

# DAVIES INSIGHTS

## **GOVERNANCE** **Executive Summary**

DAVIES

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.

## Key Contacts

### → Key Contacts

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