composition of the board or the voting results.

TEN

DIRECTORS WERE REQUIRED TO SUBMIT THEIR RESIGNATIONS UNDER MAJORITY VOTING POLICY

NINE

OF THOSE DIRECTORS REMAINED ON THE BOARD AFTER THEIR RESIGNATIONS WERE REJECTED

21 ISS, *2015 Canada Proxy Voting Guidelines for TSX-Listed Companies*, p. 15.

03 Shareholder Issues

PREVALENCE OF MAJORITY VOTING POLICIES

The prevalence of majority voting policies has increased significantly in response to the TSX requirements. The 2015 adoption rates are 97% among TSX 60 issuers (2014: 95%), 96% on the Completion Index (2014: 91%) and 96% on the SmallCap Index (2014: 91%).

Currently, the only two TSX 60 issuers without a majority voting policy are George Weston Ltd. and Power Corporation of Canada, both of which rely on the "majority-controlled" exemption of the TSX rules.

ONGOING DEBATE OVER "EXCEPTIONAL CIRCUMSTANCES"

TSX-compliant majority voting policies may include a carve-out for "exceptional circumstances", a term that is still subject to continuing debate.

Among issuers on the TSX 60, Composite, Completion and SmallCap indices, 38% do not specify any circumstances in which the board of directors is authorized to reject a director's resignation under the policy. However, the majority of issuers (over 58%) specify either a term or a list of factors that the board must consider if rejecting a director's resignation. The terms adopted by issuers include "exceptional circumstances", "extenuating circumstances", "extraordinary circumstances" and "special circumstances".

> Critics of "exceptional circumstances" carve-outs claim that without any factors listed in the majority voting policy, a board can unilaterally sidestep its own majority voting policy.

The preferred carve-out for issuers on the TSX 60, Composite and Completion indices is the term "exceptional circumstances", representing 38%, 37% and 36% of the index issuers, respectively. Issuers on those indices that do not specify any circumstances constitute 23%, 30% and 32%, respectively. However, only 19% of SmallCap Index issuers use the term "exceptional circumstances" and, a higher percentage – 44% of issuers – on this index do not specify any circumstances.

Regardless of whether the issuer uses one of these carve-outs or simply fails to state any terms whereby the board will not accept a nominee's resignation, critics of these carve-outs claim that without any factors listed in the majority voting policy, a board can unilaterally sidestep its own majority voting policy. This argument often relies on the fact that only 5% of issuers provide a list of factors for the board to consider when electing to retain a failed nominee. In fact, among TSX 60 issuers, only one company has provided any factors for its board to consider when refusing a director's resignation under a majority voting policy. Quebecor Inc. states that its board will consider, among other things, the reasons stated by the shareholders that abstain from voting "for" the director, the resigning director's number of years of service on the board, the qualifications of that director and the director's overall contribution to the company.[22] Critics argue that these factors are too subjective and provide too much discretion for boards to disregard their majority voting policies, as discussed below.

Many institutional investors, shareholder advisory firms and governance watchdogs continue to push for stricter requirements by the TSX and within corporate statutes like the *Canada Business Corporations Act* (CBCA) concerning what constitutes exceptional circumstances. They argue that without any definition, boards can unilaterally declare that such exceptional circumstances exist and thus render their majority voting policy powerless.

During the 2015 proxy season, similar to 2014, three issuers relied on exceptional circumstances to allow directors who failed to receive majority approval to remain on the board. At Quebecor's 2015 AGM, over 70% of the voting shareholders withheld their votes from Mr. Michel Lavigne's re-election as a class B director because Mr. Lavigne was the chair of the human resources and compensation committee that approved a criticized $7.8-million severance package for the former CEO. Mr. Lavigne was also one of three directors who failed to receive majority approval for his re-election in 2014 (61.87% of votes cast against his re-election). In both cases, Mr. Lavigne tendered his resignation, which the board rejected. In 2015, Quebecor announced that the board had rejected his 2015 resignation for the following reasons, among others:

During the 2015 proxy season, three issuers relied on exceptional circumstances to allow directors who failed to receive majority approval to remain on the board.

- The $7.8-million compensation package was approved unanimously by the board of directors and thus one director should not be forced to accept the blame for a decision made by all directors.
- The compensation package was approved in April 2014 and later discussed during Quebecor's 2014 AGM, at which the shareholders raised no concerns; reintroducing the compensation package would thus be inappropriate during the 2015 AGM.

Similarly, the majority voting policy of Data Group Ltd. provides that the board can refuse to accept a director's resignation if "special circumstances" exist.[23] At Data Group's 2015 AGM, four of the six directors received more "withheld" than "for" votes. Therefore, under the corporation's policy, they were required to tender their resignations. The four directors in question received votes in favour of their election in the range of 40% to 44% of the votes cast. However, the board rejected their resignations and all four directors remained on the board. Among other reasons given, Data Group disclosed that the four directors were necessary to ensure the independence of the board and that each of the four directors possessed valuable skills and expertise. The board also indicated that

22 Quebecor Inc. Notice of Annual Meeting and Management Proxy Circular, dated April 10, 2015, for the Annual Meeting of Shareholders held on May 7, 2015, p. 8.

23 Data Group Ltd. is not listed on any of the TSX indices canvassed in this report, although it is a TSX-listed issuer.

those shareholders electing to withhold their votes provided no reasoning and that if one of the shareholder's (KST Industries Inc.) votes were not counted, all four directors would have been re-elected to the board under the policy.

Finally, in the case of Spyglass Resources Corp., during its 2015 AGM, five of its seven nominated directors received more "withheld" than "for" votes. The majority voting policy of Spyglass contemplates its governance, human resources and compensation committee recommending to the board whether or not to accept a nominee's resignation.[24] The committee considered a variety of factors, including the skills of the directors, industry conditions, the reasoning of those shareholders that withheld their votes and the overall structure of the board.[25] The committee recommended that the board refuse all five resignations. The committee indicated that because Spyglass was commencing substantial investments during a severe downturn in the oil and gas industry, the inherent risk of removing five directors of its seven-member board would ultimately harm the corporation and shareholders. Although the board accepted the committee's recommendations, the board still accepted the resignation of one of the directors, as per his wishes.

ENHANCED QUORUM IN MAJORITY VOTING POLICIES

Enhanced quorum by-laws, more commonly used in the United States as a defensive tactic against proxy contests, are now also being implemented in the context of majority voting policies. Generally, enhanced quorum by-laws require, in certain circumstances, that at least two shareholders collectively holding at least a majority of the outstanding voting securities be represented at an annual or special meeting of shareholders. This is significantly more stringent than the typical quorum for shareholder meetings. In the context of majority voting policies, a nominated candidate for an issuer's board of directors who does not receive a majority of the votes in favour of election will only have to tender his or her resignation to the board if the requisite enhanced quorum standard is met. For example, TSX-listed issuers Enghouse Systems Ltd. and RedKnee Solutions Inc. have adopted a majority voting policy with an enhanced quorum requirement in Canada.

Enghouse Systems has a majority voting policy, first implemented in 2011, under which any nominee in an uncontested election wherein more than 65% of the outstanding common shares are voted in person or by proxy, and who receives a greater number of "withheld" than "for" votes is expected to tender his or her resignation to the board of directors. RedKnee Solutions Inc. implemented the

24 Spyglass Resources Corp. Management Information Circular, dated April 6, 2015, for the Annual General Meeting of Shareholders held on March 13, 2015, p. 6.

25 Spyglass Resources Corp. News Release, dated August 12, 2015, titled "Spyglass Resources Corp. Announces 2015 Second Quarter Results and Provides Corporate Governance Update".

same enhanced quorum standard in its majority voting policy in 2013 but later amended it ahead of its 2015 AGM. RedKnee's current majority voting policy applies only if there is an uncontested election of directors at which a majority (50%+1) of the outstanding common shares have been voted by securityholders in person or by proxy. The recently amended majority voting policy was approved by RedKnee's shareholders at its general meeting held in March 2015.

In its preview for the Canadian 2015 proxy season, ISS openly expressed concerns with enhanced quorum by-laws. First, ISS believes that allowing issuers to add enhanced quorum elements to a majority voting policy defeats any gains shareholders have made with respect to majority voting policies. Second, ISS argues that such policy-specific enhanced quorums lack justification when the corporation does not have enhanced quorums attached to any other circumstance.

3. Shareholder Proposals on the Rise

Canadian corporate law permits shareholders to propose that certain business be put on the agenda for a meeting of shareholders. Although the timing and substance of the proposal must satisfy statutory requirements, subject to some exceptions, an issuer must include the business submitted by a shareholder proposal in its management proxy circular for the corporation's next AGM. Under the CBCA, to be eligible to submit a shareholder proposal, a shareholder must hold, or have the support of shareholders in aggregate holding, voting shares equal to at least 1% of the outstanding voting shares or whose fair market value is at least $2,000. Typically, those shares must have been held for at least six months prior to the shareholder submitting the proposal.

During the 2015 proxy season in Canada, significantly more proposals were put to a greater number of issuers with greater variation in issuer size and industry than in prior years. A total of 65 proposals were made to 26 issuers compared with 49 proposals made to 18 issuers in 2014. Seven of those issuers were financial institutions, compared with nine in 2014. In 2014, all 18 issuers receiving shareholder proposals were on the Composite Index, whereas in 2015, eight of the 24 proposals were put to SmallCap Index issuers and 18 to Composite Index companies. This represents a dramatic increase.

The number of issuers that had shareholder proposals on their 2015 AGM agenda increased to 26 in 2015, from 18 in 2014, 14 in 2013 and 15 in 2012.

Another new trend we are observing this year is a notably higher rate of shareholder support for proposals. Whereas in prior years we observed very weak shareholder support for these proposals (typically less than 10%), in 2015 the average percentage of votes cast "for" increased to 18.7%. This average is in part skewed due to several proposals being approved by the shareholders, in some cases with overwhelming support.

In 2015, there were eight successful proposals, compared with one in 2014, none in 2013 and 2012, and two in 2011. Table 3-1 sets out the proposals put to the shareholders this year that received more than 50% of the votes in their favour.

TABLE 3-1: 2015 SHAREHOLDER PROPOSALS WITH MAJORITY SUPPORT

Issuer	Shareholder Proposal	% Votes "For"
Argonaut Gold Inc.	Advisory Vote on Executive Compensation	78.48%
Copper Mountain Mining Corporation	Disclosure of Key Performance Metrics Used to Assess Performance-Based Portion of NEO Compensation	54.93%
	Adoption of a Clawback Policy	99.05%
	Advisory Vote on Executive Compensation	80.62%
	Appoint Lead Director	65.72%
Primero Mining Corp.	Adopt Compensation Clawback Provision	97.85%
	Adopt Share Ownership Guidelines for Directors and Officers	97.85%
	Adopt Anti-Hedging Policy to Officers and Directors	97.86%

Among the proposals that were not approved by the shareholders, support was marginally higher this year (11.4%, compared with less than 10% in prior years).

Although 65 shareholder proposals were put forward in the 2015 proxy season, only a handful of organizations were responsible for them. In some cases, the proposers chose one or two issues and put the same proposal forward to a number of issuers. In other cases, the proposal was tailored to the specific issuer. All 65 proposals were made by three entities:

- 46 by Le Mouvement d'education et de défense des actionnaires (MEDAC);
- 17 by Montrusco Bolton Investments Inc. (Montrusco); and
- two by Meritas (composed of Meritas Jantzi Social Index Fund, The Congregation of the Sisters of Mercy of Newfoundland—Mercy Futures (CIBC), The Pension Plan of The United Church of Canada and The United Church of Canada Treasury).

FREQUENT PROPOSALS TO MULTIPLE ISSUERS

The following summarizes some of the most frequent proposals received during the 2015 proxy season:

- Three "gender representation on the board" proposals were put forward in 2015, all by MEDAC (BCE Inc. receiving about 3.8% of the votes, SNC-Lavalin Group Inc. receiving 3.3% of the votes and Alimentation Couche-Tard Inc. receiving 1.2% of the votes). Similar proposals were put forward to seven issuers in 2013 and only one issuer in 2014.
- In 2015, seven issuers received say on pay proposals (compared with 10 in 2014, six in 2013 and three in 2012). The proponents of these proposals were MEDAC (with respect to five issuers) and Montrusco (with respect to two issuers). Two of these proposals were approved at the shareholder meetings: Argonaut Gold Inc. (78.5%) and Copper Mountain Mining Corporation (80.6%). Even when the proposal failed, shareholder approval levels were higher than in previous years, with the votes in favour ranging from 13.6%, in the case of CGI Group Inc., to 17.0% in the case of Power Corporation of Canada.
- "Gradual phasing out of stock options as a form of compensation" proposals were put forward to seven issuers in 2015 (six of which were financial institutions), with votes in favour ranging from 4.8% to 5.9%. These proposals were all made by MEDAC.
- Proposals to "Adopt a pension plan for new executives that is the same as for all employees" were put forward to three banks by MEDAC and received votes ranging from 2.9% to 3.8%.
- Proposals requiring the use of key performance indicators (KPIs) to assess the performance-based portion of executive compensation were put forward to Argonaut Gold Inc. (receiving 29.6% of the votes) and Copper Mountain Mining Inc. (21.0%).

During the 2015 proxy season, significantly more proposals were put to a greater number of issuers with greater variation in issuer size and industry than in prior years.

- "Human rights risk assessment" proposals were put forward to Agrium Inc. (12.0% of votes) and Potash Corporation of Saskatchewan Inc. (6.7% of votes) by Meritas.
- Several proposals addressed in some form the qualification of director nominees (requiring environmental and social issue qualifications in the case of BCE Inc., Cogeco Inc., Metro Inc. and SNC-Lavalin Group Inc., risk-management qualifications in the case of Cascades Inc., and/or generally requiring disclosure of information on director qualifications, in the case of Cogeco Inc. and The Jean Coutu Group (PJC) Inc.

One trend we have not yet observed in Canada, but are witnessing in the United States, is the rise in shareholder proposals seeking to have issuers adopt "proxy access" in order to facilitate director nominations up to a specified percentage of board seats by shareholders holding a specified percentage of shares. We discuss this topic in "Proxy Access" later in this chapter.

4. Advance Notice Requirements Face Increased Scrutiny

Advance notice requirements (sometimes referred to as advance notice policies, or ANPs), in the form of either company by-laws or board policies, compel shareholders proposing nominees to an issuer's board to provide advance notice of their proposed nominations. Properly implemented, these requirements seek to prevent shareholders from waiting until an AGM to first propose nominees from the floor.

TRENDS IN ADVANCE NOTICE REQUIREMENTS IN 2015

As discussed in *Davies Governance Insights 2014*, in light of the relatively commonplace practice of U.S. issuers having advance notice requirements, combined with past judicial support expressed for such requirements, in 2013 we saw a significant increase in the number of Canadian issuers that implemented advance notice requirements. Since then, the number of issuers on the Composite and SmallCap indices with advance notice requirements has continued to grow, although the year-over-year rate of growth has declined.

51%

COMPOSITE INDEX AND SMALLCAP INDEX ISSUERS WITH ADVANCE NOTICE REQUIREMENTS

As of May 2015, 51% of issuers on the Composite Index and the SmallCap Index had adopted advance notice requirements, compared with just over 40% in 2014, and 47% of TSX 60 issuers have adopted advance notice requirements compared with 40% in 2014. Of those issuers canvassed that disclosed having advance notice requirements, about 15% put forward an advance notice by-law (or an amendment thereof) at their 2015 shareholders' meeting, compared with 18.5% in 2014, showing that the number of issuers that are adopting these requirements has dropped in years subsequent to the 2013 peak season. Table 3-2 shows the breakdown of issuers on the indices canvassed as of the date of this report that now have advance notice requirements, including those that adopted such requirements in 2015.

TABLE 3-2: ISSUERS WITH ADVANCE NOTICE REQUIREMENTS

Index	Number of Issuers Disclosing ANPs	% of Issuers Disclosing ANPs	Number of ANPs Adopted in 2015	% of ANPs Adopted in 2015
All Indices	207	51%	31	15%
TSX 60	28	47%	9	32%
Composite Index	124	51%	25	20%
Completion Index	96	52%	16	17%
SmallCap Index	118	54%	12	10%

In contrast to prior years when advance notice requirements tended to be more prevalent among smaller cap issuers, we now see the gap narrowing. In 2015, the greatest percentage increase in issuers with ANPs occurred on the TSX 60 (32%), with the result, noted above, that about 47% of TSX 60 issuers now have advance notice requirements. Therefore, almost a majority or more of all issuers on each of the indices now have advance notice requirements. We expect we will continue to see a rise in these figures in the coming years.

REVISED 2015 PROXY ADVISORY FIRM GUIDANCE ON ADVANCE NOTICE REQUIREMENTS

At the end of 2014, effective for the 2015 proxy season, ISS and Glass Lewis issued more restrictive policies for evaluating advance notice requirements. The reformulated policies were largely in response to the Ontario Superior Court's decision in *Orange Capital, LLC v Partners Real Estate Investment Trust* (2014 ONSC 3793), in which the Court found that advance notice requirements should be used only as a "shield" to protect shareholders and management, not as a "sword" to prevent nominations by shareholders or to buy time for management to defeat an activist.[26] According to its new guidance, ISS views as problematic any advance notice requirement with a purpose other than the following:

- preventing stealth proxy contests;
- allowing shareholders to submit director nominations within a reasonable time; and
- providing shareholders with sufficient information about potential nominees to allow for informed voting decisions.

On this basis, ISS recommends that advance notice requirements comply with the features set out below, failing which it may recommend voting against them. Deficient ANPs may also cause ISS to recommend that votes be withheld from individual directors, committee members or the entire board. Key features include the following:

- Advance notice by-laws or policies should be readily available to shareholders and put to them for ratification at the AGM following adoption by the board.
- Shareholders should be permitted to give notice *any time* not less than 30 days prior to an AGM (*i.e.*, the ANP should not provide that notice cannot be given prior to a specified date before the meeting, as is the case with most existing advance notice requirements).
- Any adjournment or postponement of an AGM should begin a new time period for giving notice, contrary to many existing by-laws and policies.
- The board should have the latitude to waive any provision of an advance notice requirement, not only certain provisions.
- Nominees should *not* be required to agree in advance to comply with an issuer's board policies and guidelines.
- A nominee should *not* be required to provide additional information beyond what is required in a dissident proxy circular or necessary to determine the nominee's qualifications, experience, shareholding or voting interest, or independence, in the same manner as required and disclosed for management nominees.
- If additional disclosure is requested or received from nominating shareholders and their nominees, it should be made publicly available to all shareholders.

26 Further details concerning the facts at issue in that case and the Court's findings are set out in our *Davies Governance Insights 2014* report.

Preferring a more principle-based approach, Glass Lewis's reformulated policy is premised on whether an issuer's advance notice requirements are unnecessarily burdensome or onerous on shareholders seeking to nominate directors. In evaluating issuers' ANPs, Glass Lewis will consider the reasonableness of the notice period, any excessive disclosure requirements, required commitments or undertakings to abide by unnecessarily broad or restrictive agreements, requirements to meet with the incumbent board members and other impediments that could frustrate shareholders' ability or willingness to avail themselves of the nomination process.

ISS and Glass Lewis may also issue negative recommendations if an issuer applies otherwise non-offending advance notice provisions in a manner that is contrary to their intended purpose or that undermine shareholder rights. If an advance notice policy or by-law is unilaterally adopted by the board but not included on the agenda for the next AGM, ISS will now generally recommend withholding votes from individual directors, governance or nominating committee members or the entire board. Continued failure by an issuer to obtain shareholder approval for advance notice requirements in subsequent years may result in further ISS withhold recommendations against board members.

ISS expects the full text of any by-law or articles being adopted or amended to be included in an issuer's proxy materials (or made readily available on SEDAR), failing which ISS is likely to recommend a vote against the adoption or amendment, irrespective of its terms. This approach is consistent with U.S. policies recently adopted by ISS and Glass Lewis, under which they will generally recommend withholding votes from certain individual directors, committee members and/or the entire board if the board implements or amends by-laws or charter documents without shareholder approval in a manner that could adversely impact shareholders or materially diminish the exercise of their rights.

IMPACT OF REVISED GUIDANCE ON CANADIAN ISSUERS

As a result of the proxy advisory firms' enhanced scrutiny of advance notice requirements, many Canadian issuers' existing advance notice by-laws or policies may now be perceived as problematic in some way. For example, most Canadian-style ANPs contain a limit on the earliest time before a meeting from which notice can be given (*i.e.*, no more than 65 days before the AGM). In addition, many ANPs state that an adjournment or postponement will not renew or extend the time period for giving notice. Pre-existing ANPs may also be problematic in various other respects.

As a result of proxy advisory firms' revised guidance, many Canadian issuers' ANPs may now be perceived as problematic in some way.

Another interesting yet unresolved issue surrounds ISS's objection to ANPs that require additional disclosure *beyond* what is necessary to determine the following:

- director nominee qualifications,
- director nominee experience,
- shareholder or voting interests, or
- the nominee's independence,

in the same manner as required and disclosed for management's nominees.

In this context, ANPs are clearly problematic under ISS's guidelines if they require shareholder nominees to complete additional questionnaires or agreements providing information beyond what is necessary to determine eligibility and otherwise required for a proxy circular. Similarly, requirements giving the board or management blanket discretion to request additional information from a shareholder nominee or requiring him or her to agree to comply with board policies before being elected are also offside.

What is not clear is whether provisions of ANPs that require additional information from shareholder nominees about their independence are also problematic. Commonly, such provisions are crafted as follows:

> The Corporation may require any Proposed Nominee to furnish such other information as may reasonably be required by the Corporation to determine the eligibility of such Proposed Nominee to serve as a director of the Corporation or a member of any committee of the Board, *with respect to independence or other relevant criteria for eligibility (including any stock exchange requirements) or that could be material to a reasonable shareholder's understanding of the independence or eligibility, or lack thereof, of such Proposed Nominee.*

In 2015, some Canadian issuers that proposed advance notice requirements with this type of provision that are reviewed by ISS faced negative recommendations from the proxy advisory firm and, in some cases, a failed shareholder vote on the by-law. In some cases, ISS found the ANP unsupportable on the basis that the provision in question provided the board with too much flexibility to decide what may reasonably be required to determine eligibility or independence; such flexibility, in turn, could be used by the board or management to thwart a shareholder's ability to nominate directors. On the other hand, issuers argue that these provisions should be acceptable (and are consistent with ISS's revamped guidelines), on the basis that they are seeking information only pertaining to the independence and qualifications of nominees in a manner consistent with requirements imposed on management nominees. Without that information, shareholders may not have the necessary details to make an informed decision about the eligibility and independence of a nominee, which the board has a responsibility to obtain and, based on ISS's articulated principles, is actually one of the principal purposes of an ANP.

RECOMMENDED BOARD ACTION

Boards with existing advance notice requirements are advised to carefully evaluate whether and to what extent their companies' requirements contain offending provisions and whether (and when) to implement any changes. Boards of issuers considering implementing advance notice requirements for the first time should ensure that the requirements are vetted by legal counsel for compliance with ISS's and Glass Lewis's guidance and are publicly disclosed to and ultimately ratified by shareholders.

Lastly, irrespective of whether advance notice requirements contain problematic provisions, boards should be cautious in how they apply their provisions. Issuers that adopt overly technical or strict interpretations that have the effect of frustrating a shareholder's right to nominate directors are likely to attract negative commentary or recommendations from the proxy advisory firms. Scrutiny of such behaviour is also likely to come from investors, the media and other market participants, and could even attract judicial review if challenged.

Issuers that adopt ANPs that have the effect of frustrating a shareholder's right to nominate directors are likely to attract negative commentary from the proxy advisory firms.

5. Forum Selection

"Forum selection" or "exclusive venue/forum" by-laws are designed to limit shareholders' choice of legal venue by specifying the jurisdiction in which certain shareholder claims must be litigated. The most frequently cited justification for adopting a forum selection by-law is to reduce the litigation costs and uncertainty associated with increasingly prevalent multi-forum litigation. Forum selection by-laws have been more common in the United States, and until recently, no Canadian company had adopted a forum selection provision in its by-laws.

In 2015, Yamana Gold Inc. became the first Canadian company to propose a forum selection by-law and have it approved by shareholders. In its 2015 management information circular, Yamana proposed that Ontario be designated as the exclusive forum for the litigation of certain corporate disputes. The company explained that "recent experiences with global litigation have shown that there are significant escalating costs and uncertainties where litigation is brought in multiple jurisdictions having less connection to the company." It went on to state that Ontario has "the most meaningful link to Yamana Gold" and that Ontario courts have had the most experience with the laws governing the company. The proposal was passed by a narrow margin of 52% of the shareholder votes.

In its proxy voting report for Yamana, ISS recommended voting against the proposal on the basis that it would restrict shareholder rights and that since Yamana did not disclose any "unusually substantial harm" from litigation brought by shareholders in other jurisdictions, the board had failed to provide a "compelling rationale" for designating Ontario as the exclusive forum. In their U.S. proxy voting guidelines, both ISS and Glass Lewis have generally recommended voting against proposals to introduce forum selection provisions, on the basis that they impair shareholder rights and that companies have yet to justify the need for such provisions. Neither proxy advisory firm has adopted a position on forum selection in the Canadian context. They are therefore likely to evaluate each proposal in Canada on a case-by-case basis, as ISS did in Yamana's case.

In their U.S. proxy voting guidelines, ISS and Glass Lewis have generally recommended voting against proposals to introduce forum selection provisions.

Since Yamana's adoption of a forum selection by-law, nine Canadian companies have followed suit:

- Acasta Enterprises Inc.;
- Alignvest Acquisition Corporation;
- Avingstone Acquisition Corporation;
- Dundee Acquisition Ltd.;
- Dundee Corporation;
- Gibraltar Growth Corporation;
- Hydro One Limited;
- INFOR Acquisition Corp.; and
- Shopify Inc.

Because shareholders were not required to vote in any of these additional cases, ISS's and Glass Lewis's views on these provisions are unknown at this stage.

In contrast with the United States, where courts have recognized the validity and enforceability of forum selection provisions, these provisions remain untested in Canada and it is unclear whether they would be enforced by Canadian courts. Further, Canadian companies should be aware that ISS and Glass Lewis would likely not recommend voting in favour of such provisions unless the board provides specific and substantial evidence of past harm from litigation brought outside the selected forum.

6. Proxy Access

Proxy access, the mechanism whereby shareholders that meet certain requirements can nominate directors to a company's board and have those nominees included in the company's proxy materials without going through a lengthy and expensive proxy contest, was the primary corporate governance issue in the 2015 proxy season in the United States, and one that gained momentum in Canada in the same period.

The proxy access floodgates opened during the U.S. 2015 proxy season when New York City Comptroller Scott M. Stringer, on behalf of the New York City pension funds (valued at US$160 billion) he oversees, submitted proposals to 75 companies at once. Stringer's proposals called for the adoption of a by-law that would give shareholders the right to nominate director candidates and list them on the issuer's ballot, subject to a 3% ownership threshold and a three-year holding period with a cap on shareholder director nominees at 25% of the board. Similar proposals were submitted by other shareholder advocates to more than 25 additional U.S. companies in 2015. In the United States, many institutional investors now publicly support the "3-3-25" proxy access standard over alternative formulations.

According to a recent Nasdaq/Simpson Thatcher presentation, approximately 60% of the proxy access shareholder proposals that went to a vote in the United States in 2015 have passed with near universal support for a 3% ownership threshold and three-year holding period standard. However, U.S. voting results show that although majority support for 3% proxy access is likely, it is not a foregone conclusion. In some cases, U.S. issuers have implemented proxy access with 5% ownership thresholds and caps fixed at 20% of the board.

In May 2015, CCGG issued a proposed policy titled "Shareholder Involvement in the Director Nomination Process: Enhanced Engagement and Proxy Access", citing its belief that "it is time for Canadian public companies to focus on the ability of shareholders to have meaningful input into the director nomination process, whether by being able to influence who the nominees are or through actually nominating directors."[27] In CCGG's view, decisions concerning board composition will benefit from shareholder input into the nomination process and that input is an essential component of shareholder democracy. That is, reiterating the SEC's statement in its proposed rule on Facilitating Shareholder Director Nomination, "the right to nominate is inextricably linked to, and essential to the vitality of, a right to vote for a nominee.[28] CCGG recognizes that Canadian corporation law provides certain rights to shareholders not available in

Under CCGG's new proxy access policy, shareholders holding at least 5% or 3% of a company's outstanding shares (depending on market cap) should be entitled to nominate directors for election.

27 http://www.ccgg.ca/site/ccgg/assets/pdf/proxy_access_finalv.35.docx_edited_on_june_18,_2015.pdf.

28 *Ibid*.

the United States, including the right of shareholders holding more than 5% of the outstanding shares of a company to requisition a shareholders' meeting for the specific purposes set out in the shareholder requisition.

Similarly, although Canadian corporation law permits shareholders holding a certain percentage or value of the outstanding voting shares of a company to submit a shareholder proposal for inclusion in management's proxy circular, the proposal right has limitations. The corporation is not required to include information about the shareholder's nominee in its circular in an equitable manner in the same location or with the same prominence as management's nominees; nor is the corporation required to use a fair universal proxy form. Moreover, the shareholder proponent is restricted to a 500-word statement. However, CCGG notes that such procedures, and the more commonly utilized proxy contest rules in Canada, are significantly more cumbersome for shareholders wishing to nominate directors for consideration at a shareholders' meeting than are proxy access procedures that permit shareholders to nominate directors and to have management's proxy materials include these nominees for consideration by shareholders.

Under CCGG's proposed proxy access policy, shareholders holding at least 5% of a company's outstanding shares for companies with market capitalizations of less than $1 billion and 3% for a company with market capitalization of $1 billion or more should be entitled to nominate directors for election. In addition, shareholders should be permitted to coordinate and aggregate their holdings to reach the required threshold (without any proposed cap on the number of shareholders that could form such a group). Under the CCGG policy, nominating shareholders must continue to hold the relevant percentage of shares up to the time of the meeting at which the director nominees will be considered. In addition, proxy access should be available only to shareholders whose economic ownership reflects their voting interest (*i.e.*, their economic ownership has not been reduced through short selling or the use of derivatives).

CCGG's proposed proxy access policy would also limit the number of permitted shareholder nominees to three directors or 20% of the total number of board seats, whichever is less. Shareholders would not be able to nominate another three directors or 20% of the board in following years so long as the previously shareholder-nominated directors, if elected, remain on the board. Furthermore, under the CCGG policy, information regarding shareholder nominees should not be restricted or curtailed relative to information set forth in proxy materials for management nominees. Instead, disclosure about shareholders' director nominees in the issuer's proxy circular and proxy form should be set out fairly and in the same location as the company's nominees, with the same opportunity to present information on nominee background and qualifications of all nominees. CCGG also advocates the use of a fair form of universal proxy by the issuer.

Unlike the practice in the United States, however, the proposed CCGG policy would not require any necessary share holding period in order for a shareholder to avail itself of the proxy access rules. CCGG's view is that the period during which a shareholder has held its ownership position does not correlate to whether the shareholder has the long-term interests of the company in mind. Pending modifications to Canadian corporation law, or possibly securities regulation, which CCGG is advocating for, CCGG recommends that Canadian companies actively consider introducing proxy access policies on a voluntary basis as a means of enhancing direct shareholder engagement and improving the composition of Canadian boards.

Ultimately, public companies in Canada should carefully evaluate their shareholder bases and engage with them in order to best anticipate investor views on proxy access and, if urged, be proactive in trying to shape its terms. Although proxy access shareholder proposals have not yet gained traction in Canada, given CCGG's and others' advocacy for proxy access and the resulting prominence the issue has gained in Canada this past year, Canadian issuers should continue to monitor the Canadian and U.S. developments in this area and start preparing for a potential rise in proxy access demands in the coming years.

Canadian issuers should continue to monitor the Canadian and U.S. developments in this area and start preparing for a potential rise in proxy access demands in the coming years.

7. Universal Proxies

In September 2015, CCGG released a new "Universal Proxy Policy". The policy recommends an amendment to Canadian corporate and securities laws that would mandate the use of a universal proxy form in every contested director election involving a Canadian public company. The universal proxy would list the names of all director nominees, whether nominated by the issuer or the dissident shareholder(s), thus allowing shareholders to choose any combination of directors they believe would be best for the company.

CURRENT PRACTICE

Currently in contested director elections, shareholders who attend a shareholders' meeting in person can vote for any combination of directors, whether these directors were nominated by the issuer or by another shareholder or dissident. On the other hand, shareholders who vote by proxy typically receive one form of proxy from the issuer and a separate one from the dissident shareholders, each listing only their own nominees. Because shareholders can submit only one form of proxy and a subsequent proxy would revoke an earlier one, those who cannot attend in person are limited to voting for only one set of nominees. Moreover, because shareholders increasingly hold shares through nominees or intermediaries, this reality can make it difficult or more challenging for beneficial shareholders to attend meetings in person. As a result, usually a smaller subset of shareholders attend meetings in person, with the remaining shareholders potentially finding themselves unable to avail themselves of the same rights and flexibility as those attending in person.

Although universal proxies are permitted under the current statutory regime, they are rarely used. A universal proxy was first used successfully in Pershing Square's proxy contest for Canadian Pacific Railway in 2012. In that contest, both sides ended up using universal proxy cards – management presumably doing so pre-emptively so that its card would not be viewed as less flexible than Pershing Square's. Since that contest, we have seen additional examples of dissidents and/or issuers using a universal proxy, even though not required.

THE CCGG PROPOSAL

In an effort to level the playing field and ensure that shareholders who vote by proxy enjoy the same rights as shareholders who vote in person, CCGG now recommends the use of a single form of proxy in contested elections that lists the names of all the director nominees on the same page, whether nominated by the issuer or by dissidents.

CCGG indicates in its policy that mandating the use of universal proxies for all Canadian public companies will "improve director accountability and enhance shareholder democracy by ensuring that shareholders can choose the best candidates from among those nominated." On the other hand, some critics believe that this change may encourage dissident shareholders to launch more proxy contests and may result in boards whose directors lack the required mix of skills, experiences and expertise.

DEVELOPMENTS IN THE UNITED STATES

Proxy rules in the United States require that nominees from each side be asked to consent to appear on each other's proxy forms. Such consent is rarely given.

In June 2015, SEC Chair Mary Jo White stated in a speech that the SEC is considering revising its proxy rules to require the use of universal proxy forms.[29] She nonetheless urged companies not to wait for the SEC to act and to "give meaningful consideration to using some form of a universal proxy ballot even though the proxy rules currently do not require it".[30]

29 Chair Mary Jo White, "Building Meaningful Communication and Engagement with Shareholders" (speech delivered at the Society of Corporate Secretaries and Governance Professionals 69th National Conference in Chicago, Illinois, June 25, 2015).

30 *Ibid*.

8. CSA Adopts Guidance for Proxy Advisory Firms in Canada

We reported in *Davies Governance Insights 2014* the increased regulatory focus in Canada and elsewhere on the role of proxy advisory firms like ISS and Glass Lewis. Proxy advisory firms are perceived as holding significant influence over corporate governance issues and transformative transactions, with many institutional shareholders relying on their analyses and advice. A "no" recommendation from such firms can make a crucial difference in close votes over issues such as electing directors, executive compensation, adopting or amending by-laws and important corporate transactions. Concerns have been expressed over the role that such firms play, including their internal practices and methodologies, their potentially conflicting mandates with issuers and investors and, for some, a lack of transparency into how they formulate their recommendations. In light of these concerns, in 2014 regulators in Canada and abroad put forward different regimes aimed at increasing transparency into proxy advisory firms' businesses.

Proxy advisory firms are perceived as holding significant influence over corporate governance issues and transformative transactions, with many institutional shareholders relying on their analyses and advice.

After being released for comment in April 2014, National Policy 25-201 *Guidance for Proxy Advisory Firms* (the Policy) was adopted in April 2015. The Policy applies to proxy advisory firms that provide a variety of services to shareholders. Those services typically include analyses of matters put forward for consideration at shareholders' meetings, making voting recommendations, establishing voting guidelines for issuers and providing consulting services to issuers. Rather than implementing a list of strict rules for proxy advisory firms to follow, the Policy establishes a list of guidelines or best practices that proxy advisory firms are encouraged to follow. In the view of the Canadian Securities Administrators (CSA), the Policy will allow proxy advisory firms to be more transparent in their decision-making processes and thus develop trust between such advisory firms and other market players.

The Policy addresses four broad areas of concern:

- **Conflicts of interest.** The Policy encourages proxy advisory firms to establish written policies, internal safeguards and codes of conduct to identify, manage and mitigate actual and potential conflicts of interest. The Policy also recommends that these firms regularly evaluate the effectiveness of their adopted measures.
- **Voting recommendations.** The Policy encourages proxy advisory firms to consider publishing the methods and procedures used in formulating voting recommendations, as long as such disclosure would not compromise the proprietary or commercially sensitive nature of the information.

- **Proxy voting.** The Policy indicates that proxy advisory firms should consider adopting written policies and procedures that they would follow when making recommendations for voting guidelines.
- **External communications.** Finally, the Policy outlines the information that proxy advisory firms should consider sharing with their clients. That information includes proxy advisory reports, information used from analytical models and assumptions used in performing an analysis.

During the comment period on the draft 2014 Policy, the CSA received 58 response letters. Some critics of the Policy argued that only strict rules, as opposed to the CSA's proposed approach, would effectively manage the practices of proxy advisory firms. Those in favour of the Policy, including ISS and Glass Lewis expressed the view that the guidelines establish the optimal balance between addressing the concerns of the marketplace while respecting the private contractual relationship between an advisory firm and its clients.

Following its review of the comments received on the draft Policy in 2014, the CSA adopted the final Policy in 2015 with only fairly minor changes to the initial draft. The key changes are the following:

- **Firm oversight of conflict of interest policies.** The Policy was amended to recommend that any board, committee or individual selected to oversee the operations of a proxy advisory firm should also be responsible for managing the development and implementation of its internal policies on avoiding and disclosing conflicts of interest.
- **Website disclosure.** The Policy contains a recommendation that proxy advisory firms publish certain information on their websites. The CSA indicates that this information would typically include the firm's policy on hiring, retaining and training individuals to ensure that they have the appropriate experience, competencies, skills and knowledge to prepare vote recommendations and proxy voting guidelines.
- **Proxy voting guidelines.** A provision was added in the Policy recommending that proxy advisory firms adopt an internal policy whereby the firm evaluates the size, industry and governance structure of an issuer before providing proxy voting guidelines.
- **Sources and methodologies.** Finally, the Policy was amended to provide that proxy advisory firms should include in their voting recommendation reports all sources of information used and specify which methodologies were adopted for its report.

Although there remain critics who believe the CSA's Policy does not go far enough in regulating proxy advisory firms, we do not expect the CSA to tighten its regulation in this area.

9. Proxy Voting Reform Initiative and Developments

The problems with the proxy voting system in Canada have been discussed for a number of years. In 2010, we published the Davies paper The Quality of the Shareholder Vote in Canada, which brought attention to the complex and opaque system through which shareholders cast their votes at shareholders' meetings.[31]

In August 2013, the CSA issued a consultation paper reviewing the proxy voting infrastructure and outlining a proposed approach to address the identified concerns. Between January and March 2014, the CSA conducted roundtable discussions held at various securities regulators. Details of the OSC roundtable discussion and concerns raised are set out in our *Davies Governance Insights 2014*. Subsequent to the consultation period and roundtable discussions, the CSA conducted a qualitative review of six uncontested shareholders' meetings, formed a technical working group and engaged in targeted consultations with certain stakeholders.

In January 2015, the CSA released Staff Notice 54-303 *Progress Report on Review of the Proxy Voting Infrastructure* detailing progress that the CSA has made in its review of the proxy voting infrastructure and outlining next steps for reform. The review's findings confirm that the current proxy voting infrastructure is "fragmented" and needs to be modernized and improved. The progress report identifies five improvements needed to the vote reconciliation process, some of which have been discussed in our prior reports:

- modernizing the way meeting tabulators receive omnibus proxies;
- ensuring that the information that meeting tabulators receive is accurate and complete;
- enabling each intermediary that submits proxy votes on behalf of clients to find out how many shares a meeting tabulator has determined that the intermediary is entitled to vote (its Official Vote Entitlement);
- increasing consistency in how meeting tabulators reconcile proxy votes submitted by intermediaries to Official Vote Entitlements; and
- establishing communication between meeting tabulators and intermediaries about whether proxy votes are accepted, rejected or prorated.

For the 2016 proxy season, the CSA is directing the key entities involved in vote reconciliation to develop appropriate industry protocols that, at a minimum,

31 http://www.dwpv.com/en/Resources/Publications/2010/Discussion-Paper-The-Quality-of-the-Shareholder-Vote-in-Canada.

address the five required improvements. The CSA will continue to take a leadership role by overseeing the development of these protocols and states that it may consider mandating aspects of these protocols or regulating entities in the proxy voting infrastructure as necessary.

10. Trends in 2015 Proxy Contests

31

PROXY CONTESTS INVOLVING CANADIAN COMPANIES

During the last 12 months to September 2015, there have been 31 proxy contests involving Canadian companies, up slightly from the comparable period in 2014. The majority of these (19 proxy contests) involved smaller issuers with market capitalizations under $100 million, eight involved mid-sized issuers with market capitalizations over $100 million but under $1 billion, and only four involved issuers with market capitalizations over $1 billion.

Of the four contests targeting large cap issuers, two were in the oil and gas industry: Gran Tierra Energy in which West Face Capital, a 9.8% shareholder, successfully campaigned to nominate a majority of the members of the board; and Pacific Rubiales Energy in which O'Hara Administration Co., a 19% shareholder, successfully campaigned to have shareholders oppose the acquisition of Pacific Rubiales by a Harbour Energy/ALFA, s.a.b. joint venture.

The other two large cap contests were part of the ongoing battles for control of Central Gold Fund of Canada and Silver Bullion Trust. Initially, Polar Securities commenced an unsuccessful proxy contest to replace the board of Central Gold Trust, a gold depositary issuer, and obtain unitholder approval to amend its redemption rules. Polar Securities also commenced an unsuccessful proxy contest to replace a majority of the board of Silver Bullion Trust, a mid-cap silver depositary managed by a group related to Central Gold's management. Subsequently, Sprott Asset Management made acquisition proposals and, as part of its acquisition proposals, initiated proxy contests for each of Central Gold Trust and Silver Bullion Trust. Sprott Asset Management also initiated a proxy contest to replace the board of Central Fund of Canada, a large cap precious metal depositary issuer with a dual-class share structure and related management. Sprott submitted a shareholder requisition that was contested in court in Alberta and ruled to be invalid on the basis that the Class A non-voting shares held by the requisitioning shareholders did not encompass the calling of a shareholders' meeting or voting on the matters sought to be considered at such meeting. At the time of writing, it is still to be determined whether Sprott Asset Management will be successful in acquiring control of these issuers.

Of the eight proxy contests involving mid-cap issuers, one-half were in the energy sector, with the balance consisting of one proxy contest in each of the software, hotel, media and mining industries. In three of the four contests regarding mid-cap energy companies, the dissidents sought less than majority representation on the board (proposing reconstituted boards in some cases) and were successful. In the fourth, FrontFour Capital Group sought the complete replacement of the board of Legacy Oil & Gas, but was pre-empted by the agreed acquisition of Legacy by Crescent Point Energy.

In each of the four remaining mid-cap proxy contests, dissidents sought and successfully obtained partial, but less than majority, board representation.

As outlined above, there were 19 proxy contests involving issuers with market capitalizations under $100 million, so it is among the smaller cap issuers that proxy contests are most frequent. Among issuers of this size, contests appear to be growing in frequency in contrast to large cap issuers among which proxy contests are relatively rare. Of the 19 contests involving small cap issuers, 11 were in the mining sector, three involved oil and gas companies, two in environmental services and one in each of the bullion depositary, technology and real estate industries. In 11 of the 19 small cap contests, the board won; in four, the dissident won; two resulted in effective draws; and two remain unresolved at this point.

Perhaps unsurprisingly and consistent with last year, we see that the majority of proxy contests in the current market cycle are occurring in the energy and mining sectors, in which depressed product pricing over an extended period has left share prices low and investors unhappy but unwilling to sell. In these cases, proxy contests pushing for board reconstitution and refurbishment of strategic plans are obvious alternatives to M&A transactions for shareholders to consider as a means to improve share price performance. We also observe a trend in dissident shareholders more often seeking minority board representation (as opposed to contests for a majority of board seats), and enjoying greater success when they do so. In large part, this is as a result of boards' increased willingness to engage and compromise with dissident shareholders seeking minority representation. Looking forward, we anticipate a continued evolution of proxy contests in Canada, though at the fairly modest levels seen in the past two years.

The majority of proxy contests in the current market cycle are occurring in the energy and mining sectors.

04 Selected Issues in Board Risk Management

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Selected Issues in Board Risk Management

1. Risk Management

Overseeing risk management remains at the forefront of a public company board's responsibilities. It continues to be a high priority for institutional investors and proxy advisory firms. A PricewaterhouseCoopers survey report issued in 2014 in the United States indicated that risk management remains a top priority for investors, and a 2014-2015 National Association of Corporate Directors survey showed that risk oversight is one of the most commonly discussed issues with institutional investors. The 2015 Canada Proxy Voting Guidelines of Institutional Shareholder Services Inc. (ISS) specifically consider risk-management practices when recommending whether to withhold votes in an uncontested director election. To illustrate, when Walmart was undergoing a foreign corrupt practices investigation, ISS recommended voting against the chairman, CEO and audit committee chair because of the board's failure to adequately communicate material risk factors to shareholders and to reassure shareholders that the board was exercising proper oversight and would hold executives accountable if appropriate.

Directors are responsible for obtaining reasonable assurance that senior management has identified the company's principal risks and put in place appropriate risk-management policies and procedures.

The board's responsibility for risk management derives largely from directors' corporate law fiduciary duties, provincial securities laws and regulations, stock exchange requirements and best practices.

Courts in the United States are well attuned to the relationship between effective risk-management controls and the fiduciary duties of directors. These courts are increasingly imposing liability on directors who fail to oversee management's implementation of reasonable safeguards to mitigate identified risks or who fail to consider significant risk factors altogether.[32] Although Delaware courts have imposed a high burden for establishing liability, judicial recognition that directors have a duty to oversee risk-management practices is a powerful accountability tool for investors and may increasingly come into play in the Canadian context.

To be clear, directors are not responsible for day-to-day risk management. Instead, they are responsible for obtaining reasonable assurance that senior management has identified the company's principal risks and put in place appropriate risk-management policies and procedures that are consistent with the company's risk appetite. Risk-oversight responsibilities should be divided appropriately between the board as a whole and board committees. Risks, which vary by company and industry, include operational risks, geopolitical risks, corrupt practices risks, economic and market risks and disclosure risks.

32 Wachtell, Lipton, Rosen & Katz, "Risk Management and the Board of Directors", *Harvard Law School Forum on Corporate Governance and Financial Regulation* (July 28, 2015), available at: http://www.wlrk.com/webdocs/wlrknew/AttorneyPubs/WLRK.24301.15.pdf.

04

Selected Issues in Board Risk Management

DISCLOSURE RISK MANAGEMENT

In respect of disclosure risks, a public company board is responsible for ensuring that the company discloses material information to the market that is accurate, timely, consistent and broadly disseminated.

Securities laws require public companies to promptly disclose both material facts and material changes. A material fact is a fact (whether external or internal) that would reasonably be expected to have a significant effect on the share price. A material change is a change in the business, operations or capital (internal events only) that would reasonably be expected to have a significant effect on share price. Securities laws prohibit selective disclosure.

> Given the heightened threat of securities class actions and other risks, public company boards should make disclosure risk management a priority.

A board is responsible for obtaining reasonable assurance that senior management has established robust disclosure procedures and practices to avoid inconsistent, inaccurate, stale or selective disclosure of material information. The board (and/or its committees) will also typically be responsible for reviewing and approving most material public filings before they are made, placing disclosure risks squarely within their oversight.

Given the heightened threat of securities class actions in Canada and well as other risks discussed in the next section, public company boards would be well advised to make the management of disclosure risk a priority.

Risk from Poor Disclosure Practices

Risks associated with poor disclosure practices and procedures include the following:

- continuous disclosure review by securities regulators, which can delay the ability to obtain financing and lead to enforcement action by securities regulators;
- reputational damage and loss of shareholder confidence and market credibility;
- insider trading allegations; and
- securities class actions for alleged misrepresentations under the *Securities Act* (Ontario) (OSA).

THE RISE IN SECURITIES CLASS ACTIONS

Securities class actions, and particularly those based on alleged misrepresentations in secondary market disclosure, are a growing concern for public companies in Canada. For example, under the OSA, public companies together with their directors and officers may be held liable for misrepresentations in secondary market public documents (including management's discussion and analysis (MD&A), annual information form (AIF), financial statements and press releases) as well as in public oral statements.

According to data collected by NERA Economic Consulting,[33] 11 new securities class actions were filed in 2014, equal to the number of new cases filed in 2013, and consistent with the average number of new cases filed per year (11.4 cases) over the preceding five years, 2009 to 2013. In each of 2013 and 2014, 10 of the 11 new actions were statutory secondary market misrepresentation claims. As of December 31, 2014, there were 60 unresolved securities class actions in Canada and the aggregate amount of damages sought was more than $35 billion. Of those 60 class actions, 38 involved statutory secondary market misrepresentation claims. The aggregate amount of damages sought in those cases was more than $32 billion, or about 91% of the total outstanding claims.

From 2006 until the end of 2014, 22 statutory secondary market misrepresentation cases were settled, in whole or in part, for an aggregate amount of more than $345 million.[34] In the same period, only three (5%) have been dismissed by the courts.

In 2014, six Canadian securities class actions were settled or tentatively settled, with defendants in these cases agreeing to pay a total of approximately $38.4 million. Five of these settlements were secondary market cases, with an average settlement amount of $5.7 million.

Companies in the mining and oil and gas sectors continue to account for a substantial share of new claims filed. For example, seven out of 11 new filings in 2014 (64%) involved companies in the energy and mining sectors.

The number of securities class actions initiated in 2015 is lower than in previous years, which may partly be due to recent carriage fights among plaintiff law firms, as well as recent court decisions unfavourable to plaintiffs. However, we expect that securities class actions will continue to be a material part of the landscape for Canadian public companies. Accordingly, it would be prudent for Canadian boards to ensure that appropriate policies and procedures are in place to mitigate this risk.

Alleged misrepresentations in unresolved secondary market securities class actions against public companies and their directors and officers have included the following issues:

- inadequacy of internal controls;

60

UNRESOLVED SECURITIES CLASS ACTIONS IN CANADA AS OF DECEMBER 31, 2014

Over $35 billion

AGGREGATE AMOUNT OF DAMAGES SOUGHT

33 Bradley A. Heys, Mark L. Berenblut and Jacob Dwhytie, *Trends in Canadian Securities Class Actions: 2014 Update — The Docket Continues to Grow as New Filings Outpace Settlements* (February 10, 2015) [the NERA Report]. The data provided in this section have been taken from the NERA Report.

34 This includes partial settlements in the action involving Sino-Forest.

- non-compliance of financial statements with generally accepted accounting principles;
- non-compliance with the company's code of ethics and business conduct;
- non-compliance with environmental regulations;
- inaccurate estimated capital costs and expected production date of mining project; and
- concerns regarding accounting practices and financial reporting.

ROBUST DISCLOSURE PROCEDURES

Despite a downturn in securities class action filings in 2015, the threat of securities class action claims remains very real. To address this threat and boards' duties to oversee disclosure risk management, boards should obtain reasonable assurance that senior management and risk officers have established robust disclosure practices and procedures that are consistent with best practices. We discuss a number of best practices below.

Establish a Written Corporate Disclosure Policy

Issuers should consider adopting a written corporate disclosure policy, in accordance with National Policy 51-201 *Disclosure Standards*. The policy should be reviewed and approved by the board of directors and distributed widely to officers and employees. A written policy can assist in setting out a common understanding of the disclosure process and promoting compliance within the company.

59

TSX 60 ISSUERS WITH WRITTEN DISCLOSURE POLICIES

In our survey of market practices for this report, we found that 59 issuers on the TSX 60 indicated in their public disclosure that they have written disclosure policies of some form. Just under half of these issuers (28) have made their disclosure policies publicly available. Of these issuers, the majority (19 issuers, or 68%) have published stand-alone disclosure policies, and the remaining nine issuers combined their disclosure policies with an insider trading policy or a code of conduct.

Irrespective of the approach that companies may take in their disclosure policies and the details therein, management and their boards should consider the following matters when drafting their disclosure policies:

- how to decide and who decides what is material information;
- a policy on reviewing analyst reports;
- how to release earnings announcements and conduct related to analyst calls and meetings;

- how to conduct meetings with investors and the media;
- what to say and not to say at industry conferences;
- proper use of electronic media and the corporate website;
- the use of forecasts, projections and other forward-looking information;
- procedures for reviewing briefings and discussions with analysts, institutional investors and other market professionals;
- response plans for unintentional selective disclosures and market rumours;
- what to include in a policy on trading restrictions; and
- policy on "quiet periods" or "blackouts".

Strike a Management-Level Disclosure Committee

Issuers should consider striking a management-level disclosure committee that is responsible for implementing disclosure practices in accordance with the company's disclosure policy. The disclosure committee's mandate would also include reviewing and authorizing disclosure (whether electronic, written or oral) in advance of its public release and monitoring the corporate website.

In our survey of market practices, over two-thirds (41) of the issuers on the TSX 60 publicly disclosed that they have disclosure committees. Four other issuers have publicly disclosed in previous years' disclosure that they have disclosure committees, and presumably those issuers have maintained their disclosure committees even though this fact was not included in their 2015 disclosure. The remaining 15 issuers have not disclosed whether they have disclosure committees.

Of the 45 issuers that disclosed that they have disclosure committees, 15 (33%) also disclosed a mandate for those committees. Eight such issuers (53%) set out their mandates within the disclosure policy; three issuers (20%) appended mandates to their disclosure policies; and four issuers (27%) briefly described disclosure committee responsibilities as a part of their disclosure policies.

Half of the issuers on the TSX 60 also disclosed the composition of their disclosure committees. For 29 of these 30 issuers, the disclosure committees comprise only senior officers and employees. One issuer's disclosure committee includes an independent director (the chair of its audit committee), according to its 2007 disclosure. The composition of this issuer's disclosure committee is not referenced in its 2015 disclosure.

Practices vary on the CEO's membership on the disclosure committee. In addition to the CFO and chief legal officer and/or chief compliance officer, other senior financial officers (such as the controller) and the officer responsible for investor relations are often on the disclosure committee.

Ensure Rigorous Information Systems and Meaningful Discussion of Materiality

It is essential that the disclosure committee, or others charged with responsibility for disclosure, be fully apprised of all material corporate developments in order to determine whether there is information that should be publicly disclosed and what the appropriate timing is for release of that information. The board should ensure that clear internal procedures are in place to facilitate information flow from operations to personnel charged with making disclosure decisions — and that the procedures are followed.

It is important to ensure that the disclosure committee is kept apprised of material information relating to the company throughout the year, but it is particularly important when annual or quarterly financial statements and MD&A or the company's AIF are being prepared. In this regard, the disclosure committee should have ongoing discussions or meetings about potentially material information. The committee should also meet or have discussions during the preparation of news releases and quarterly and annual disclosures.

Boilerplate disclosure should be avoided, and robust and specific risk factors should be disclosed in the AIF, prospectuses and the forward-looking information disclaimer. Directors should also be provided with an opportunity to review and discuss news releases and other financial disclosures prior to their release.

Designate Spokespersons and Control the Message

The CEO should designate a limited number of spokespersons to be responsible for communication with the media, investors and analysts. Spokespersons should be senior members of management and be aware of analysts' reports relating to the company.

Limiting the number of designated spokespersons reduces the risk of unauthorized disclosures, inconsistent statements by different people in the company and statements that are inconsistent with the public disclosure record of the company, as well as disclosures to some but not all investors that might offend principles of fair disclosure.

In this regard, the company should consider written Q&A scripts for designated spokespersons for meetings with media, investors and analysts. The spokesperson should exercise caution in one-on-one meetings and marketing meetings to avoid selective disclosure.

Actively Manage Electronic Communications

Although electronic communications are viewed as an extension of a company's formal disclosure record, disclosure on the corporation's website does not generally constitute legally adequate disclosure of information that is considered material. Any disclosures of material information on a website should therefore be accompanied by a news release.

The chief legal officer should approve all links from a corporation's website to third-party websites and should be responsible for responses to electronic inquiries. Only public information or information that could otherwise be disclosed in accordance with the disclosure policy should be used in response to electronic inquiries. Companies should prohibit or carefully regulate employees' participation in Internet chat rooms, bulletin boards or newsgroup discussions on matters pertaining to the company's activities or its securities.

CONCLUSION

The consistent application of best practices in the disclosure of material information will enhance a company's credibility with investors and analysts, and minimize the risk of non-compliance with securities laws.

Corporate disclosure practices should recognize that there are often countervailing issues and interests at play in determining the best timing and scope for disclosing material events. There may be circumstances in which delaying disclosure of a material event is desirable out of concern that the full facts or consequences are not yet known, or that time or intervening events may resolve or mitigate the impact. Decisions in this area can be difficult. Consider, for example, as discussed under "Bridging the Cyber Confidence Gap" below, the situation in which an issuer faces a potentially significant cybersecurity breach whose full impact is not yet known.

When in doubt, outside counsel should be consulted on technical disclosure issues and tough judgment calls on materiality, as well as for a benchmark of an issuer's disclosure policy and practices against best practices.

The consistent application of best practices in the disclosure of material information will enhance a company's credibility with investors and analysts, and minimize the risk of non-compliance with securities laws.

2. Leading-Edge Practices in Governing Subsidiaries

Recent legal proceedings in which Canadian courts have been asked to hold parent companies directly liable in negligence for the actions of their subsidiaries suggest that we may be entering a new era of corporate governance in which courts are more willing to look beyond the separate legal personality of parent and subsidiary corporations.[35]

Factors that may be relevant in determining whether a Canadian parent company owes a duty of care to third parties for its subsidiary's conduct include the following:

- ownership and effective control of the subsidiary (*i.e.*, whether or not the subsidiary is wholly owned);
- the degree of control exercised by the parent over the situation giving rise to potential liability;
- assumptions of responsibility by the parent regarding the situation giving rise to potential liability;
- public representations by the parent regarding its relationship with the subsidiary;
- employment by the parent, rather than the subsidiary, of the individuals responsible for the subsidiary's activities; and
- adoption of policies by the parent that apply to its subsidiary.

Courts are more willing to look beyond the separate legal personality of parent and subsidiary corporations.

Against this backdrop, it is critical that parent and subsidiary corporations strategically develop leading-edge governance structures, policies and practices to address this new risk. Below we discuss a number of key governance issues relevant to the parent-subsidiary relationship and potential parent company liability.

TO WHOM DO SUBSIDIARY BOARD DIRECTORS OWE A FIDUCIARY DUTY?

Under Canadian corporate law, directors of a subsidiary owe a fiduciary duty to act in the best interests of the subsidiary company. This is despite the fact that nomination decisions are often made by the parent and that subsidiary directors may be officers and employees of the parent. Complex governance issues arise when the best interests of a subsidiary diverge from those of a parent – for example, when the subsidiary's stakeholders include not just the parent shareholder but also creditors and minority shareholders, if the subsidiary is not wholly owned by the parent. In this context, the interests of the subsidiary's

35 *Garcia v Tahoe Resources Inc.* (file opened 18 June 2014), Vancouver, 144726 (BCSC); *Araya v Nevsun Resources Ltd.*, 2015 BCSC 1209. See also our presentation "Parent Company Liability in Tort for the Actions of Foreign Subsidiaries", available at: http://www.dwpv.com/~/media/Files/Davies_Academy_EN/2015/Davies-Academy-2015-06-17.ashx?la=en. See also our bulletin on the Supreme Court of Canada's decision *Chevron Corp. v Yaiguaje*, 2015 SCC 42, available at: http://www.dwpv.com/en/Resources/Publications/2015/Supreme-Court-of-Canada-Rules-in-Chevron-Corp-v-Yaiguaje.

creditors or minority shareholders may need to be considered — for example, in decisions relating to intercorporate transfer pricing arrangements or when one of the companies faces financial distress. In such situations, officers and directors of a subsidiary should take care to ensure that they clearly delineate and separate their duties and responsibilities in respect of the subsidiary and the parent. Further, corporate records and minutes should reflect that the subsidiary board considered the particular impact of a corporate transaction or contract on the subsidiary and was not merely subservient to the requests of the parent's board or advisers.

WHAT FACTORS SHOULD BE CONSIDERED WHEN CREATING NEW SUBSIDIARIES?

There should be compelling reasons for creating a new subsidiary. Parent corporations should consider implementing a written policy and approval process governing the creation of new subsidiaries, including approval by a senior officer of the parent, where appropriate. Choice of jurisdiction for incorporation of a new subsidiary will be driven by business considerations, regulatory requirements and tax considerations.

WHAT FACTORS SHOULD BE CONSIDERED WHEN NOMINATING SUBSIDIARY DIRECTORS?

Although external directors may be members of subsidiary boards when required by law or encouraged as a best practice, most subsidiary boards comprise management directors who are senior officers of the parent or another subsidiary. Best practices for major subsidiary boards to consider may include the following:

- setting up a structure and process to identify necessary skills, qualifications and competencies required of subsidiary board members;
- separating the chair of the subsidiary board from the president of the subsidiary corporation (the chair may be a senior officer from another business line or geographic region);
- appointing subsidiary board directors from other business lines or geographic regions rather than employees from the revenue-generating operations of the subsidiary itself; and
- appointing board members who are resident in the jurisdiction where the subsidiary is incorporated.

Interlocking or mirror boards may provide some efficiencies when a parent is a holding company and a subsidiary is an operating entity. However, directors who serve on both boards must be aware that lack of independence can be relevant in tax considerations and can give rise to potential conflicts and increased risk of parent liability for the subsidiary's conduct.

HOW MUCH DIRECTION AND OVERSIGHT SHOULD A PARENT CORPORATION EXERCISE OVER ITS SUBSIDIARIES?

A parent needs to assess and implement the appropriate level of oversight it should exercise over its subsidiaries, which will vary depending on the particular circumstances. The following issues need to be considered:

- **Local versus enterprise-wide corporate policies.** Although enterprise-wide corporate policies implemented by a parent are designed to promote corporate coherence and operational efficiency, they may also accentuate legal risk. Subsidiaries should ensure that they independently evaluate and consider the impact of enterprise-wide policies on them before adoption. Subsidiaries should have the latitude to make changes, as appropriate, to reflect their operational needs and to comply with the local jurisdiction's legal rules and local context. Implementation should be carried out by the subsidiary itself.
- **Centralized versus decentralized compliance, regulatory filings and record-keeping.** In large organizations, the logistics associated with overseeing a large number of subsidiaries can present a formidable challenge. Parents should evaluate the need for and extent of a centralized system for compliance, regulatory filings and record-keeping, in addition to any systems implemented at the subsidiary level. A centralized system allows a parent corporation to better monitor, evaluate and address trends and risks at the enterprise-wide level. However, to minimize parent liability exposure, a centralized system should be for oversight purposes only; the subsidiaries should directly ensure compliance.

WHERE IS THE LOCATION OF THE MIND AND MANAGEMENT OF THE SUBSIDIARY CORPORATION?

A subsidiary will need to comply with director residency requirements under the corporate law, if any, of the jurisdiction where the subsidiary is incorporated. Local regulators often wish to see that the "mind and management" of the subsidiary is in the local jurisdiction and want to ensure that the subsidiary is making decisions in the local jurisdiction. In addition, for Canadian tax purposes, the residence of a corporation will generally be located where mind and management is exercised. This is typically where the board carries out its functions. However, if the facts suggest that a Canadian parent corporation is making the key decisions regarding its foreign subsidiary's business and the subsidiary board does not review and fully consider the parent's proposal, the subsidiary may be found to be resident in Canada for tax purposes. Board meetings by conference call and electronic meeting platforms may provide a certain level of efficiency, but may present challenges in respect of the mind and management tests. Best practices may include a corporate requirement that directors of subsidiaries personally attend most (or a certain number of) board meetings in the local jurisdiction and that full minutes of the subsidiary board and records of the subsidiary's business be kept in that jurisdiction — evidencing all the factors that were considered in reaching a particular decision.

The needs of each organization will be different and counsel can be consulted to assist in designing the best approach in any given situation.

3. Bridging the Cyber Confidence Gap

In *Davies Governance Insights 2014*, we discussed the growing risk-management issues relating to cybersecurity and how to protect companies against harmful activities executed through computers, IT systems and/or the Internet. These risks include malicious IT hacking, as well as the unintentional loss or release of proprietary information or the personal information of an issuer's customers. Given the increased dependence by issuers and others on technology, the prospect of cyberattacks or data breaches compromising a company's information, business or reputation continues to be a live issue. Despite these trends, boards of many issuers find themselves challenged to adequately address cybersecurity risk within their broader risk-management mandates.

Studies show a current lack of understanding by boards of cybersecurity risks – the "Cyber Confidence Gap" – exacerbated by evolving digital technologies and technical, often unfamiliar, jargon.

Cybersecurity is an enterprise-wide risk that has risen to prominence (and evolves) so quickly that many boards of directors find they are not well versed in the specific dangers and associated costs it raises. This section outlines the key risks and costs posed by current cybersecurity threats, and aims to better equip directors and senior management with tools to manage these risks and the major drivers of costs associated with breaches.

The National Association of Corporate Directors in the United States has identified an "IT Confidence Gap", also known as the "Cyber Confidence Gap". Cybersecurity issues can be intimidating, involving jargon that is technical and unfamiliar to many directors, particularly if they are unable to devote the time necessary to stay current with rapidly changing technologies along with the plethora of other governance issues placed at their feet. The convergence of a number of technological trends such as the following has exacerbated this gap in recent years: the reliance upon data security; the rise of mobile computing; the need to safeguard customers' data privacy; the use of cloud services; software as a service; social media; and leveraging technology to improve work speed and efficiency. Each of these trends create unique risks that must be managed.

Studies show the impact of these trends on the Cyber Confidence Gap. Corporate Board Member magazine and FTI consulting[36] found that data security was the Number 1 and Number 2 issue that kept directors and general counsel, respectively, awake at night in the United States. This concern is well founded. The following statistics highlight how many companies are unprepared for cybersecurity issues:

- 37% of general counsel found directors effective at cybersecurity oversight.
- 50% of directors were confident that their boards know the right questions to ask management regarding the status and risks of their IT strategy.
- 25% of directors believe their corporations are well shielded against attack by hackers.
- 50% of IT administrators believe their executives have a sub-par understanding of cybersecurity issues.

THE POTENTIAL LONG-TERM COSTS OF CYBERSECURITY BREACHES

Cybersecurity breaches can impose significant, enduring costs and impairment of revenue, especially in certain industries.

Cybersecurity attacks have the potential to adversely affect an organization over the long term. A company's costs can include, in the short term, the costs of legal advice, consultants, notifying customers and funding identity-theft protection services for consumers, distraction for staff and management due to investigations, and lost revenue caused by harm to reputation and loss of trust with customers. Over a longer time horizon, significant costs and damages can stem from lawsuits by aggrieved customers, shareholders, financial institutions and regulatory bodies. Consider the following costs and losses caused by cybersecurity attacks:[37]

- Costs paid averaged US$6 million per breach event in the United States in 2014.
- Lost revenue averaged US$3.3 million per breach event in the United States in 2014.
- Target paid US$148 million until August 2014 for its 2013 breach of approximately 70 million customer records.

36 *Corporate Board Member*, "Law in the Boardroom in 2014 Study" (May 19, 2014), available at: http://www.fticonsulting.com/insights/reports/law-in-the-boardroom-in-2014.

37 Ponemon Institute, "2014 Cost of Data Breach Study: Global Analysis" (May 2014), available at: https://www-01.ibm.com/marketing/iwm/dre/signup?source=ibm-WW_Security_Services&S_PKG=ov34982&S_TACT=C40402FW [2014 Breach Cost Study].

- Home Depot paid US$43 million for its 2014 breach of approximately 40 million customer records.

These costs will be higher for businesses heavily involved with the following:

- critical infrastructure, such as financial institutions, healthcare, utilities, pipelines and capital markets;
- personal and financial information about many customers, including retailers; and
- valuable proprietary technologies, such as software, pharmaceuticals, defence and aerospace.

In these industries, the potential value to a third party of a successful attack can be much higher than for other industries. In response, risk-management efforts of directors and management must be greater.

OVERSEEING THE MANAGEMENT OF CYBERSECURITY RISKS: A BOARD RESPONSIBILITY

Although managing cybersecurity issues is the responsibility of management, as a result of the elevated importance of cybersecurity, it is now very much a board issue. Overseeing the management of cybersecurity risks, like any other risk, falls within a director's statutory and fiduciary obligations owed to the corporation and its stakeholders. However, a recent study suggests that not all boards of North American enterprises are conducting oversight activities:[38]

- 67% of boards rarely or never review cybersecurity roles and responsibilities;
- 56% of boards rarely or never review top level policies; and
- 37% of boards rarely or never review security program assessments.

Directors and senior management are not required to be intimately familiar with the technological issues, but they must act honestly and in good faith with a view to the best interests of the corporation, and exercise the care, diligence and skill that a reasonably prudent person would exercise in comparable circumstances. They will typically be able to rely on the business judgment rule for protection.

In addition, it is important that directors and senior management take into account compliance with securities laws, which in Canada and the United States provide guidance on publicly disclosing material risks facing the issuer, including

Managing cybersecurity risks, like other enterprise risks, is the responsibility of the board. Boards can be held liable for inattention to cybersecurity issues.

38 Carnegie Mellon University CyLab, "Governance of Enterprise Security: CyLab 2012 Report, How Boards & Senior Executives Are Managing Cyber Risks" (May 16, 2012), available at: http://globalcyberrisk.com/wp-content/uploads/2012/08/CMU-GOVERNANCE-RPT-2012-FINAL1.pdf.

cybersecurity risks.[39] Below are some practical steps that boards should consider to manage cybersecurity risks.

Step 1: Equip Directors with Tools to Manage Cybersecurity Risks – Conduct a Census to Establish a Baseline

As a useful starting exercise, directors and executives should think about the following questions when assessing how well they are discharging their duties and whether they are doing enough to protect the enterprise.

- How many breaches has the issuer suffered to date, and how significant have they been?
- Is the issuer at high risk due to (i) its strategic importance; (ii) valuable information or large amounts of consumer financial information on its network; or (iii) being a likely target of a group with the means to carry out a cyberattack?
- Are there programs in place to manage cybersecurity risks and if so, are they effective at doing so?
- What is the most sensitive information in the organization? Where is it stored, both in the network and in which jurisdiction? How is it protected? Who has access, both internally and externally? What obligations are owed by any vendor(s) managing this information or the infrastructure storing and accessing this information?
- If a breach happened today, who would do what? Will this response neutralize the threat? Will the response comply with regulatory obligations in each of the jurisdictions in which the issuer operates?

Additionally, issuers should consider bringing in external consultants to advise on the state of their cybersecurity preparedness and risk-management efforts.

Step 2: Equip Directors with Tools to Manage Cybersecurity Risks – Manage Primary Drivers of Breach-Response Costs

The next step involves targeting the primary drivers of cybersecurity-breach response costs, in order to implement the most appropriate and cost-effective management of cybersecurity risks. As identified by the 2014 Breach Cost Study, the average total breach cost is US$201 per data record (*i.e.*, per customer) breached. Canada was not surveyed. According to that same study, some steps can be more or less effective in reducing the costs associated with a cybersecurity-breach response (assuming an average total breach response

39 2014 Breach Cost Study, *supra* note 37.

cost of US$145 per data record/customer). Outlined below are some of the more effective processes that issuers can implement to reduce the cost of a breach.

- **Implement strong technical safeguards across the enterprise.**

  Using a cybersecurity framework to systematically analyze an organization will help determine whether additional technical safeguards (*i.e.*, firewalls, controlling the access of information, requiring complex passwords, and data encryption) are required. These frameworks can help address governance and management oversight. Two such frameworks were recently promulgated in Canada and the United States for use in critical infrastructure industries.[40] Additionally, issuers should consider having the state of their cybersecurity audited by a credible third party.

- **Prepare a formal breach-response plan, ready to be implemented immediately.**

  Following a data breach, some organizations may be subject to mandatory data-breach notifications, and may face investigations from various regulatory authorities and lawsuits from a multitude of parties.

  Irrespective of whether breach-notification requirements are triggered by securities laws or other specific laws or required for practical purposes, waiting to develop a response plan in the chaos following a breach is fraught with pitfalls and can increase costs. A planned, detailed breach-response plan is recommended to respond in a manner that minimizes costs and the loss of trust of customers, vendors and shareholders.

- **Have the organization's business continuity team provide substantial support following an incident.**

  Following a breach, having a team responsible for business continuity can play an important role in ensuring that the company can conduct business as usual; this team can thus play a leading role in ensuring that the costs of a breach are reduced.

- **Hire and maintain dedicated cybersecurity personnel, such as a chief information security officer.**

  Having one executive-level employee responsible for cybersecurity can help ensure that sufficient resources and management time will be devoted on a level commensurate with the risk facing the issuer.

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40 Office of the Superintendent of Financial Institutions, Cyber Security Self-Assessment Guidance (October 28, 2013), available at: http://www.osfi-bsif.gc.ca/eng/fi-if/in-ai/pages/cbrsk.aspx; U.S. Commerce Department's National Institute of Standards and Technology, Cybersecurity Framework Version 1.0 (February 12, 2014), available at: http://www.nist.gov/cyberframework/upload/cybersecurity-framework-021214.pdf.

Just as the above steps can help reduce the costs of a cybersecurity breach, there are other factors that, if left unattended, can significantly increase the costs to a business of responding to such breaches. Outlined below are some situations in which data breaches may occur, and key steps an issuer can take to try to mitigate those risks and costs.

- **Data breach caused by third-party error.**

  A number of evolving digital technology trends, such as cloud computing and software as a service, involve the storage and/or processing of a company's proprietary or customer information on third-party hardware over which the company may have little to no control. Third-party arrangements can increase the incidence and severity of breaches, and therefore should be carefully structured.

  Being proactive in reviewing cybersecurity controls of, and agreements with, vendors and service providers that interface with an issuer's networks can help mitigate the potentially significant costs that can result from a vendor's action or inaction. An issuer should consider taking the following steps:

  - ensure that it has indemnity for third-party claims caused by the gross negligence, theft or misconduct of the vendor;
  - require that the vendor implement safeguards (*i.e.*, limit access to the issuer's networks); and
  - assess any liability caps on claims against the vendor and possible carve-outs for data breaches.

- **Data breach caused by lost or stolen devices, such as a mobile device, USB data key or laptop.**

  Most high-profile Canadian data breaches have involved inadvertent loss of portable storage devices or laptop computers. As a result, many businesses are increasing their technical safeguards, such as by encrypting the devices or storage disks, as well as using cloud storage services to obviate the need for portable storage devices. These measures can help reduce the risk of a data breach.

- **Premature notification of a data breach.**

  In most cases, issuers will find themselves required to publicly disclose a material cybersecurity breach on a timely basis. However, issuers should be careful not to disclose news of a data breach prematurely after it is discovered; an appropriate amount of time should be taken to ensure that the threat has been removed and preliminary facts about the nature and scope of the breach have been determined.

A formal breach-response plan, prepared in advance with local counsel in compliance with the laws of the jurisdictions in which the company operates, can identify breach-notification requirements and assist with developing optimal notification timelines.

Step 3: Equip Directors with Tools to Bridge the Cyber Confidence Gap — Take Steps to Comprehensively Protect Against Cybersecurity Risk

- **Bridge the Cyber Confidence Gap by tapping into leading governance trends.**

  If the root of an issuer's shortcomings in cybersecurity preparedness is the Cyber Confidence Gap, one solution is to address the factors creating that gap. A solution for many issuers is to tap into the leading governance trend of developing a skills matrix for, and undertaking regular assessments, of the board. This will ensure that directors are a diverse group with expertise spanning the range of issues that are relevant to the issuer.

  For example, issuers with greater exposure to cybersecurity risks could follow the lead of BlackBerry by nominating a cybersecurity expert to their boards. Boards should also consider providing ongoing cybersecurity-related education and bringing in external consultants to provide periodic expertise and counsel.

- **Consider insurance against cybersecurity threats.**

  A cybersecurity breach can occur at any time, and breach-response costs and third-party claims for damages can exceed $100 million in some industries. Consequently, issuers should consider maintaining insurance against these threats. As Sony found out following a 2011 breach of over 70 million customer records when it unsuccessfully tried to rely on its commercial general insurance policy, separate cybersecurity insurance is often required because general policies typically do not cover costs arising from a cybersecurity incident.

  An appropriate policy, with a sufficient level of coverage having regard to the key risks and specific business of the issuer, can be designed with an insurance broker.

- **Use active oversight to manage cybersecurity risks.**

  Lastly, boards or an assigned committee should assume responsibility for cybersecurity risk-management oversight. This can include reviewing cybersecurity and privacy policies to set a culture of security; reviewing related annual budgets, assigned roles, policies, reports on risks and breaches and related insurance policies; and conducting a periodic review and audit of all cybersecurity-related protections, all in coordination with the appropriate management. Active oversight by the board of Wyndham Worldwide Corp. was instrumental in the dismissal of a derivative lawsuit under Delaware law brought against directors and officers following several data breaches by Wyndham Worldwide. This was the first reported case of a derivative lawsuit following a data breach in the United States and Canada.

4. New Developments in Anti-Corruption Investigations

In our 2013 and 2014 *Davies Governance Insights* reports, we discussed important developments under the *Corruption of Foreign Public Officials Act* (CFPOA), Canada's principal legislation combating bribery of foreign public officials in international business transactions. Essentially, the CFPOA prohibits anyone from giving or offering a loan, reward, advantage or benefit of any kind to a foreign public official to obtain a business advantage and as consideration for an act or omission by the official. Although seemingly straightforward on its surface, the legislation is anything but that and has far reaching scope and implications.

For companies and their principals that are found, or even alleged, to be non-compliant, violations of CFPOA can result in serious reputational damage, as well potentially significant legal sanctions, fines, criminal charges and/or jail time. We are also increasingly seeing that violations of CFPOA by Canadian companies can lead to repercussions in jurisdictions outside Canada. We provide in this report an update on some high-profile investigations launched or continuing by the International Anti-Corruption Unit (IACU) of the Royal Canadian Mounted Police (RCMP) under the CFPOA.

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THE ONGOING SNC-LAVALIN INVESTIGATIONS

Since the RCMP launched its investigation in 2011 into the alleged corrupt practices of SNC-Lavalin Group Inc. in Bangladesh and several African countries, SNC-Lavalin and certain of its past executives have faced various implications. Several SNC-Lavalin executives and employees have been charged under the CFPOA, and the company itself, together with over 100 of its affiliates, has been rendered ineligible to be awarded a World Bank–financed contract until 2023.

Most recently, in February 2015 the RCMP laid additional charges against SNC-Lavalin, its division SNC-Lavalin Construction Inc. and its subsidiary SNC-

Lavalin International Inc.[41] The three entities have been charged with one count of corruption under the CFPOA and one count of fraud under the Canadian *Criminal Code*. The alleged criminal acts surfaced as part of the investigation into the company's business dealings in Libya from 2001 to 2011. The charges relate to alleged bribes totalling nearly $48 million. In December 2011, the company's board of directors first learned about the alleged payments and activities of the company's then-CEO and others in the senior management team. The board launched an independent review that was overseen by the audit committee, publicly announced the internal investigation in February 2012 and dismissed the CEO shortly thereafter. In March 2012, SNC-Lavalin turned over all of its findings to the RCMP and the Sûreté du Québec. The internal investigation found that SNC-Lavalin's former executive VP of Construction had hired agents without complying with SNC-Lavalin's policies on, among other things, authorized signatories and limits on fees, and had paid the agents $56 million. The investigation could not determine the identity of the agents, the nature of the services provided or what the payments to the agents were used for.

By September 2012, SNC-Lavalin had overhauled its code of ethics, launched training sessions and required employees and board members to complete annual certification processes. In October 2012, a new CEO was appointed and the company established a chief compliance officer position.

SNC-Lavalin has responded to the RCMP's recent charges by saying that it would vigorously defend itself against the charges and noted that the alleged conduct was committed by employees who had left the company long ago.[42]

MAGINDUSTRIES INVESTIGATIONS

In January 2015, the RCMP obtained a search warrant for the Toronto headquarters of MagIndustries Corp. seeking evidence of major bribes allegedly paid by its subsidiaries to officials in the Republic of Congo.[43] The company controls the US$1.5 billion Magento potash mine project in the Congo.

41 Royal Canadian Mounted Police, National Division Press Release, "RCMP Charges SNC-Lavalin" (February 19, 2015), available at: http://www.rcmp-grc.gc.ca/ottawa/ne-no/pr-cp/2015/0219-lavalin-eng.htm.

42 W. Michael G. Osborne, "SNC-Lavalin charged with foreign corruption offences" (February 20, 2015), *The Litigator* (blog), available at: http://www.thelitigator.ca/2015/02/snc-lavalin-charged-with-foreign-corruption-offences/?utm_source=Mondaq&utm_medium=syndication&utm_campaign=View-Original.

43 Peter Koven, "MagIndustries Corp reveals evidence that subsidiaries allegedly paid major bribes in Republic of Congo", *Financial Post* (June 17, 2015), available at: http://business.financialpost.com/news/mining/magindustries-reveals-evidence-that-company-paid-major-bribes-in-republic-of-congo.

Shortly thereafter, MagIndustries commenced an internal investigation of the allegations.[44] Since then, the company has not filed its financial results, its stock was cease traded and the TSX delisted the company's securities for failure to meet the TSX's continued listing requirements. Moreover, MagIndustries' internal investigation has been halted since the company's controlling shareholder, a Chinese firm named Evergreen Holding Group (Evergreen), refused to put up any money for the investigation. Evergreen is allegedly responsible for some of the bribery. Each MagIndustries director who was working on the investigation has since resigned, the CFO was removed from his duties and the CEO was replaced.

In June 2015, MagIndustries revealed the findings of its investigation to date. Essentially, they suggest that both Evergreen and MagIndustries' subsidiaries bribed Congolese government officials. The bribery allegations involve infractions such as gifts of furniture (including ornamental stone lions), as well as five "black money" payments totalling about US$102,000 to Congolese government officials and the construction of a villa for one official.

The RCMP's investigation is continuing and formal charges have yet to be laid. According to search warrant materials obtained by CBC News, the RCMP believes that four executives within the company, including its former CEO, ignored warnings from Canadian financial advisers and signed off on a string of illegal payments to Congolese officials.[45] Legal experts point out that the central issue for the RCMP is the involvement of Evergreen.

GRIFFITHS ENERGY FACES ADDITIONAL FOREIGN FORFEITURES

We reported in *Davies Governance Insights 2013*[46] that Griffiths Energy International (now Caracal Energy Inc.) (Griffiths) was fined $10.35 million in 2013 for engaging in bribery in violation of the CFPOA. The bribes in question were made through a $2-million consulting agreement with a U.S. company that was wholly owned by the spouse of Chad's ambassador to Canada and the United States; the consulting agreement was contingent on Griffiths successfully securing two petroleum exploration blocks. Bribes were also paid through the issuance of Griffiths shares at a nominal price to the spouse of the Chad ambassador, the spouse of the former deputy chief of mission for Chad in the

44 MagIndustries Corp., News Release, "MagIndustries Announces Formation of Special Committee in Connection with RCMP Investigation" (January 29, 2015), available at: http://www.marketwired.com/press-release/magindustries-announces-formation-special-committee-connection-with-rcmp-investigation-tsx-maa-1987325.htm.

45 Dave Seglins and Pete Evans, "MagIndustries probed by RCMP over bribery allegations in Congo", *CBC News* (May 29, 2015), available at: http://www.cbc.ca/news/business/magindustries-probed-by-rcmp-over-bribery-allegations-in-congo-1.3091035.

46 http://www.dwpv.com/en/Resources/Publications/2013/Davies-Governance-Insights-2013.

United States and another individual. The Crown originally sought forfeiture of those shares as proceeds of crime and "offence related property", but withdrew its applications for forfeiture in 2014. The reasons for that decision were not disclosed.

New developments related to the Griffiths shares implicated in the bribery arose this year. In July 2015, the U.K. High Court upheld a forfeiture order sought by the U.K. Serious Fraud Office at the request of the U.S. Department of Justice (DOJ) against US$6.8 million held in a Royal Bank of Scotland account linked to the sale of the Griffiths shares. The forfeiture order was upheld by the U.K. High Court despite a Canadian court's having previously released a freeze order on the shares. The U.K. High Court stated that because the Canadian court did not consider the merits of the case in releasing the freeze order, its judgment was not binding on U.K. courts. Two civil forfeiture complaints were also filed by the DOJ in 2014 and 2015 for funds in South African and Royal Bank of Scotland accounts, but have not yet resulted in any orders.

ADVICE FOR BOARDS REGARDING CFPOA

The ongoing developments and investigations, both domestic and foreign, in CFPOA cases illustrate the far-reaching implications of allegations and convictions under the Act and corresponding legislation outside Canada. For example, for Griffiths, although the forfeiture proceedings in the United Kingdom and the complaints filed by the DOJ were aimed at the recipients of the bribes, rather than at Griffiths, the reputational consequences of the continued prosecutions are nonetheless serious for the company. That case also highlights how the initiation of proceedings in Canada may not forestall potentially serious implications in other jurisdictions, given the broad-reaching scope of equivalent legislation elsewhere. In addition, many investigations are not publicized by the RCMP because they may have sensitive national and international political implications, yet have the potential to seriously affect the subject companies and their principals.

In light of the increased prevalence of anti-corruption investigations and enforcement in Canada and elsewhere, companies that deal with foreign public officials should implement internal safeguards at all levels of the corporate group to prevent violations of the CFPOA and thus avoid the legal and reputational consequences of being found guilty of a violation. In addition, to help minimize the risks of a CFPOA investigation and its potentially negative consequences, policies and practices implemented as safeguards should be continuously monitored for effectiveness under the supervision of the company's board of directors (or a committee) and regular reports should be received from responsible compliance officers. Moreover, we are increasingly seeing demands for greater disclosure by issuers about their policies pertaining

Policies and practices implemented as anti-corruption safeguards should be continuously monitored for effectiveness under the supervision of the company's board of directors.

to CFPOA compliance, both in their public continuous disclosure materials and in the form of representations and warranties in deal documents. Having a board or committee specifically charged with overseeing compliance in this area will better arm issuers to be responsive to such demands.

05

Changes to Rights Plans, Takeover Bid Amendments and Corporate Law Reform

05
Changes to Rights Plans, Takeover Bid Amendments and Corporate Law Reform

1. Update on Rights Plans and Takeover Bid Amendments

On March 31, 2015, Canadian securities regulators published proposed changes to Canada's harmonized takeover bid rules (the Proposed Bid Amendments) that will significantly alter the way in which unsolicited (or hostile) takeover bids are carried out. The changes, aimed at "rebalancing" the current dynamic between hostile bidders and target boards, will provide target boards with considerably more time to respond to hostile bids. The changes will also impose new requirements on takeover bids that will significantly lessen a hostile bidder's leverage.

The Proposed Bid Amendments, if adopted, will require that all formal takeover bids have the following "50-10-120" features:

- **50% mandatory minimum tender condition.** Bids must be subject to a mandatory tender condition requiring that more than 50% of all outstanding target securities owned or held by persons other than the bidder and its joint actors be tendered before the bidder can take up any securities under the bid. This contrasts with the current takeover bid rules, which do not impose any minimum tender requirements.
- **10-day extension requirement.** A bidder must extend its bid for an additional 10 days once the minimum tender condition and other bid conditions have been met and it announces its intention to take up and pay for securities deposited under the bid. Current takeover bid rules permit, but do not require, a bidder to extend the bid (unless there is an amendment to the bid).
- **120-day bid period.** Bids must remain open for a minimum of 120 days, subject to the ability of the target board to waive, in a non-discriminatory manner when there are multiple bids, the minimum period to no less than 35 days. The 120-day requirement may be waived if (i) the target board states in a news release a shorter deposit period for the bid; or (ii) the target issues a news release stating that it has agreed to enter into, or determined to effect, a specified alternative transaction. The current takeover bid rules require that a bid be open for at least 35 days.

According to the Canadian Securities Administrators (CSA), the Proposed Bid Amendments intend to "enhance the quality and integrity of the takeover bid regime and rebalance the current dynamics among offerors, offeree issuer boards of directors, and offeree security holders by (i) facilitating the ability of offeree issuer security holders to make voluntary, informed and co-ordinated

The "50-10-120" proposed takeover bid amendments will significantly alter the way in which unsolicited takeover bids are carried out and lessen a hostile bidder's leverage.

tender decisions, and (ii) providing the offeree board with additional time and discretion when responding to a takeover bid."

The Proposed Bid Amendments would leave intact the overarching principle of Canadian takeover bid regulation that it is the shareholders, not the directors, who should decide whether a change of control should occur, although the amendments substitute collective shareholder action for individual shareholder decision-making. The amendments will give boards more time and greater leverage to deal with hostile bidders. The CSA has not proposed any changes to its defensive tactics policy. Thus securities regulators would continue to intervene where boards take steps that deprive shareholders of the ability to tender to a bid that otherwise satisfies the new legal requirements.

Although the CSA appears to be maintaining certain central policies, the proposed rule changes represent a reversal of several principles that have been applied by Canadian securities regulators for many years. In effect, the Proposed Bid Amendments mark the following evolution in the CSA's thinking on hostile bids:

- Despite almost three decades of cease trading rights plans after 45 to 70 days following commencement of a hostile bid, the CSA appears to have accepted the view that this approach does not provide sufficient time to conduct a proper auction for a company or generate other superior alternatives.
- Notwithstanding the conclusion of a number of securities regulatory panels that partial bids and bids with waivable (or no) minimum tender conditions (*i.e.*, "any and all" bids) are not coercive to shareholders, the CSA is now proposing to impose an irrevocable minimum tender requirement for all bids that will render any and all bids impossible and partial bids harder to accomplish.

RAMIFICATIONS OF A LONGER BID PERIOD

Many of the ramifications of requiring a longer bid period for hostile bids are obvious and include the following:

- Target boards will have more time to respond to a hostile bid and seek alternatives.
- With a hostile bidder facing the prospect of a four-month wait before its bid can be accepted, the target board will have much greater leverage to negotiate with the hostile bidder, particularly since the target board can reduce the 120-day period to as little as 35 days (the current minimum bid period).

- Speed of execution will cease to be one of the advantages of bypassing the board and going straight to shareholders with an unsolicited bid.
- The automatic availability of a longer bid period to target boards should reduce the need for securities commission intervention in bids.
- Acquirers weighing the costs and benefits of waging a hostile takeover battle will have to budget more time and money and consider the increased likelihood of interlopers emerging before their bid expires.
- Bidders that require financing will need to maintain financing arrangements for a much longer period of time following commencement of the bid.

The CSA's proposals to lengthen the minimum bid period by almost fourfold and the requirement of a mandatory 10-day extension have knock-on effects on other elements of the takeover bid rules.

THE END OF RIGHTS PLANS?

The Proposed Bid Amendments will give target boards more time to seek alternatives to a hostile bid and will effectively require all bids to have common permitted bids features (without the target company having to adopt a rights plan). However, rights plans will continue to be relevant, though for more limited purposes, such as regulating shareholders' accumulation of large positions in a company through transactions that are exempt from the takeover bid rules. The CSA's Proposed Bid Amendments would not change these exemptions as had been recommended by some commentators on the 2013 proposal. As a result, shareholders may still increase their ownership above the statutory 20% threshold by acquiring shares through limited private transactions without triggering the formal takeover bid rules. Adopting a rights plan will continue to be an effective defence against a shareholder increasing its ownership in a company through such exempt acquisitions.

Rights plans will continue to be relevant, although for more limited purposes.

It will be interesting to see whether rights plans could be used to afford a target board additional time after the proposed new 120-day bid period has elapsed or to hold off a bidder indefinitely. Given the much higher hurdles that a bidder will have to cross under the Proposed Bid Amendments, presumably there will be a heavy burden on issuers to demonstrate that it is not "time for a rights plan to go" if a bidder has complied with the new rules.

Against this background, Suncor Energy Inc.'s unsolicited takeover bid for Canadian Oil Sands Limited (COS) initiated in September 2015 takes on particular significance. Following the launch of Suncor's hostile bid, which was made in compliance with the permitted bid requirements of COS's then existing rights plan, COS adopted a second rights plan that would require Suncor to double its 60-day minimum bid period to 120 days or seek an order terminating COS's pill. At the time of writing this report, no draft legislation has been introduced in any of the relevant provincial legislatures to give effect to the Proposed Bid Amendments. If Suncor applies for a cease trade order of COS's rights plan, it will be interesting to see whether the securities regulators reviewing the application will adhere to the jurisprudence they themselves have created over the last 25 years. If so, the effect would be that if no superior offer for COS surfaces after approximately 60 to 75 days, the rights plan should be removed to permit the offer to go through to shareholders. Alternatively, in light of the recommendations in the Proposed Bid Amendments to the takeover legislation, would the regulators conclude not to cease trade a rights plan requiring a bid to remain open for 120 days? Commentators have noted that it is one thing for securities regulators to enforce proposed regulations or policies that they have proposed and are able to bring into force on their own initiative, but have not yet done so; it is quite another to apply their (the regulators') recommended rules that require an act of legislature to amend legislation currently in force but that has not yet been enacted by the relevant legislature.

It is expected that the Proposed Bid Amendments, likely with some minor technical changes, will become law in the first half of 2016.

2. Proposed Amendments to the *Canada Business Corporations Act*

In the 2015 federal budget released in April, the government announced that the 2015 Economic Action Plan would include proposed amendments to the *Canada Business Corporations Act* (CBCA) to promote gender diversity among public companies, using the "comply or explain" model of disclosure (the same model currently required for TSX-listed companies and by most provincial securities regulators and discussed in Chapter 2 of this report). The budget announcement also promised to modernize director-election processes and communications with shareholders. It is likely that these promised modernizations relate to a number of the issues raised by Industry Canada in its December 2013 consultation paper on potential CBCA amendments. The objectives of the consultation were to ensure that the governance framework for CBCA companies remains effective, fosters competitiveness, supports investment and entrepreneurial activity, and instills investor and business confidence.

In addition to the promotion of gender diversity within board and executive ranks of CBCA corporations, the Industry Canada consultation paper also sought consultation on the potential adoption of a majority voting requirement for the election of directors of public companies incorporated under the CBCA and the facilitation of the "notice and access" method for shareholder communications, which is currently not available to CBCA companies. Although the 2015 budget announcement suggested that majority voting and notice-and-access might be implemented through CBCA amendments, no specific legislation to amend the CBCA was subsequently released prior to the August 2, 2015, dissolution of Parliament.

With the defeat of the Conservative government in the October federal election, it remains to be seen whether the new Liberal government will move ahead with the announced CBCA amendments and introduce the amending legislation in the next Parliamentary session. However, given that the proposed amendments resulted from a broad consultation by Industry Canada and involved non-partisan issues, we expect that the new government will continue with Industry Canada's CBCA modernization efforts.

3. Ontario Business Law Reform

In its 2015-2016 provincial budget statement, the Ontario government promised to undertake a sweeping modernization and harmonization of the province's corporate and commercial legislation. In February 2015, the Ontario Minister of Government and Consumer Services named a panel of business law experts and gave them the task of identifying those Ontario statutes most in need of immediate reform. The announcement appears to follow the federal government's proposed plans to amend the federal CBCA to address a range of governance, corporate and commercial matters, discussed above.

In June 2015, after canvassing 19 provincial statutes, the panel issued *Business Law Agenda: Priority Findings and Recommendations Report* (the Report).[47] The Report contains 16 recommendations for reform. Each recommendation focuses on an area in which Ontario was found to be at a competitive disadvantage in attracting and retaining investment and industry to the province when compared with other Canadian and international jurisdictions. The Report has been broadly publicized, and the government established a process of public consultation and commentary that ran to October 16, 2015.

Several of the Report's recommendations address reforms to matters of corporate governance, principally under the *Business Corporations Act* (Ontario) (OBCA), the Ontario equivalent of the CBCA and corresponding provincial corporate statutes. The panel uniformly recommends a general review and updating of the OBCA as a whole, in order to identify and implement

47 See http://www.ontariocanada.com/registry/showAttachment.do?postingId=18942&attachmentId=28451.

changes reflecting technological advancements and legislative and case law developments in Canada, other Commonwealth jurisdictions, the United States and elsewhere. In the panel's opinion, priority should be given to the following reforms:

- facilitating electronic meetings and communications, and removing current legislative barriers to efficient communications (*e.g.*, by dispensing with the need for director consent to telephonic or electronic meetings and with the need for notices to be delivered by prepaid mail);
- providing greater certainty about the duties and liabilities imposed on, and the defences and protections available to, directors and officers – although it is notable that the Report provides no specifics in this regard;
- eliminating Canadian residency requirements for boards of directors (which is described by the panel as an "outdated concept");
- allowing shareholders to determine the composition of boards of directors, including by creating a mechanism allowing shareholders to vote "against" (rather than "withhold" votes from), candidates for election to the board, akin to mandated majority voting;
- modernizing legislative provisions addressing shareholders' rights and remedies by clarifying the position of *beneficial* owners of shares (and, in doing so, recognizing the ubiquity of modern book-based systems of share registration); and
- permitting the incorporation in Ontario of unlimited liability corporations, as is already allowed in Nova Scotia, Alberta and British Columbia.

Each of the panel's recommendations is, of course, subject to further refinement through the public consultation process and during subsequent legislative debate. It is also expected that the proposed reforms to the CBCA may affect the nature and scope of changes ultimately proposed and implemented to the OBCA, particularly as they relate to governance matters.

Appendix

Appendix

As discussed in Chapter 2 of this report, in 2015 we surveyed a random sampling of the disclosures of Canadian issuers on the TSX 60, Composite Index and SmallCap Index. This appendix provides excerpts, taken from our survey, of disclosures found in public documents released during the 2015 proxy season that correspond to the diversity-related disclosure requirements under amended Form 58-101F1 *Corporate Governance Disclosure* (the Disclosure Amendments).

The grey areas contain the text of the applicable Disclosure Amendment under NI 58-101. Examples of TSX-listed issuers' disclosures, taken from the three surveyed TSX indices and a range of industries, are included below the Disclosure Amendment text.

11. *Policies Regarding the Representations of Women on the Board*

    (a) Disclose whether the issuer has adopted a written policy relating to the identification and nomination of women directors. If the issuer has not adopted such a policy, disclose why it has not done so.

    (b) If an issuer has adopted a policy referred to in (a), disclose the following in respect of the policy:

        (i) a short summary of its objectives and key provisions,

        (ii) the measures taken to ensure that the policy has been effectively implemented,

        (iii) annual and cumulative progress by the issuer in achieving the objectives of the policy, and

        (iv) whether and, if so, how the board or its nominating committee measures the effectiveness of the policy.

Type of Issuer	Industry	Disclosure Excerpt
TSX 60	Diversified Real Estate Activities; Financial Services; Real Estate	To achieve the Board's diversity goals, it has adopted the following written policy: Board appointments will be based on merit, having due regard for the benefits of diversity on the Board, so that each nominee possesses the necessary skills, knowledge and experience to serve effectively as a director; In the director identification and selection process diversity on the Board, including gender diversity, will influence succession planning and be a key criterion in adding new members to the Board; and The Board has a gender diversity target of ensuring at least 30% of independent directors are women.

Appendix

Type of Issuer	Industry	Disclosure Excerpt
TSX 60	Financial Services; Insurance	The board believes that a group of highly qualified and experienced directors that reflects the demographic characteristics of the company's key stakeholders produces better corporate governance and decision-making. The board is committed to diversity of all kinds and has adopted a diversity policy that includes provisions relating to the identification and nomination of female directors. The objective of the board's diversity policy is to ensure that the board as a whole possesses diverse characteristics, including a diversity of skills and experience relevant to the company's business, in order to appropriately fulfill its mandate... Effective implementation of the board's diversity policy is the responsibility of the Governance, Nomination & Investment Committee. When recruiting candidates for appointment or election to the Board, the Governance, Nomination & Investment Committee will: ■ develop a preferred candidate profile based on the skills, experience and expertise determined to be best suited to complement the existing directors or fill a need on the board ■ consider the level of diversity on the board based on gender and other criteria such as age, ethnicity and geography, and ■ require a director search firm to identify diverse candidates within the scope of the preferred candidate profile. The Governance, Nomination & Investment Committee will assess the effectiveness of the board's diversity policy by considering the level of diversity on the board based on the factors identified above and whether the target percentage of female directors has been achieved.
TSX 60	Pharmaceuticals	Upon the recommendation of the Nominating and Corporate Governance Committee, the Board has adopted a formal written diversity policy. The objective of the diversity policy is to require the consideration of a wide range of attributes, competencies, characteristics, experiences and background, including the number of women on the Board, when considering the composition of the Board in the director nomination and re-nomination process. The key provisions of the diversity policy emphasize the Company's view about the benefits of diverse backgrounds and the need to consider diversity in evaluating the needs of the Board. The Nominating and Corporate Governance Committee will oversee and annually evaluate the implementation and effectiveness, both as measured annually and cumulatively, of the diversity policy in conjunction with its Board evaluation and nomination process.

Type of Issuer	Industry	Disclosure Excerpt
TSX 60	Industrials; Transportation	On March 10, 2015, the Corporate Governance and Nominating Committee recommended, and the Board approved, a diversity policy for the Board. It provides that the Corporate Governance and Nominating Committee, which is responsible for recommending director nominees to the Board, will consider candidates on merit, based on a balance of skills, background, experience and knowledge. In identifying the highest quality directors, the Committee will take into account diversity considerations such as gender, age and ethnicity, with a view of ensuring that the Board benefits from a broader range of perspectives and relevant experience. The Committee will also set measurable objectives for achieving diversity and recommend them to the Board for adoption on an annual basis. Pursuant to the policy, the Board adopted a target of having a minimum representation of one-third of the Board by women, by 2017. The Board Diversity Policy is available on our [website].
TSX 60	Energy; Oil and Gas	A fundamental belief of [the Company]'s Board is that a Board comprised of women and men representing diverse points of view can add greater value than a Board comprised of directors with similar backgrounds. The Board aims to be comprised of directors who have a range of perspectives, insights and views in relation to the issues affecting [the Company]. This belief in diversity was confirmed in a written Diversity Policy adopted by the Board. The Diversity Policy states that the Board should include individuals from diverse backgrounds, having regard to gender, as well as ethnicity/aboriginal status, age, business experience, professional expertise, personal skills, stakeholder perspectives and geographic background. Accordingly, consideration of the number of women who are directors, along with consideration of whether the other diverse attributes highlighted in the policy are sufficiently represented on the Board, is an important component of the selection process for new members of [the Company]'s Board. The Board has ensured that the Diversity Policy will be effectively implemented by embedding it into its Policy on Directors' Selection Process for New Members (the Selection Process Policy). The Selection Process Policy requires the Governance Committee to conduct periodic assessments to consider the level of representation on the Board of the various attributes enumerated in the Diversity Policy, including the number of women on the Board. The Governance Committee has emphasized the Board's commitment to the recruitment of women in recent years by making the identification of candidates who are women a key search criterion in the director selection and nomination process, including compliance with the Diversity Policy, through the Board's Evaluation Process.

Appendix

Type of Issuer	Industry	Disclosure Excerpt
TSX Composite	Consumer Products	The Company does not have a written policy relating to the identification and nomination of women on the Board of Directors or in executive positions though it considers diversity of race, ethnicity, gender, age, cultural background and professional experience in evaluating candidates for Board membership and appointment to executive positions.
TSX Composite	Banks; Financial Services	In March 2015, the Board approved a new Nomination and Independence Policy that outlined the search and nomination process for new directors. This policy establishes, among other things, the commitment of [the Company] to diversity and inclusiveness in practices around Board nomination. The Board recognizes the benefits of promoting diversity both within [the Company] and at the Board level. In assessing candidates and selecting nominees, the Board considers gender diversity an important factor and as such the Board has set a target that at least three of nine directors will be women by 2020. Following the annual general meeting and assuming that all nominees for director are elected as contemplated in the Circular, one of nine directors (11%) on the Board will be women. The Board has sought to ensure that its commitment to diversity and inclusiveness will be effectively implemented by embedding it into the Nomination and Independence Policy. The Compensation and Nominating Committee (the CNC) will have the opportunity annually to evaluate the effectiveness of the director selection and nomination process, including adherence to its diversity and inclusiveness, through the annual evaluation of the Board.
TSX Composite	Energy Equipment and Services; Oil and Gas Equipment and Services	Our Board has not adopted a written policy relating to the identification and nomination of women directors. Our Board believes that Board nominations should be made on the basis of the skills, knowledge, experience and character of individual candidates and the requirements of our Board at the time. Our company is committed to a meritocracy and believes that considering the broadest group of individuals who have the skills, knowledge, experience and character required to provide the leadership needed to achieve the business objectives of our company, without reference to their age, gender, race, ethnicity or religion, is in the best interests of our company and all of our stakeholders.

Type of Issuer	Industry	Disclosure Excerpt
TSX Composite	Energy; Oil and Gas	The Diversity and Renewal Policy as adopted by our board addresses the identification and nomination of women as directors of the corporation. The main principle of the Diversity and Renewal Policy as adopted by our board is that board nominations should be made on the basis of the skills, knowledge, experience and character of individual candidates and the requirements of the board at the time. [The Company] is committed to a meritocracy and believes that considering the broadest group of individuals who have the skills, knowledge, experience and character required to provide leadership needed to achieve our business objectives, without reference to their gender, is in the best interests of [the Company] and all of our stakeholders. Our board does however, recognize the benefits of diversity within the board and pursuant to the Diversity and Renewal Policy the board encourages the consideration of women who have the necessary skills, knowledge, experience and character when considering new potential candidates for the board. To ensure the effectiveness of Diversity and Renewal Policy, our C&CG Committee will review the number of women considered or brought forward as potential nominees for board positions when the board is looking to add additional members or replace existing members and the skills, knowledge, experience and character of any such women candidates relative to other candidates to ensure that women candidates are being fairly considered relative to other candidates. The C&CG Committee will also review the number of women actually appointed and serving on our board to evaluate whether it is desirable to adopt additional requirements or policies with respect to the diversity of the board.
TSX SmallCap	Paper and Forest Products	The Board is considering implementing a gender diversity policy for its board as contemplated by the amendments of the Canadian Securities Administrators to National Instrument 58-101 - *Disclosure of Corporate Governance Practices*.

Appendix

Type of Issuer	Industry	Disclosure Excerpt
TSX SmallCap	Energy; Oil and Gas	At this time, the Board does not have any female members. While the Board recognizes the potential benefits from new perspectives which could manifest through increased gender diversity within its ranks, the Board has not formally adopted a written board diversity policy and has not set a target regarding the number or percentage of female members that it wishes to include on the Board. The selection of candidates for appointment to the Board will continue to be based on the skills, knowledge, experience and character of individual candidates and the requirements of the Board at the time, with achieving an appropriate level of diversity on the Board being one of the criteria that the Nominating Committee considers when evaluating the composition of the Board.
TSX SmallCap	Energy; Oil and Gas	The Board recognizes the benefits of diversity within the Board and within management of the Corporation and, pursuant to the Diversity and Term Limit Policy, the Board encourages the consideration of the broadest group of individuals representative of the population of individuals generally known to meet the sought after criteria, who have the necessary skills, knowledge, experience and character when considering new potential candidates for the Board. To ensure the effectiveness of Diversity and Term Limit Policy, the Compensation and Corporate Governance Committee will review the number of women considered or brought forward as potential nominees for Board positions and the skills, knowledge, experience and character of any such women candidates relative to other candidates to ensure that women candidates are being fairly considered relative to other candidates. The Compensation and Corporate Governance Committee will also review the number of women actually appointed and serving on the Board to evaluate whether it is desirable to adopt additional requirements or policies with respect to the diversity of the Board in the future.

Type of Issuer	Industry	Disclosure Excerpt
TSX SmallCap	Materials; Metals and Mining	The Board has adopted a Diversity Policy which promotes diversity generally in the workplace by respecting and appreciating differences in gender, age, ethnic origin, religion, education, sexual orientation, political belief or disability, but does not relate to the identification and nomination of women directors specifically… The Company recognizes the benefits arising from Board, management and employee diversity, including broadening the Company's skill sets and experience, accessing different outlooks and perspectives and benefiting from all available talent. The Company does not support the adoption of quotas to support its Diversity Policy. Employees, management and directors will be recruited and promoted based upon their qualifications, abilities and contributions. The Board is committed to fostering a diverse workplace environment where: ■ individual differences and opinions are heard and respected; ■ employment opportunities are based on the qualifications required for a particular position at a particular time, including training, experience, performance, skill and merit; and ■ inappropriate attitudes, behaviors, actions and stereotypes are not tolerated and will be addressed and eliminated. The Board will proactively monitor Company performance in meeting the standards outlined in the Diversity Policy. This will include an annual review of any diversity initiatives established by the Board and progress in achieving them. The Board will consider diversity in the selection criteria of new Board members. In particular, it will seek to have at least one woman candidate for any future director positions. In each Annual Report or Management Proxy Circular, the Company will disclose: ■ the measurable initiatives for achieving diversity set by the Board in accordance with the Diversity Policy and the progress towards achieving them; and ■ the proportion of women at [the Company] as employees, senior management and on the Board.

Type of Issuer	Industry	Disclosure Excerpt
TSX SmallCap	Energy; Oil and Gas	Our Board has not adopted a written policy relating to the identification and nomination of women directors. Our Board believes that Board nominations should be made on the basis of the skills, knowledge, experience and character of individual candidates and the requirements of our Board at the time. Our company is committed to a meritocracy and believes that considering a broad group of individuals who have the skills, knowledge, experience and character required to provide the leadership needed to achieve the business objectives of our company, without reference to their age, gender, race, ethnicity or religion, is in the best interests of our company and all of our stakeholders... Our Compensation, Nominating and Corporate Governance Committee has established a "skills matrix" outlining the skills and experience which they believe are required by the members of our Board. The skills matrix will be reviewed annually by our Committee and updated as necessary.

12. *Consideration of the Representation of Women in the Director Identification and Selection Process* (Manitoba, New Brunswick, Newfoundland and Labrador, Northwest Territories, Nova Scotia, Nunavut, Ontario, Québec and Saskatchewan only) — Disclose whether and, if so, how the board or nominating committee considers the level of representation of women on the board in identifying and nominating candidates for election or reelection to the board. If the issuer does not consider the level of representation of women on the board in identifying and nominating candidates for election or re-election to the board, disclose the issuer's reasons for not doing so.

Type of Issuer	Industry	Disclosure Excerpt
TSX 60	Banks; Financial Services	As provided in our Corporate Governance Guidelines, the corporate governance committee considers diversity (including gender, as well as age, geography, members of minority groups, aboriginal heritage, and persons with disabilities) when reviewing qualified candidates for recommendation for appointment or election to the board. The committee regularly considers board composition and anticipated board vacancies in light of its stated objectives and policies. It also completes a self-assessment measuring, among other things, how it has performed against its objectives.

Type of Issuer	Industry	Disclosure Excerpt
TSX 60	Financial Services; Insurance	The Diversity Policy, which includes provisions relating to the identification and nomination of women directors, provides that in fulfilling its role in recommending to the Board candidates for Director nominations, the members of the Governance and Nominating Committee (a) consider candidates that are highly qualified based on their experience, education, expertise, personal qualities, and general and sector specific knowledge, (b) consider diversity criteria, among other relevant criteria, when determining the optimum composition and balance for the Board, (c) review potential candidates from a variety of backgrounds and perspectives, having in mind the Corporation's diversity objectives, and (d) in order to support the specific objective of gender diversity, ensure that at least one woman is included in the short list of candidates being considered for nomination for a Board position. The Policy provides that the Committee will assess the effectiveness of the Board nomination process in achieving the Corporation's diversity objectives on an annual basis.
TSX Composite	Financial Services; Real Estate	Accordingly, the composition of the Board is intended to reflect a diverse mix of skills, experience, knowledge and backgrounds, including an appropriate number of women trustees… Under the Diversity Policy, when identifying suitable candidates for appointment to the Board, [the Company] considers candidates on merit against objective criteria having due regard to the benefits of diversity and the needs of the Board. Any search firm engaged to assist the Board or the Governance, Compensation and Environmental Committee in identifying candidates for appointment to the Board will be directed to include women candidates and women candidates will be identified from time to time by the Governance, Compensation and Environmental Committee when considering potential Board nominees.

Appendix

Type of Issuer	Industry	Disclosure Excerpt
TSX Composite	Banks; Financial Services	As stated in the Corporation's Statement of Corporate Governance Practices and written diversity policies, the GNC Committee considers diversity (including gender, race, religion, ethnicity, language, sexual orientation, physical ability, geographic representation, age and other personal characteristics) when reviewing qualified candidates for recommendation for appointment or election to the Board. The Corporation has adopted a Board of Directors Diversity Policy that ensures the benefits of diversity, together with skills, background, experience and knowledge, are taken into account when considering candidates for the Board, and which promotes the development of strategies for identifying and attracting women board candidates. Under this Policy, the GNC Committee will take into account the Corporation's overall objectives of increasing diversity, maintaining flexibility to effectively address succession planning, and ensuring that the Corporation continues to attract and retain highly qualified individuals to serve on the Board. The Corporation continues to add women to the evergreen list of candidates for the Board.
TSX SmallCap	Materials; Metal and Mining	In 2014, the Board identified the need for increased gender diversity on the Board and, as a direct result thereof, limited their search for an additional Board member to women candidates who had certain strengths, skills and experience which the Board believed would enrich the Board. In June 2014, this resulted in the appointment of the Company's first woman Director. As a result of [her] appointment, women represent approximately 16.7% of the Company's Directors.

13. *Consideration Given to the Representation of Women in Executive Officer Appointments* (Manitoba, New Brunswick, Newfoundland and Labrador, Northwest Territories, Nova Scotia, Nunavut, Ontario, Québec and Saskatchewan only — Disclose whether and, if so, how the issuer considers the level of representation of women in executive officer positions when making executive officer appointments. If the issuer does not consider the level of representation of women in executive officer positions when making executive officer appointments, disclose the issuer's reasons for not doing so.)

Type of Issuer	Industry	Disclosure Excerpt
TSX 60	Real Estate; Financial Services;	Executive officer appointments are solely based on merit, and not on other factors because management and the Board believe that merit should be the guiding factor in determining whether a particular candidate could bring value to the Corporation.
TSX 60	Banks; Financial Services	Our representation goals for women do not explicitly focus on our executive officer positions; however, our overall company goal creates a healthy feeder pool that supports planning and succession strategies at the most senior levels of the Bank. This focus allows us to ensure the continued growth of women among our senior leadership ranks.
TSX 60	Mobile Data Services; Telecommunication Services	In its consideration of potential candidates for executive officer positions management takes into account gender diversity, recognizing the benefits of having a management team representing different perspectives…In October 2014, the Board approved a People Plan in which a commitment was made to execute a Diversity and Inclusion Plan (the D&I Plan)…The D&I Plan will be used to determine and monitor goals at the executive and other management levels, reflecting the Company's commitment to fostering an inclusive environment where all employees can reach their full potential.
TSX Composite	Energy; Energy and Equipment Services	[The Company] believes that all executive officer candidates should be selected based on their character, business experience, expertise, integrity and business acumen among other factors. [The Company] hires and promotes based on these criteria, regardless of gender. [The Company] has not developed a policy that specifies representation of either gender in executive officer appointments.

Appendix

Type of Issuer	Industry	Disclosure Excerpt
TSX Composite	Diversified Financial Services; Security and Commodity Exchanges	[The Company] considers the level of representation of women in executive officer positions when making executive officer appointments… To this end, executive positions are monitored for the number of women in these roles and reviewed with the [the Company] Board on at least an annual basis. Our succession planning process includes a review of women in senior roles and the overall balance of our successor pools with respect to gender in order to grow and develop future leaders now. Where necessary, we will amend or create roles to accommodate the development of a succession candidate from a designated group. When an opportunity arises to appoint an executive we actively pursue and consider a full slate of candidates that includes a representative number of women. Whenever significant gaps in representation compared with the qualified external talent pool are found, [the Company] will develop and execute plans to address the gaps.
TSX SmallCap	Energy; Oil and Gas	The Board has not adopted any policies that specifically address the appointment of female officers of [the Company]. The Board believes that executive officer appointments should be made on the basis of the skills, knowledge, experience and character of individual candidates and the requirements of management at the time. [The Company] believes that considering the broadest group of individuals is required to provide the leadership needed to achieve the Company's business objectives and, accordingly, the level of women in executive officer positions is not considered when making executive officer appointments.
TSX SmallCap	Materials; Metal and Mining	In addition, the Board is responsible for the approval of all executive officer appointments and works closely with management to identify the most qualified candidates. Although the Company does not currently have any women in senior executive officer positions (representing zero percent), the Company believes in the value of gender diversification on both the Board and in senior management and will review potential nominees for election as Directors and candidates for senior management positions to ensure that women candidates are being fairly considered against other candidates. The proportion of women in the Company's workforce is growing. With the continued support of the Board and management, the Company expects this trend to continue in the years ahead. The Company remains actively committed to pursuing and developing ongoing diversity initiatives at the Company.

14. *Issuer's Targets Regarding the Representation of Women on the Board and in Executive Officer Positions* (Manitoba, New Brunswick, Newfoundland and Labrador, Northwest Territories, Nova Scotia, Nunavut, Ontario, Québec and Saskatchewan only)

(a) For purposes of this Item, a "target" means a number or percentage, or a range of numbers or percentages, adopted by the issuer of women on the issuer's board or in executive officer positions of the issuer by a specific date.

(b) Disclose whether the issuer has adopted a target regarding women on the issuer's board. If the issuer has not adopted a target, disclose why it has not done so.

(c) Disclose whether the issuer has adopted a target regarding women in executive officer positions of the issuer. If the issuer has not adopted a target, disclose why it has not done so.

(d) If the issuer has adopted a target referred to in either (b) or (c), disclose:

(i) the target, and

(ii) the annual and cumulative progress of the issuer in achieving the target.

Type of Issuer	**Industry**	**Disclosure Excerpt**
TSX 60	Financial Services; Insurance	The Corporation has not adopted a target regarding women on the Board as the Board believes that such an arbitrary target would not be in the best interests of the Corporation. (Note: Same stance on a target regarding women in executive officer positions.)
TSX 60	Pharmaceuticals	The Company has not established a specific target number or date by which to achieve a specific number of women on the Board, as we consider a multitude of factors in determining the best nominee at the time and consider the Company's objectives and challenges at such time...Among other factors, the Talent and Compensation Committee considers the level of representation of women in executive officer and managerial positions when making appointments and considering succession planning; however, the Company does not have a specific target number or date by which to achieve a specific number of women, as it considers a multitude of factors in determining the best person for any position.

Appendix

Type of Issuer	Industry	Disclosure Excerpt
TSX 60	Energy; Oil and Gas	While the Governance committee has not set a specific target for the number of women directors on out Board, the committee believes that a diverse board with a variety of perspectives enhances our decision-making and helps keep the Board informed and effective. We do not believe targets are an appropriate method of increasing diversity on the Board. Instead, we believe that a process-based method of reviewing directors on a variety of diversity factors (including gender) is more appropriate, particularly given the business environment in which [the Company] operates...While we do not have specific goals for the executive leadership team, in 2014, the percentage of women on our executive leadership team increased from 11 per cent to 22 per cent.
TSX 60	Banks; Financial Services	Specific targets or quotas for gender or other diversity representation have not been adopted for the SET [Senior Executive Team] or for the board due to the small size of these groups and the need to consider a balance of criteria in each individual appointment. It is important that each appointment to the board and to SET be made, and be perceived as being made, on the merits of the individual and the needs of the bank at the relevant time. In addition, targets or quotas based on specific criteria could limit the board's ability to ensure that the overall composition of the board and the SET meets the needs of the bank and our shareholders. Targets and quotas are also unnecessary to promote gender diversity on the board and in executive officer positions in light of the bank's demonstrated leadership and the effectiveness of our diversity policy: 35% (6 of 17) of our director nominees are women, and 30% (3 of 10) of our SET are women.

Type of Issuer	Industry	Disclosure Excerpt
TSX 60	Industrials; Transportation	The Committee will also set measurable objectives for achieving diversity and recommend them to the Board for adoption on an annual basis. Pursuant to the policy, the Board adopted a target of having a minimum representation of one-third of the Board by women, by 2017. The Board Diversity Policy is available on our website at [website]…Although no gender diversity targets have been established specifically for senior executive positions, [the Company] promotes an inclusive and diverse hiring approach that supports the recruitment of female candidates and provides opportunities for their advancement. Specific targets or quotas for gender diversity are not currently used for senior executive positions as appointments are based on a balance of criteria, including merit, experience and competency of the individual at the relevant time. Nonetheless, executive officer appointments are reviewed with our diversity and talent management objectives in mind, including the level of representation of women in executive officer positions.
TSX Composite	Consumer Staples; Drug Retail; Drug Stores and Pharmacies	The Corporation would like to maintain the percentage of women on the Board of Directors at a minimum of 25% so that the Corporation can continue to derive benefits from the experience and expertise of both women and men… Considering the small number of positions in question, the Corporation has refrained from setting targets for the representation of women among its Executive Officers.

Appendix

Type of Issuer	Industry	Disclosure Excerpt
TSX Composite	Energy; Oil and Gas	[The Company] is committed to a corporate culture of inclusiveness and tolerance without resorting to the use of arbitrary gender targets or diversity-based quotas. [The Company] has been successful in its efforts to recruit exceptional leaders who are women. As evidenced by the statistics in the chart below, [the Company] is proud of its current gender diversity and expects to continue to sustain its achievement in this regard. [The Company] will continue to monitor its gender diversity and disclose the results to the Shareholders on an annual basis.
TSX Composite	Automotive Retail; Consumer Discretionary	Given the infrequent turnover of directors the Board has not set specific targets as to the number of women board members it will maintain. The Company believes that the Board needs to be able to assess a potential nominee's qualities and competencies as a whole instead of emphasizing on gender, which also prevents situations where an individual could be perceived as not having been nominated solely on the basis of such individual's merits. The Company has not adopted a specific target regarding the representation of women in executive officer positions of the Company. The Company believes that recruiting for executive level positions should involve an assessment of a candidate's qualities and competencies as a whole instead of emphasizing on gender, which also prevents situations where an individual could be perceived as not having been nominated solely on the basis of such individual's merits.

Category	Total	Number of Women	% of Women
Board of Directors (standing for re-election)	10	2	20
Executive Officers	12	3	25
Managers	32	11	34

Type of Issuer	Industry	Disclosure Excerpt
TSX Composite	Energy; Energy Equipment and Services; Oil and Gas Services	Given the small size of our Board, we have not adopted specific targets regarding the representation of women on the Board because we believe that merit of the candidate and needs of the organization must remain paramount. We do not believe that targets are an appropriate method of increasing diversity on the Board. Rather, we believe that a process-based method of reviewing directors on a variety of diversity factors, including gender, age, ethnicity, geographic location, and other experience is more appropriate. However, we are mindful of the need to pursue qualified female candidates. The committee ensures that the list of potential director candidates includes a reasonable number of qualified women, but ultimate decisions are made based on the qualifications of the candidates and the expert needs of the Board. The Board must also have the flexibility to add qualified board members when they become available, and this may mean adding male or female candidates, as appropriate. We cannot make a commitment to select a candidate whose gender is a decisive factor above all other considerations; we must select the best qualified candidate… When considering new appointments to executive positions, the Board considers a range of skills, experience and diversity, including the level of representation of women in executive officer positions. However, we have not established specific gender targets, as we believe the merit of the candidate and needs of the organization must remain paramount. We believe that success in attaining greater female participation at the leadership level begins early in a women's career, fostered by exposure to a broad variety of business opportunities, line experience, and leadership with increasing levels of responsibility and scope. Management provides annual updates to the Human Resources and Compensation Committee, and the CEO meets in-camera with the committee every year to review the depth of the talent pool and the succession capacity for critical roles.

Appendix

Type of Issuer	Industry	Disclosure Excerpt
TSX Composite	Banks; Financial Services	In conjunction with the Policy, the Board has adopted the objective that at least one-third of its independent directors are women which the Corporation will strive to achieve annually. The Corporation has currently achieved this objective with 33% (3 of 9) independent directors being women… The HRC Committee and the Chief Executive Officer is prepared to adopt a quantitative range for women in Executive Officer positions at the Corporation and has set a minimum objective for women in Executive Officer positions of 25% over the next three to five years. This medium-term objective aligns with the Corporation's approach to its financial targets. Currently, the Corporation has met this objective as 29% (4 of 14) of the Executive Officers of the Corporation are women.
TSX SmallCap	Energy; Oil and Gas	The Corporation has not imposed quotas or targets regarding the representation of women on the Board and in executive officer positions. The Board believes that imposing quotas or targets regarding the representation of women in executive officer positions would compromise the principles of meritocracy.
TSX SmallCap	Materials; Metals and Mining	The Company has not adopted a target (as defined) regarding women on its Board. Pursuant to the Diversity Policy, the Board will seek to have at least one woman candidate for any future director positions. The Company has not adopted a target (as defined) regarding women in executive officer positions of the Company. Pursuant to the Diversity Policy, management of the Company will seek to have at least one woman candidate for any new senior management positions. The Company has not adopted specific dates to achieve the above goals as the Board and management will consider director and executive officer candidates if, as and when the need arises based upon candidate qualifications, abilities and potential contributions irrespective of gender as the Company does not support the adoption of quotas to support its Diversity Policy.

Type of Issuer	Industry	Disclosure Excerpt
TSX SmallCap	Financial Services; Real Estate	While the Trust has not adopted a target regarding the representation of women in executive officer positions, the Trust believes that diversity is embedded in our talent management practices and is focused on the development and advancement of women and visible minorities and other aspects of diversity. In terms of gender diversity, currently 33 percent of executives at the Trust are women (2 of 6). Our philosophy of development and promotion from within strengthens our values and culture, aids in retention of talent and provides more options for succession. We complement this practice with selective external hiring to benefit from diverse experiences and fresh perspectives. The Trust does not believe that quotas, strict rules or targets necessarily result in the identification or selection of the best candidates for executive officers. However, the Trust is mindful of the benefit of diversity in the workplace; accordingly, both the level of female representation and diversity are considered as essential considerations in the selection process for new executive officers, in addition to the expertise and experience required. Annually, the Board reviews and discusses CEO and group executive succession.

Key Contacts

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Researching and writing this paper was a project undertaken by Davies Ward Phillips & Vineberg LLP and not on behalf of any client or other person.[48] If you would like to discuss any of the issues raised in this report, please contact any of the partners listed below:

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