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Women on Boards: Regulators Release Modest Results of "Comply or Explain" Disclosure Requirements

On September 28, 2016, the securities regulatory authorities in Manitoba, New Brunswick, Newfoundland and Labrador, Northwest Territories, Nova Scotia, Nunavut, Ontario, Québec, Saskatchewan and Yukon (the "**Participating Jurisdictions**") published CSA Multilateral Staff Notice 58-308 *Staff Review of Women on Boards and in Executive Officer Positions – Compliance with NI 58-101 Disclosure of Corporate Governance Practices* (the "**Notice**"). This is the second review of corporate governance disclosure as it relates to women on boards and in executive positions following the implementation of amendments to National Instrument 58-101 *Disclosure of Corporate Governance Practices* in December 2014 (the "**Rule Amendments**").

The Rule Amendments follow a "comply or explain" regime, which requires all non-venture issuers to make certain annual disclosures with respect to women in leadership roles. These include:

- the number and percentage of women on the issuer's board of directors and in executive officer positions;
- director term limits or other mechanisms of board renewal;
- policies relating to the identification and nomination of women directors;

- consideration of the representation of women in the director identification and nomination process and in executive officer appointments; and

- targets for women on boards and in executive officer positions.

The Notice summarizes the corporate governance disclosures, as they relate to the Rule Amendments, of 677 non-venture issuers with year ends between December 31, 2015 and March 31, 2016. It compares the results against those reported in the first review, 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 "**Year 1 Notice**").

Key Findings

Board and Executive Officer Positions

The CSA found that, among the issuers in the sample group, 55% have at least one woman on their board (up 6% from last year) and 59% have at least one woman in an executive officer position (consistent with the 60% reported last year).

Although only 10% of issuers added one or more women to their boards in the past year (compared to 15% reported in the Year 1 Notice), the overall percentage of board seats occupied by women this year increased from 11% to 12%.

Further, there has been a year over year increase in the number of board seats occupied by women in all size categories of issuers. Large issuers (over $10 billion market capitalization) continue to lead the way, with 23% of board seats held by women.

As observed last year, the number of women on boards and in executive officer positions varied significantly by industry. For example, the utilities and retail industries had the most women on their boards, and correspondingly had the fewest boards with no women on them. Again this year, the mining, oil and gas, and technology industries had the most issuers with no women on their boards, and also had the most issuers that do not have any female executive officers.

Term Limits and Board Renewal Mechanisms

The CSA found that 20% of issuers adopted director term limits (compared to 19% reported in the Year 1 Notice). Of those issuers with term limits, 48% set age limits, 23% had tenure limits and 29% had both. The most common reason cited for not adopting board renewal mechanisms was that terms limits reduce continuity or experience on the board.

Policies Regarding Board Representation

Of the issuers in the sample, only 21% adopted a policy relating to the identification and nomination of women directors (compared to 15% reported in the Year 1 Notice); issuers with such a policy had higher average female board representation (18%) as compared to those with no policy (10%). The majority of issuers (59%), however, disclosed that they did not adopt a policy (compared to 65% in the Year 1 Notice).

Consideration of the Representation of Women

The CSA found that 58% of issuers disclosed that they consider the representation of women when making executive officer appointments (up 5% from last year), and 68% of these issuers specifically explained their considerations—a significant increase over the 38% reported in the Year 1 Notice. As observed last year, the most common explanation for not considering the representation of women in executive officer appointments was that the issuer's selection is based on merit.

In the sample, 66% of issuers disclosed that they consider the representation of women on their boards as part of their director identification and nominating process (up 6% from last year). As with executive officer appointments, disclosure by issuers of how they consider the representation of female directors on their boards in their identification and nomination process significantly improved, with 70% providing an explanation compared to 42% in the Year 1 Notice. The most common reason for not considering the representation of women was that the issuer seeks the best candidates, regardless of gender (91%).

Targets

The CSA found that only 9% of issuers set a target for the appointment of women to the board (up from 7% last year), and those issuers with board targets had a greater proportion of women on their boards (25%) than those without a target (10%). Of issuers with board targets, 57% had already achieved their stated target. Only 2% set an executive officer target (compared to 2% last year).

Conclusion

Overall, the Notice shows only a marginal increase in the number of women on the boards of non-venture issuers across all size categories of issuers, although there remain important variations by industry. The CSA indicated that it will continue to evaluate and report on the corporate governance disclosure of non-venture issuers to ensure that they provide meaningful disclosure regarding the representation of women on their boards and in executive officer positions. Further, the CSA intends to measure if the Rule Amendments ultimately achieve their intended purpose of increasing transparency. While the report shows that there has been progress in achieving some of the regulators' objectives, a number of issuers still had not fully complied with the Rule Amendments' disclosure requirements.

Once all issuers have made the relevant disclosures for two consecutive years, the Participating Jurisdictions intend to publish a comparison of the complete two-year results. Although there has been some progress in regulations and policies that require and encourage the inclusion of women on boards and in executive positions, there is still a lot of room for improvement for gender diversity in the boardroom and executive suite.

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a cautionary note

The foregoing provides only an overview and does not constitute legal advice. Readers are cautioned against making any decisions based on this material alone. Rather, specific legal advice should be obtained.