Diversity requirements taking hold

By DONALEE MOULTON

Diversity has been a hot topic in corporate Canada for more than a decade, and now nine securities commissions are making it a formal disclosure requirement.

Effective Dec. 31, all companies listed on the Toronto Stock Exchange must include information about women in their most senior ranks and at the board level in their proxy circular or annual reports.

"This is an important change to our disclosure regime. We think it will encourage greater representation," said Jo-Anne Matear, manager of the Ontario Securities Commission's corporate finance branch in Toronto.

Securities regulators in Manitoba, New Brunswick, Newfoundland and Labrador, the Northwest Territories, Nova Scotia, Nunavut, Ontario, Québec, and Saskatchewan now require companies to report on their policies regarding representation of women on the board, targets with respect to women on the board and in executive positions, and the actual number of female directors and executives. As well, they must disclose whether consideration is given to female representation when selecting new board members and hiring executives.

"We're asking companies to look at their policies and their corporate board and report back to us. In no way are companies required to have X number of women on their board," said Heidi Schedler, enforcement counsel with the Nova Scotia Securities Commission in Halifax.

The use of a mandatory quota, in place in at least 13 countries, was one option the commissions in Canada explored and rejected.

"We are not dictating any policies or practices. We're not telling businesses how to run themselves," noted Matear.

Some experts believe that the less stringent approach is the soundest. "Prescribed minimum standards bypass the need for a thoughtful approach to the issue, consideration of alternative approaches and consideration of other diversity aspects beyond gender. It is also often unfortunately the case that once adopted, it can be difficult to elevate standards beyond prescribed minimums," said Andrew MacDougall, a lawyer with Osler, Hoskin & Harcourt in Toronto.

The new rules, called "comply or explain" requirements, call on companies to demonstrate the participation of women in leadership and governance positions and how this has been supported by policy and practice. If there are no or few women in key positions, companies must explain why. The approach is intended to provide flexibility.

SCHEDLER

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"It avoids a one-size-fits-all solution," said Jennifer Longhurst, a partner with Davies LLP in Toronto.

The commissions' new disclosure requirements are already having an impact, noted Fiona Macfarlane, Ernst and Young's chief inclusiveness officer in Vancouver. "It's certainly raised the profile of the issue. The onus is on the company to explain. Before, the onus was on everyone to make the business case."

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MACFARLANE

Research conducted by Catalyst, a New York-based organization that promotes women and business, found that between 2004 and 2008 Fortune 500 companies with the most female directors had a 26 per cent higher return on invested capital and a 16 per cent higher return on sales compared with companies that had the fewest female directors. According to the Conference Board of Canada, companies can cultivate innovation by making sure they have at least three women on their boards. This helps ensure a critical mass that changes board dynamics to foster creativity and encourage new ideas.

"The best talent doesn't reside in any one group," noted Macfarlane, Ernst and Young's managing partner in British Columbia. "A lack of diversity is an indication we haven't gone deep enough. We're pulling our talent from a very small pool."

At present, that would seem to be the case in Canada. According to a

2013 Financial Post report, only 15.9 per cent of board positions in Canada's largest companies were occupied by women and approximately 40 per cent of companies had no women board directors at all.

"For many years, many people didn't think much about diversity in leadership positions. Those positions were dominated by men. It's only natural when you're looking for replacements to start with your network," said Longhurst.

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While understandable, the absence of women from boards and senior positions is no longer acceptable. The commissions' new disclosure requirements are intended to reinforce that message.

"The rules should provide a strong incentive for companies to improve their governance practices and increase the representation of women on corporate boards and among executive officer positions," said Amanda Linett, a lawyer in the Toronto office of Stikeman Elliott.

MacDougall said he was convinced that will happen. "I am confident that next year there will be a large increase in the number of companies disclosing that they have adopted a written policy on board diversity and that many of those will also adopt targets for representation of women in such positions," he said.

The commissions are equally optimistic the new rules will change the existing landscape because shareholders want to know about the companies they invest in.

"That was the foundation for us. It is very important for our investors to be informed," said Schedler.

Not all securities commissions believe the disclosure requirements are appropriate. Alberta, British Columbia and Prince Edward Island opted out of introducing the rules outlined in Disclosure of Corporate Governance Practices, National Instrument 58-101.

"The ASC has carefully considered the issue of board diversity in the context of Alberta's securities laws and has come to the conclusion that regulation in this regard falls outside our mandate," Alberta Securities Commission spokesperson Mark Dickey told *The Bottom Line*.

Ultimately, opting out may be a symbolic gesture. Most companies trade on the TSX, and the disclosure rules will apply to them regardless of where their offices are located.

Companies should also prepare themselves for the possibility of more disclosure requirements ahead. The participation of women is only one component of a diverse workplace. The inclusion of visible minorities and disabled individuals are others.

"This is an important first step. We will think about expanding down the road," said Matear.

In the meantime, companies must begin disclosing the required information about women directors and executives. The work required is not onerous, but companies are expected to move beyond boilerplate answers and delve into their approach, philosophy and commitment to a diverse workplace.

"If a filing isn't up to par, the commission could cease trade temporarily," said Schedler. "We take all disclosure requirements seriously. We're not going to put these rule amendments a peg down from others."

Quota standards

Many countries and many companies are setting quotas for the number of women that must be on boards. According to a gender diversity report prepared by Osler, Hoskin & Harcourt:

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, ranging from demanding at least one female director to requiring 50 per cent of the directors on the board be women, although a 40 per cent quota is the most common.

The European Union is proposing a law that would require large public companies with less than 40 per cent representation of women on their boards to introduce a new selection procedure that gives priority to qualified female candidates.

Nine Canadian companies have adopted targets for women on their boards. This includes the Royal Bank of Canada, which requires at least 25 per cent of members be women; Cineplex Inc., which plans to have 30 per cent female directors by 2017; and Cominar Real Estate Investment Trust, now moving towards gender parity — a 50/50 split — on its board.

• *Donalee Moulton*