OSLER

Gender Diversity on Boards and in Senior Management

ANDREW MACDOUGALL
AND MICHELE QU

The under-representation of women on boards and in senior management roles has long been a concern. However, a confluence of better tools for communication and recruitment, a regulatory focus on the issue, and media interest in the topic, have highlighted the need to take steps to redress the imbalance. New disclosure requirements under Canadian securities laws which come into effect in 2015 are expected to have an impact on disclosure and practice.

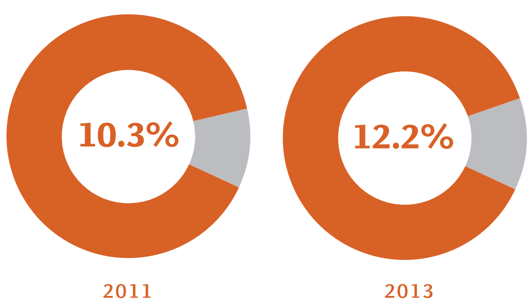
WOMEN'S PRESENCE IN CANADIAN BOARDROOMS

According to the *2013 Catalyst Census: Financial Post 500 Women Board Directors*, women represented just 15.9% of all board seats among Canada's 500 largest companies. Change has occurred over time, but slowly. The census results also revealed that the percentage of women sitting on the boards of Canada's public companies has increased from 10.3% in 2011 to 12.2% in 2013. And there is considerable room for improvement as 41.7% of public companies did not have any female directors.

Social and economic changes have resulted in a very different business and consumer environment today. Studies showing that gender diverse boards deliver better financial performance than those boards with lower numbers of women have made a business case for increasing gender diversity on boards. Capitalizing on such studies, in July 2014, Barclays Bank PLC launched a series of exchange-traded notes which track performance in an index comprised of U.S.-based listed companies that have a female CEO and/or at least 25% female members on the board and which meet market capitalization and trading volume thresholds.

Regulators have also noticed and taken steps to encourage change.

% of Women on the Boards of Directors among Canada's Public Companies



THE GLOBAL TREND

Countries take different approaches to disclosure rules respecting board diversity. In the United States, proxy disclosure rules require disclosure of whether, and if so how, a nominating committee considers diversity in identifying nominees for director and if there is a board policy with respect to consideration of diversity in identifying director nominees, disclosure of how this policy is implemented and how the nominating committee or the board assesses the effectiveness of its policy. In the United Kingdom, public companies must describe the board's policy on diversity, including gender, any measurable objectives that they have set for implementing the policy, and progress on achieving the objectives. Australia goes further as companies listed on the ASX are required to disclose their governance practices against corporate governance principles that recommend that companies: (1) establish and disclose a summary of a diversity policy which includes a requirement for the board to establish measurable objectives for achieving gender diversity; (2) disclose annually the objectives established and progress towards achieving them; and (3) disclose annually the proportion of female employees in the entire organization, senior executive positions and women directors on the board.

Several countries including Belgium, Denmark, Finland, France, Iceland, India, Israel, Italy, Kenya, Malaysia, Netherlands, Norway and Spain have taken legislative or regulatory steps to impose a minimum standard for gender diversity on boards. These minimum standards range from demanding at least one female director to requiring 50% of the directors on the board be women, although requiring a board comprised of at least 40% women directors is the most common. The European Union is also proposing a law that will require large public companies with less than 40% women on their boards to introduce a new board selection procedure that gives priority to qualified female candidates.

Mandatory requirements with strict deadlines can have an impact. As an example, according to a 2013 European Commission report on women in board and top management positions in major European public companies, in France, the percentage of women directors in public companies increased from 12.3% to 26% between 2010 and 2013 as large companies are required to comply with a mandatory 40% quota by 2017.

Other jurisdictions, such as Austria, Germany, Hong Kong, Kenya, Luxembourg and Sweden, have adopted a "comply or explain" approach, requiring companies to take gender diversity into consideration in their board nomination criteria, but without specifying a specific target percentage of women directors.

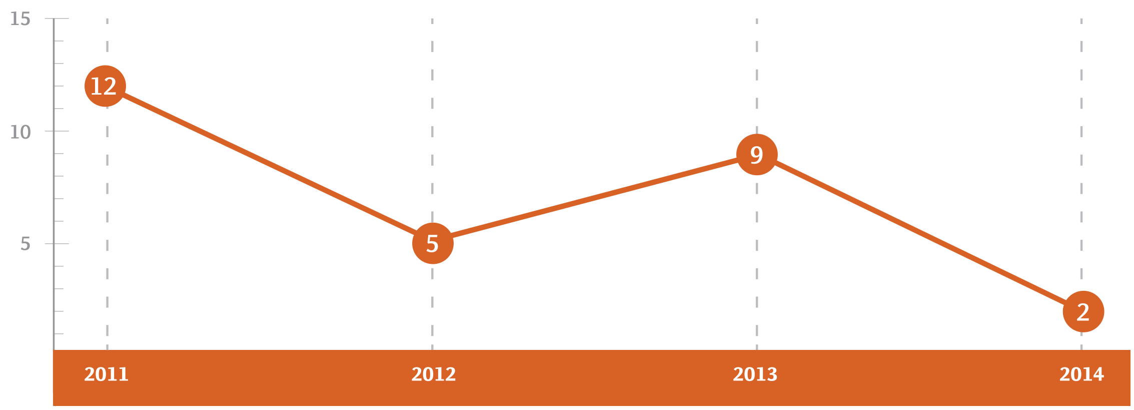
SHAREHOLDER PROPOSALS

Over the last several years there have been a number of shareholder proposals seeking to increase diversity on boards.

In 2014, the California State Teachers' Retirement System and California Public Employees' Retirement System offered their assistance to 131 California companies without any female board members to help to diversify their boards. Within four months, 35 companies had responded and 15 companies had placed at least one female director on their boards.

The table below illustrates the number of shareholder proposals seeking to increase diversity on boards according to the Shareholder Association for Research & Education:

Number of Shareholder Proposals to Canadian Companies to Increase Gender Diversity on Boards (#)



12 PROPOSALS requesting boards to adopt a policy of gender parity on the board

5 PROPOSALS Two focussed on gender diversity and three dealt with diversity but not just gender diversity

9 PROPOSALS focussed on gender diversity

2 PROPOSALS focussed on gender diversity

REGULATORY DEVELOPMENTS IN CANADA

Federal and Québec Initiatives

In January 2014, Industry Canada issued a paper seeking to conduct public consultations on changes to the *Canada Business Corporations Act* (CBCA), the federal business corporations statute. The Consultation Paper asked for comments on "whether new measures to promote diversity within corporate boards should be included in the CBCA and what such measures might entail."

ADVISORY COUNCIL FOR PROMOTING WOMEN ON BOARDS RECOMMENDS BOARDS ASPIRE TO

30%

female directors
over the 2014-2019 timeframe, with the longer term goal being gender balance.

In June 2014, the federal government published a report by the Government of Canada's Advisory Council for Promoting Women on Boards that was presented to the Minister of Status of Women. The report recommended that:

- Boards should aspire to 30% female directors over the 2014-2019 timeframe, with the longer term goal being gender balance.
- Publicly traded companies should be subject to a "comply or explain" disclosure obligation in their published annual reports approach for moving toward an identified goal and should adopt two and five year goals within the context of a board renewal plan.
- Companies should make gender balance on boards a priority to be advanced by board governance through policies, human resources, and board recruitment and nomination committees.

On March 26, 2014, Senator Céline Hervieux-Payette introduced (for the fifth time) into Canada's Senate, proposed legislation to establish gender parity on the board of directors of certain corporations. The current version of the bill passed first and second readings and was referred to the standing Senate Committee on Banking, Trade and Commerce on June 19, 2014.

Legislation in Québec requires that 50% of the board seats of Québec Crown corporations be held by women.

Women on Boards and in Senior Management Initiatives under Securities Legislation

In July 2013, at the request of the Government of the Province of Ontario, the Ontario Securities Commission (OSC) issued a consultation paper seeking input on proposed disclosure rules for public companies to encourage them to increase the number of women on boards and in senior management positions. On January 16, 2014, following receipt of over 92 written submissions and a public roundtable discussion, all of which generally supported the initiative, the OSC issued for comment proposed changes to corporate governance disclosure requirements which would apply to all companies subject to Ontario public company reporting obligations, other than companies listed on the TSX Venture Exchange and investment funds.

In July 2014, the securities regulatory authorities in Saskatchewan, Manitoba, Québec, New Brunswick, Nova Scotia, Newfoundland and Labrador, Northwest Territories and Nunavut republished the proposed changes for a comment period which ended September 2, 2014. The British Columbia Securities Commission did not join these regulators in supporting the initiative and the Alberta Securities Commission took the additional step of stating it will not participate.

On October 15, 2014, the OSC and these eight securities regulatory authorities issued notice of amendments to National Instrument 58-101 requiring disclosure respecting the representation of women on boards and in senior management. The new disclosure requirements will be effective for 2015 Proxy Season and apply to all non-venture issuers reporting in Ontario, Saskatchewan, Manitoba, Québec, New Brunswick, Nova Scotia, Newfoundland and Labrador, Northwest Territories and Nunavut. Such companies are required to disclose in the proxy circular for the annual meeting (or the annual information form if the issuer does not send a proxy circular to its investors) filed following an issuer's financial year ending on or after December 31, 2014:

- the number and percentage of women directors and women who are executive officers, together with any targets the company has adopted regarding the number or percentage of women in such positions and the progress made in achieving those targets or explain why it has not done so;
- whether the company has a written policy relating to the identification and nomination of women candidates for director or explain why it has not done so;
- a summary of any policy for the identification and nomination of women candidates for director which the company has adopted, the policy and its objectives, implementation measures, the annual and cumulative progress made on achieving the objectives and whether, and if so, how the board or nominating committee measures the policy's effectiveness;
- whether it considers the level of representation of women on the board in identifying and nominating candidates for director and the level of representation of women in executive officer positions when making executive officer appointments, or explain why it does not consider these levels of representation; and
- whether or not the company has adopted term limits for board service and, if not, why not.

2014 DISCLOSURE PRACTICES

While it was not mandatory to provide disclosure regarding diversity practices in 2014, the increased focus on gender diversity internationally and in Canada and the expectation that new disclosure requirements are forthcoming, led many Canadian issuers to increase the information they provide regarding their approach to diversity at the board and senior management levels in their proxy materials.

In 2014, a few Canadian companies took the step of disclosing a specific target or goal for the proportion of women on the board or senior management. Nine companies voluntarily adopted their own targets focussing on board gender proportion.

An increasing number of Canadian companies have adopted a formal policy or guideline addressing board diversity with a total of 24 Canadian companies disclosing that they have done so. Policies adopted by issuers generally detail the commitment to board diversity and the actions to be taken, such as committing to actively recruit board members from diverse backgrounds, including by gender, age, ethnicity, Aboriginal heritage, geography, political affiliation and persons with disabilities. In addition, four companies disclosed that they were considering the adoption of a board diversity policy: Genesis Land Development Corp. and Midas Gold Corp., each stated they intended to develop a gender diversity policy in 2014; Pengrowth Energy Corporation stated that it has added this matter into its work plan for 2014; and Eldorado Gold Corporation stated that it had established a succession committee

9 Canadian companies who have adopted targets for board gender proportion (%)

25%

CAMECO CORPORATION
Diversity policy includes a target that at least 25% of their directors are women

EMERA INCORPORATED
Has a practice which requires no fewer than 25% of directors are female

ROYAL BANK OF CANADA
Board set the objective that at least 25% of board members should be women

TELUS CORPORATION
Adopted a target of having a minimum of 25% of women as independent directors by 2017

30-33%

BANK OF MONTREAL
Set a goal that each gender comprise at least 33% of the independent directors

CANADIAN REAL ESTATE INVESTMENT TRUST
Target requiring 33% of the independent directors be women by 2017

CINEPLEX INC.
Committed to increase the proportion of female directors to 30% by 2017

50%

COMINAR REAL ESTATE INVESTMENT TRUST
Aims to move towards gender parity on its board

DREAM UNLIMITED
Targeted representation of women on board of at least 50% when identifying board nominees

with responsibility for recommending to the board a diversity policy after OSC's publication of the final rules regarding women on boards.

Two companies have adopted goals for the consideration of new candidates for director: National Bank of Canada set an objective that half of the director nominees to fill new vacant board member positions be women and Alacer Gold Corp.'s diversity goal requires at least 25% of all board candidates be women. Other companies disclosed that those involved in recruiting director candidates are required to put forward a diverse group of candidates, including women candidates.

2015 OUTLOOK

By December 31, 2014, as companies are required to comply with the new securities law disclosure rules respecting the representation of women on boards and their targets regarding the number or percentage of women directors, an increase in the number of issuers adopting such targets can be anticipated. In addition, in light of the "comply or explain" disclosure obligation regarding whether companies have a written policy on nominating women candidates in their director identification and selection processes, it is expected that more companies will adopt formal board gender diversity policies in writing.

Osler's Corporate Governance Group provides practical and effective governance strategies tailored to the needs of each organization, regardless of size or jurisdiction. ***Andrew J. MacDougall*** *is a partner at Osler and specializes in corporate governance.* ***Michele Qu*** *is an articling student at Osler.*

© 2014 Osler, Hoskin & Harcourt LLP
All rights reserved.
osler.com