



New Gender Diversity and Board Renewal Disclosure Rules

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Introduction

In time for the 2015 proxy season, the Canadian Securities Administrators have released amendments to National Instrument 58-101 *Disclosure of Corporate Governance Practices* and Form 58-101F1 *Corporate Governance Disclosure* (“**Form 58-101F1**”) which will require TSX-listed companies to disclose certain information relating to the representation of women on boards of directors and in executive officer positions and on mechanisms of board renewal.

The British Columbia and Alberta Securities Commissions did not adopt the new disclosure rules (the “**New Rules**”). However, because the Ontario Securities Commission adopted the New Rules (which apply to non-venture issuers) and all TSX-listed companies are reporting issuers in Ontario, the New Rules will apply to British Columbia and Alberta companies listed on the TSX.

This memorandum summarizes the New Rules and incorporates examples of disclosure from both Australia (where similar rules are in place) and Canada (where some issuers implemented new measures in anticipation of the New Rules) which illustrate the potential range of responses to the New Rules.

The New Rules

The New Rules will apply to proxy circulars filed following an issuer's financial year ending on or after December 31, 2014. The New Rules will require companies to provide disclosure regarding the following six matters in the proxy circular sent in connection with an annual general meeting:¹

¹ If an issuer's financial year ended before December 31, 2014, then the disclosure will first be required in its 2016 proxy materials. If a company does not send a circular soliciting proxies for the election of directors at an annual meeting, the company must provide the disclosure in its annual information form. The information required by the New Rules may be incorporated into a proxy circular by reference, provided the other document has been filed or is filed simultaneously with the proxy circular.

- (1) the number of women on the board and in executive officer positions;
- (2) targets regarding the representation of women on the board and in executive officer positions;
- (3) policies regarding the representation of women on the board;
- (4) the board's or nominating committee's consideration of the representation of women in the director identification and selection process;
- (5) the issuer's consideration of the representation of women in executive officer positions when making executive officer appointments; and
- (6) director term limits and other mechanisms of renewal of the board.

The regulatory authorities examined a variety of measures, including hard quotas. However, the New Rules adopt a disclosure-based model in their aim to increase the representation of women. Generally, the New Rules are not prescriptive. That is, they do not require a company to, for example, adopt new policies or to take into consideration the representation of women when identifying new director candidates. What the New Rules do require is for a company to disclose *why* it has *not* implemented certain policies or taken into account certain considerations if it has not done so.

With this “comply or explain” model, also adopted in Australia, a company will have to either (a) comply with the New Rules and adopt and disclose the content of the necessary policies or make and describe the necessary considerations, or else (b) explain why it does not have such policies or make such considerations.

The following table sets out a quick reference guide to the New Rules and the disclosure required by a company if it chooses to either comply or explain.

New Disclosure Requirement (Item # of Form 58-101F1)		Disclosure Required	
Item 10 – Director Term Limits / Other Mechanisms of Board Renewal	Has the company adopted term limits for directors or other mechanisms of board renewal?	IF SO	Describe terms limits or other mechanisms of board renewal
		IF NOT	Explain why not
Item 11 – Policies Regarding the Representation of Women on the Board	Has the company adopted a <u>written</u> policy relating to the identification and nomination of women directors?	IF SO	1) Include a short summary of the objectives and key provisions 2) Disclose measures taken to ensure policy effectively implemented 3) Annual and cumulative progress in achieving objectives 4) Whether and how board measures effectiveness
		IF NOT	Explain why not
Item 12 – Consideration of the Representation of Women in the Director Identification and Selection Process	Does the board or nominating committee consider the level of representation of women on the board in identifying and nominating candidates for election or re-election?	IF SO	Explain how the board or nominating committee considers the level of representation
		IF NOT	Explain the reasons why the company does not consider the level of representation.
Item 13 – Consideration Given to the Representation of Women in Executive Officer Appointments	Does company consider the level of representation of women in executive officer positions when making executive officer appointments?	IF SO	How does the company consider the level of representation?
		IF NOT	Explain the reasons why the company does not consider the level of representation.
Item 14 – Targets Regarding the Representation of Women on the Board and in Executive Officer Positions	Does the company have a target regarding: (a) women on the company’s board; and (b) women in executive officer positions?	IF SO	Disclose the actual target (number, percentage, or range) and the annual and cumulative progress in achieving the target
		IF NOT	Explain why not
Item 15 – Number of Women on the Board and in Executive Officer Positions	Does the company have: (a) women on the board of directors; and (b) women in executive officer positions, including of major subsidiaries?	IF SO	Disclose the number and percentage of women
		IF NOT	Disclose the number and percentage of women as zero (0)

Gender Diversity on Boards and in Senior Management

The five New Rules that relate to the representation of women fall under three categories, being disclosure of: (1) actual representation; (2) targets, policies, and objectives; and (3) hiring considerations.

(1) *Actual Representation*

Form 58-101F1 now requires a company to disclose the following:

- (a) the number and proportion (in percentage terms) of directors on the company's board who are women; and
- (b) the number and proportion (in percentage terms) of executive officers of the company, including all major subsidiaries, who are women.

As it relates to a parent company, this information would have been implicit in a company's disclosure. It is likely that best practices will now require an additional statement setting out the number and percentage of women on the board and in executive officer positions.

As it relates to subsidiaries, a company will now have to disclose the number and percentage of female executive officers of "major subsidiaries". The definitions of "executive officer"² and "major subsidiary"³ are as follows.

"executive officer" means an individual who is

- (a) a chair, vice-chair or president;
- (a.1) a chief executive officer or chief financial officer;
- (b) a vice-president in charge of a principal business unit, division, or function including sales, finance or production; or
- (c) performing a policy-making function in respect of the issuer.

"major subsidiary" means a subsidiary of an issuer if

- (a) the assets of the subsidiary, as included in the issuer's most recent annual audited or interim...statement of financial position, are 30 per cent or more of the consolidated assets of the issuer reported on that...statement, or
- (b) the revenue of the subsidiary, as included in the issuer's most recent annual audited or interim...statement of comprehensive income, is 30 per cent or more of the consolidated revenue of the issuer reported on that statement.

(2) *Targets, Policies and Objectives*

Form 58-101F1 now requires a company to disclose whether it has adopted a written policy relating to the representation of women on its board and targets for female directors and executive officers, along with a summary of the terms of and progress towards the achievement of the objectives of the policy and the targets. If the company has not adopted these measures, it must explain why it has not done so.

² National Instrument 51-102 *Continuous Disclosure Obligations*

³ National Instrument National Instrument 55-104 *Insider Reporting Requirements and Exemptions*

If the company does have a written policy in place, Form 58-101F1 requires disclosure of the following:

- (a) a short summary of its objectives and key provisions;
- (b) the measures taken to ensure that the policy has been effectively implemented;
- (c) annual and cumulative progress by the issuer in achieving the objectives of the policy; and
- (d) whether and, if so, how the board or its nominating committee measures the effectiveness of the policy.

In addition to the disclosure on written policies, the company must also disclose whether it has adopted any targets for the number or percentage of women on its board and in executive officer positions by a specified date.

If the company has adopted targets, it must disclose what the targets are and the annual and cumulative progress in achieving those targets. If the company has not adopted any targets, it must disclose why it has not done so.

The New Rules are modelled in large part on the approach of the Australian Securities Exchange's ("ASX") Corporate Governance Principles and Recommendations (the "ASX Principles"), which also employ a "comply or explain" model on gender diversity policies.

The ASX's Principles adopt a more normative stance than the New Rules. That is, the ASX Principles take the form of statements that a company "should" do an action or have a policy. Nevertheless, the ASX Principles are not mandatory. Similar to the New Rules, if a company does not adopt a particular principle, it must explain why not.

Recommendation 1.5 of the ASX Principles sets out similar requirements to Items 11, 14, and 15 of the New Rules pertaining to policies, targets and actual representation. The full text of Recommendation 1.5 can be found at Appendix A to this memorandum.

In its guide on responding to the "comply or explain" ASX Principles, the Australian Institute of Company Directors (the "AICD") recommends:

companies should, where possible, seek to comply with the spirit and intention of the [ASX's] recommendations relating to diversity, and not simply adopt a strict legal interpretation to their application. Interested stakeholders will be looking to see whether companies are making a genuine commitment to improve diversity within their organisation, rather than focusing on technical compliance with the recommendations.

As the AICD points out, a diversity policy need not set out the actual objectives. The policy may simply state that the board will establish them, giving the board flexibility to tailor objectives. The following guidance on setting measurable objectives is taken from the AICD's ASX Principles compliance manual.

AICD

Tips for setting measureable objectives

The board is required to establish measureable objectives for achieving gender diversity.

In order to set meaningful objectives, each entity will need to assess its current diversity levels and identify where gaps exist. Measurable objectives can then be developed which are tailored towards improving diversity in areas where most work is needed. There is no 'one-size-fits-all' approach. Each company will be unique in its diversity make up.

There are a number of different types of measurable objectives which a company may wish to set for itself including:

- procedural/structural objectives – for example, establishing a diversity committee or appointing a diversity manager; setting up internal review and reporting procedures; ensuring directors and employees are selected from diverse candidate pools and are interviewed by a diverse selection/interview panel;
- targets – for example, setting targets to improve the number of women in particular areas of the business where women are not well represented; setting targets to increase the proportion of women within executive management levels and within particular salary bands, and linking targets to the key performance indicators (and bonus remuneration) of the board, the CEO and senior executives;
- initiatives and programs – for example, introducing mentoring and coaching programs, and undertaking employee surveys on diversity.

In setting measurable objectives, boards need to decide the manner in which the achievement of gender diversity should be measured, for example:

- in the case of targets – the proportion of women employed by (or consultants to) the company, in senior executive positions and on the board and the timeframe for this to occur by;

(continued)

- in the case of initiatives and programs – the type of program, how it will operate, when it will be established by, who it will be available to, how it will be monitored and reviewed.

ASX issuer Newcrest Mining Limited (“**Newcrest**”) has adopted a Diversity Policy which requires it to set, review and report measurable objectives. Some smaller Australian issuers have elected not to comply with the ASX Principles. For example, Orinoco Gold Limited (“**Orinoco**”) addressed the issue in its 2014 Annual Report, stating that its board is small and it has other policies regarding discrimination and harassment in place.

The following page displays in tabular form an excerpt from Newcrest’s 2014 Annual Report (an example of a company which has elected to provide expanded disclosure).

Newcrest's Diversity Measures 2011-13

Diversity Measure	31 Dec 2013 Target	30 Jun 2011	30 Jun 2012	30 Jun 2013	31 Dec 2013 Actual	Comments
To increase the proportion of women selected for the graduate program from 25.0 percent as of 31 Dec 2010 to 33.3 percent as at 31 Dec 2013.	33.3%	26.0%	29.5%	24.3%	33.3%	Target achieved Dec 2013
That 33.3 percent of succession plans for all level 2 to 5 roles will have at least one female included by 31 Dec 2013.	33.3%	25.0%	27.2%	38.0%	38.0%	Target achieved April 2013
Increase the proportion of women in management levels 2 to 4 by 15.0 percent by 31 Dec 2013*.	15.0%	-	8.7%	21.3%	15.6%	Target achieved Dec 2013

*Measure adopted in 2012.

To further embed the progress Newcrest made in respect to diversity measurements outlined in Figure 2, Newcrest has selected three measures for the forthcoming reporting period 2014-16.

New diversity measures were approved by the Newcrest Board in early 2014 and replace those outlined in Figure 2. The new measures are intended to deliver a larger pool of women from which Newcrest can identify and develop future leaders.

The new measures are as follows:

- (i) Increase the representation of women in management levels 2 and 4 to a minimum of 16 percent by 31 December 2016.
- (ii) Increase the proportion of women accessing programs aimed at accelerating development by a minimum of 20 percent by 31 December 2016.
- (iii) Increase the representation of women selected for the graduate program to a minimum of 40 percent by 31 December 2016.

By contrast, an excerpt from Orinoco's 2014 Annual Report (an example of a company which has elected to explain "if not, why not") is set out below.

Orinoco – "If Not, Why Not"

GENDER DIVERSITY

The Company has not adopted an express policy specifically addressing the achievement of gender diversity. Due to the current limited size of the Board, the Board does not consider it necessary to have a gender diversity policy, but will consider adopting a policy in the future. Furthermore, the Company has not set any objectives for achieving gender diversity. Should a gender diversity policy be considered appropriate for the Company in the future due to increases in size of the organisation, the policy will specifically deal with the objectives for achieving diversity.

The Company's corporate code of conduct provides a framework for undertaking ethical conduct in employment. Under the corporate code of conduct, the Company will not tolerate any form of discrimination or harassment in the workplace.

The Group currently has no female board members or senior executives.⁴

In apparent anticipation of the New Rules, some Canadian issuers have adopted measures and have expanded their disclosure.

Some Canadian issuers have adopted aspirational targets for gender composition. For example, the Bank of Montreal's board "aspires toward board composition in which each gender comprises at least one-third of independent directors."⁵

Other issuers have already put in place policies which require the new disclosure. In April 2014, Goldcorp Inc. ("**Goldcorp**") adopted a Diversity Policy. The Diversity Policy addresses specific aspects of the New Rules, including the setting, review, and

disclosure of measurable objectives for achieving diversity. Goldcorp's Diversity Policy specifically states the company is not adopting quotas to support the policy's objectives.

The policy requires Goldcorp to disclose the proportion of female and minority employees at Goldcorp, in senior executive positions and on the Board, and the progress towards "achieving diversity" set by the Board in accordance with the policy.

The following page displays the pertinent excerpts from Goldcorp's Diversity Policy, which defines diversity as "any dimension which can be used to differentiate groups and people from one another," including gender.

⁴ Orinoco Gold Limited, 2014 Annual Report, p. 21.

⁵ Bank of Montreal Board Diversity Policy

Goldcorp Diversity Policy Excerpts

This Policy sets out the guidelines by which Goldcorp will endeavor to increase diversity throughout the Company including at the Board level...

Goldcorp does not support the adoption of quotas to support its diversity policy...directors will be recruited and promoted based upon their ability and contributions.

Board and Management Responsibilities and Reporting

Board responsibilities

The Board is committed to fostering a diverse environment where:

- individual differences are respected;
- the ability to contribute and access employment opportunities is based on performance, skill and merit; and
- inappropriate attitudes, behaviors and stereotypes are confronted and eliminated.

The Board will proactively monitor Company performance in meeting the standards outlined in this 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.

Reporting

In each Annual Report or Proxy Management Circular, the Company will disclose:

- the measurable initiatives for achieving diversity set by the Board in accordance with this Policy and the progress towards achieving them;
- the proportion of female and minority employees at Goldcorp, in senior executive positions and on the Board.

(3) *Hiring Considerations*

Issuers now must disclose the following in relation to the hiring or recruitment of women candidates:

(a) for women on the board – 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 re-election to the board; and

(b) for women in executive officer positions – whether and, if so, how the company considers the level of representation of women in executive officer positions when making executive officer appointments.

If the board or company does not make these considerations, then the company must explain the reasons for not doing so.

Recommendation 2.6 of the ASX Principles requires ASX issuers to list the mix of skills and diversity they look to achieve in board membership.

While broader than the New Rules, this recommendation can be compared to Items 12 and 13 of Form 58-101F1, which require a company to disclose the consideration it gives to the representation of women in board and senior executive positions.

Canadian issuers may want to consider whether a discussion of the consideration that is given to the representation of women could be couched in terms of the range of skills and diversity considerations the board considers, as Newcrest did in the following excerpt from its 2014 Annual Report.

**Newcrest 2014 Annual Report
Consideration of Diversity**

“Nominations to the Board are considered by the Board Nominations Committee, which was constituted in April 2014 and comprises all Non-Executive Directors. Prior to that, the full Board had ultimate responsibility for decision-making in this area. Details of the role and composition of the Nominations Committee are set out under ‘Board Committees’. When considering new appointments to the Board, suitable candidates are identified considering a range of skills, experience and diversity, including gender diversity. External professional advisers are engaged to assist in this process as required.”⁶

Board Renewal

In addition to the new disclosure on the representation of women, a company must also now disclose whether it has adopted any term limits or other mechanisms for board renewal.

If it has adopted any measures, the company must describe them. If it has not, then the company must explain why it has not done so.

It should be noted that not all governance groups agree on the appropriateness of director term or age limits. For example, Glass Lewis takes the position that age and term limits “typically are not in shareholders’ best interests.”⁷

On the other hand, The Canadian Coalition for Good Governance cites Telus Corp.’s (“Telus”) 2014 proxy disclosure as a model for disclosure on board renewal and term limits. Telus has adopted a 15-year term limit but also maintains a “rigorous” annual performance assessment process. Telus describes its term limits, board evaluation, and succession planning

processes and then provides a table (at Figure A on the following page) that highlights some of the key attributes that it tracks for each board member.

**Telus 2014 Proxy Circular
Board Term Limits and Board Renewal**

The Board does not have a mandatory age limit, but in 2013, it adopted a 15-year term limit policy...The term limit policy will not replace the rigorous annual performance assessment process that takes place under the leadership of the Corporate Governance Committee...In conjunction with the Board evaluation and as part of the succession planning process, directors are also canvassed on their intention to retire from the Board in order to identify impending vacancies as far in advance as possible.

The succession planning process also involves the creation of a skills matrix, which helps the Corporate Governance Committee and the Board identify any gaps in the skills and competencies considered most relevant for the Company...The table below lists the top three competencies of our nominees together with their age range, tenure, official languages spoken and residency.⁸

⁶ Newcrest Mining Limited, 2014 Annual Report, p. 30

⁷ Glass Lewis & CO., Proxy Paper Guidelines – 2015 Proxy Season, p. 15.

⁸ Telus 2014 Proxy Circular

Figure A: Telus table of director attributes

	Location				Years on Board			Age		Language		Top three competencies									
	British Columbia	Alberta	Ontario	Quebec	0 to 5	6 to 10	11+	59 and under	60 to 69	70+	English	French	Senior executive / strategic leadership	Finance and accounting	Executive comp / human resources	Governance	Technology knowledge	Industry knowledge	Retail / customer experience	Risk management	Government / regulatory affairs
Dick Auchinleck	X					X		X			X		X			X					X
Charlie Baillie			X			X		X		X			X	X							X
Micheline Bouchard				X	X			X		X	X		X				X	X			
John Butler		X				X		X		X				X	X						X
Ray Chan		X			X			X		X			X	X		X					
Stockwell Day	X				X			X		X	X		X	X							X

Conclusion

In Australia, where similar rules are in place, the percentage of women on ASX 200 boards has more than doubled from 8.3% in 2009 (prior to the adoption of the ASX Principles) to 18.8% in 2014. As of October 31, 2014, women comprised 30% of new appointments to ASX 200 boards.⁹ By contrast, women represent just 11% of directors of companies listed on the S&P TSX composite index.¹⁰

Ultimately, it is hoped that the New Rules will increase the representation of women on boards and in senior executive positions at major Canadian issuers.

In addition, the new disclosure rules will provide transparency to investors for whom these considerations may be important. TSX issuers will have to fashion a response to the New Rules which best suits their size, operations, and objectives.

⁹ Australian Institute of Company Directors, Statistics – Appointments to S&P/ASX 200 Boards, October 31, 2014 [http://www.companydirectors.com.au/Director-Resource-Centre/Governance-and-Director-Issues/Board-Diversity/Statistics]

¹⁰ “Canada falling behind on women on corporate boards”, CBC News, March 8, 2013 [http://www.cbc.ca/news/business/canada-falling-behind-on-women-on-corporate-boards-1.1313277].

Appendix A

ASX Principles

Recommendation 1.5¹¹

A listed entity should:

- (a) have a diversity policy which includes requirements for the board or a relevant committee of the board to set measurable objectives for achieving gender diversity and to assess annually both the objectives and the entity's progress in achieving them;
- (b) disclose that policy or a summary of it; and
- (c) disclose as at the end of each reporting period the measurable objectives for achieving gender diversity set by the board or a relevant committee of the board in accordance with the entity's diversity policy and its progress towards achieving them, and either:
 - (1) the respective proportions of men and women on the board, in senior executive positions and across the whole organisation (including how the entity has defined "senior executive" for these purposes)...

¹¹ In 2014, the ASX's gender policy guidelines were consolidated into Recommendation 1.5. Previously, the guidelines were contained separately in Recommendations 3.2, 3.3, and 3.4 of the ASX Principles.