

Key Corporate Governance and Disclosure Developments in 2017

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During 2017, a number of proposed amendments to the *Canada Business Corporations Act* (“CBCA”) and the *Business Corporations Act (Ontario)* (“OBCA”) were introduced and/or advanced. These amendments, if adopted, will have a significant effect in 2018 on public companies governed by these statutes. In addition, securities regulators provided guidance on various continuous disclosure matters, and the Toronto Stock Exchange (“TSX”) provided guidance on majority voting policies as well as advance notice policies. Finally, the TSX also introduced additional website and equity compensation disclosure requirements which will come into effect in 2018.

CBCA and OBCA Corporations to be impacted by Proposed Corporate Governance Changes

If the proposed amendments to the CBCA and the OBCA are enacted, companies governed by the CBCA or the OBCA and listed on stock exchanges other than the TSX could be required to implement statutory measures that are comparable to those corporate governance and disclosure measures already required of TSX-listed companies with respect to the matters referenced below.^{1,2} If enacted, these new requirements would include:

CBCA and OBCA Amendments

- **Majority Voting for directors:** Currently, shareholders either vote for, or withhold their vote from, nominees for director and because a withheld vote does not count as a vote against, a nominee who receives even a single vote ‘for’, will be elected in an uncontested election. The proposed amendments will require that shareholders vote either for or against each director nominee. A nominee will only be elected as a director if the majority of the votes cast are in favour of the nominee. The existing TSX majority voting policy requires that any nominee who receives more votes ‘withheld’ than ‘for’ such nominee’s election must, notwithstanding having been elected under the statutory requirements, immediately tender his or her resignation and absent “*exceptional circumstances*”, the board of directors must accept the resignation within 90 days of the shareholders’ meeting and must publicly announce its decision. The proposed CBCA and OBCA amendments will result in a nominee who fails to receive the required voting support not having been elected, removing the necessity for a resignation to be tendered and thereby removing from the board of directors the discretion to accept or reject a tendered resignation.

1 Bill C-25 An Act to Amend the Canada Business Corporations Act, the Canada Cooperatives Act, the Canada Not-for-profit Corporations Act, and the Competition Act (Bill C-25) was introduced on September 28, 2016 and corresponding proposed amendments to the Canada Business Corporations Act (CBCA) Regulations were introduced on December 13, 2016. On November 23, 2017, Bill C-25 passed its Second Reading in the Senate and was referred to the Standing Senate Committee on Banking, Trade and Commerce.

2 Bill 101, Enhancing Shareholder Rights Act (Bill 101) was introduced on March 7, 2017 for the purpose of amending the Business Corporations Act (Ontario). Bill 101 has passed its second reading in the Legislature and has been referred to the Standing Committee on Finance and Economic Affairs for further consideration.

- **Annual Elections for Directors:** Although uncommon in Canada, the CBCA and OBCA currently permit directors to be elected for a term of up to three years. The amendments will require annual elections, which is consistent with the current requirements of the TSX.
- **Prohibition of slate elections:** Consistent with the current requirements of the TSX, the amendments will require that each director be elected on an individual basis and not as part of a slate.
- **Enhanced requirements for diversity disclosure to shareholders:** All public CBCA and OBCA companies will be required to disclose on an annual basis, information pertaining to directors' and executive officers' gender diversity, as well as information with respect to director term limits and other mechanisms for renewal of the board of directors.³ In addition, each company will be required on an annual basis to disclose whether or not it has adopted a broader diversity policy (i.e. broader than gender based) in respect of its directors and senior management and to either include a summary of the policy or explain why no policy has been adopted.

CBCA Amendments

- **Notice and Access:** Canadian securities regulators permit the use of notice and access (whereby materials are posted online and notice of the posted materials is provided to shareholders) in respect of the delivery of proxy related materials. However, due to a number of technical issues, including the requirement to obtain the express written consent of shareholders before sending electronic materials, notice and access has generally been unavailable for CBCA companies. The proposed amendments to the CBCA are expected to make notice and access more accessible to CBCA companies.

OBCA Amendments

- **Shareholder Proposals:** Currently the OBCA provides that a shareholder may make a proposal which, subject to limited exceptions, must be included in the company's management information circular. Proposals may include

nominations for an unlimited number of directors provided that the proposing shareholder (or group of shareholders) is the registered or beneficial owner of at least 5% of the shares or 5% of the shares of a class or series of shares entitled to vote at the shareholders' meeting. The proposed OBCA amendments will reduce the ownership threshold required to make a proposal to 3% but limit the nomination right to a single director. The amendments will also require the use of a single proxy form which will include the names of management's nominees and any shareholder proposed nominees. Where a nominee director has been proposed, the amendments will entitle shareholders present at the shareholders' meeting to select the chair of the meeting, rather than the current practice of the chair being determined in accordance with the bylaws of the company.

- **Shareholder Requisition of Meeting:** Currently the OBCA provides that holders of 5% of the issued shares entitled to be voted at a shareholders meeting may requisition the board of directors to call a shareholders' meeting. The proposed OBCA amendments would change the ownership threshold required to requisition a meeting to 3% of the issued shares entitled to be voted at a shareholders meeting.
- **Shareholder Proposal of Executive Compensation Policy:** In what may prove to be the most controversial of the proposed amendments, the amended OBCA will permit a shareholder to make a proposal to adopt an executive compensation policy with respect to the remuneration of directors or officers of the company and require that the board of directors fix the remuneration of the directors and officers in accordance with any adopted policy. To date, no specifics of what is intended by an "executive compensation policy" have been provided and depending on the nature of such policies, the amendment could reflect a significant change to the existing authority of directors to establish levels and methods of compensation.

3 For CBCA companies, reference should be had to items 10 to 15 of Form 58-101 of National Instrument 58-101 Disclosure of Corporate Governance Practices. For OBCA companies, the specific requirements have yet to be introduced.

Continuous Disclosure Guidance

During 2017, Canadian securities regulators and the TSX issued disclosure guidance, based on their respective reviews of existing disclosure which, in a number of instances, was found to be inadequate.

CSA Multilateral Staff Notice 58-309

The securities regulatory authorities in Alberta, Manitoba, New Brunswick, Newfoundland and Labrador, Northwest Territories, Nova Scotia, Nunavut, Ontario, Quebec, Saskatchewan and Yukon provided guidance in October 2017 with respect to the current gender disclosure regime. CSA Multilateral Staff Notice 58-309 *Staff Review of Women on Boards and in Executive Officer Positions – Compliance with NI 58-101 Disclosure of Corporate Governance Practices (“58-309”)* provided a review of compliance with the public disclosure requirements provided by National Instrument 58-101 *Disclosure of Corporate Governance Practices*, which requires non-venture issuers to disclose certain information relating to woman directors and executive officers. As a result of disclosure deficiencies, securities regulators noted:

- Disclosure must include both the number and the percentage of women on an issuer’s board of directors and in its executive officer positions.
- If a written policy regarding the representation of women on the board of directors has been adopted, a description of the policy and an explanation of how the policy applies to the identification of women directors, must be included.
- If gender targets have been adopted, disclosure of annual and cumulative progress in achieving those targets must be included.
- If there is consideration of the representation of women in the identification and selection of directorship and executive officer candidates, a description of the process must also be disclosed.
- If term limits or other mechanisms for the renewal of the board of directors have been adopted, a description of the limits and/or other renewal mechanisms as well as their contribution to board renewal, must be disclosed.

OSC Staff Notice 51-728

On September 21, 2017 the Ontario Securities Commission (the “OSC”) published OSC Staff Notice 51-728 Corporate Finance Branch 2016-2017 Annual Report. Concerns highlighted by the OSC with respect to continuous disclosure included:

- The lack of meaningful disclosure in Management’s Discussion & Analysis (“MD&A”) especially regarding:
 - (i) changes in accounting policies including initial adoption;
 - (ii) results of operations;
 - (iii) risk and uncertainties; and
 - (iv) liquidity and capital resources.
- Unwarranted prominence given to non-GAAP financial measures in news releases, MD&A, prospectus filings, websites, and marketing materials, as well as the visibility and clarity of adjustments made from the comparable GAAP measure and the appropriateness of the adjustments themselves. With respect to these deficiencies, the OSC made specific reference to mining issuers, real estate investment trusts, as well as technology and biotechnology issuers.
- Disclosure of only generic factors and assumptions in the forward-looking information section of news releases, MD&A, prospectus filings, marketing materials, investor presentations and websites, as well as forward looking information assumptions not being quantified.
- Non-compliant disclosure of preliminary economic assessments (“PEA”) in technical reports, as a PEA of an advanced property containing mineral reserves is only permissible when those results are disclosed in a matter consistent with the CIM definitions incorporated by National Instrument 43-101 *Standards of Disclosure for Mineral Projects*.
- Insufficient information by venture issuers using Form 51-102F6V Statement of Executive Compensation in the discussion of the “oversight and description of director and named executive officer compensation” and in the table of “stock options and other compensation securities”.

- Early and selective disclosure on social media platforms while failing to ensure that material information is more widely disseminated and concurrently filed on the System for Electronic Document Analysis and Retrieval (“SEDAR”). Accordingly, the OSC is encouraging issuers to adopt a social media governance policy to enhance the integrity of disclosures provided in both social media and regulatory filings in order to prevent unbalanced, misleading or selective disclosure.

Ensuring social media compliance with securities laws is a recurring theme raised by securities regulators. In March 2017, the Canadian Securities Administrators published Staff Notice 51-348 *Staff’s Review of Social Media Used by Reporting Issuers* (“51-348”). Based on a review conducted by the securities regulatory authorities in Alberta, Ontario, and Quebec, 51-348 stresses that reporting issuers must constantly be aware of the securities reporting obligations that their social media activities may trigger, even if these activities are not directly intended to communicate with investors. 51-348 highlighted disclosure deficiencies in the following areas:

- (i) selective disclosure on social media;
- (ii) forward looking information disclosed only on social media;
- (iii) lack of coordination of the timing of social media announcements, i.e. disclosure released first on social media and only later via SEDAR or news release;
- (iv) third party posts on social media suggesting missing continuous disclosure;
- (v) unbalanced or misleading disclosure on social media to the extent that it raises concerns under securities laws;
- (vi) misleading or untrue statements provided on social media or statements and commentary on social media that were inconsistent with the issuer’s other continuous disclosure; and
- (vii) misleading or untrue statements provided through links to other documents such as analyst reports and news articles.

Issuers need to ensure that regardless of the medium of disclosure, the disclosure complies with securities laws. In order to ensure compliance, it is recommended that each issuer adapt a comprehensive social media policy that includes strong internal controls in respect of dissemination of information on behalf of the issuer and ensure that all members of its organization, especially those engaged in social media use on behalf of the issuer, are familiar with and abide by this policy.

TSX Staff Notice 2017-0001

TSX Staff Notice 2017-0001 published on March 9, 2017 provides guidance for listed issuers with respect to the TSX requirement (in effect since June 2014) that its listed companies (other than majority controlled companies) have in place majority voting policies (“MVPs”). A MVP requires a director who in an uncontested election, receives fewer votes ‘for’ than ‘withheld’, to immediately tender his or her resignation, which must, in the absence of “exceptional circumstances”, be accepted by the remainder of the board of directors. The TSX noted the following deficiencies with respect to existing MVPs:

- Certain MVPs did not have the effect of requiring (as opposed to merely ‘expecting’) a director to tender his or her resignation immediately if he or she did not receive a majority of votes cast.
- Certain MVPs did not provide a time frame for the board of directors to render a decision as to whether or not to accept a resignation or the time frame provided was outside of the 90 day period permitted by the TSX.
- Certain MVPs did not specifically require the board of directors to accept the tendered resignation of a director, absent exceptional circumstances.
- A number of factors identified in MVPs as “exceptional circumstances” were inconsistent with the objective of providing a meaningful way for shareholders to hold individual directors accountable. A director’s length of service, qualifications, experience, attendance record or contributions to the board of directors are among the factors identified by the TSX as not constituting “exceptional circumstances” so as to permit the rejection of the tendered resignation.

Governance

- MVPs should include the TSX requirement that a copy of the news release describing the board of director's decision in respect of the resignation, be provided to the TSX.
- Certain MVPs contained additional requirements that cause circumvention of the TSX's policy objectives. Examples of additional requirements include:
 - (i) a higher quorum requirement for the election of directors as compared to the quorum requirement for other resolutions; and
 - (ii) MVPs that exclude certain nominees, such as insider nominees or incumbent directors, from certain requirements of the MVPs or that otherwise treat certain nominees more favorably than others.

TSX Staff Notice 2017-0001 additionally provides guidance for listed issuers respecting the use of advance notice bylaws and policies ("**Advance Notice Policies**") in the context of director election requirements. Advance Notice Policies require that advance notice of proposed nominees for directors made by shareholders, along with certain additional information, be provided to the issuer well in advance of a shareholders' meeting, thereby allowing shareholders sufficient opportunity to evaluate the nominees. The TSX highlighted provisions that it believes to be inconsistent with the policy objectives of the TSX rules pertaining to director elections, including:

- Requiring the nominating shareholder to be present at the meeting of shareholders at which his or her nominee is standing for election.
- Requiring the nominating shareholder to provide burdensome or unnecessary disclosure, such as the dates when such security holder acquired securities of the issuer or other information that the TSX views as irrelevant for security holders to make an informed decision to elect directors. (The TSX does however support the disclosure of the nominating security holder's economic and voting position).
- Requiring the nominee or nominating security holder to complete a Personal Information Form ("**PIF**") in order for the nomination to be accepted, unless the PIF is also required by the issuer from management's and the board of director's nominees.

- Requiring the nominating shareholder to complete a questionnaire, make representations, submit an agreement or provide written consent in a form specified by the issuer, unless such questionnaire, representations, agreement or written consent is also required by the issuer from management and the board of director nominees.

In addition, the TSX expects that an Advance Notice Policy will give the board of directors the discretion to waive any provision of an Advance Notice Policy. Finally, the TSX expects listed issuers to adopt Advance Notice Policies sufficiently in advance of a meeting of shareholders in order to allow compliance with the Advance Notice Policy in respect of the next shareholders' meeting.

Updates for TSX Listed Issuer Continuous Disclosure

Amendments to the TSX Company Manual (the "**Manual**") adopted in October 2017 will require enhanced website disclosure and enhanced disclosure of security based compensation plans in 2018 for TSX listed issuers (with some narrow exceptions).

- **Website Content:** In an effort to ensure that there is ready access to key security holder documents (which although available on SEDAR, may be difficult to locate), Part IV of the Manual has been amended effective April 1, 2018, to require TSX-listed issuers (other than Non-Corporate Issuers, Eligible Interlisted Issuers and Eligible International Interlisted Issuers (as such terms are defined in Part I of the Manual)) to make available on their websites (to the extent applicable) current, effective versions of the issuer's:
 - (i) constating documents;
 - (ii) majority voting policy;
 - (iii) advance notice policy;
 - (iv) position descriptions of the chairman of the board of directors, and the lead director;
 - (v) board mandate; and
 - (vi) board committee charters.

- **Security Based Compensation Plans and Awards:** Beginning with financial years ending on or after October 31, 2017, TSX-listed issuers will be required to include additional disclosure in their proxy circulars in respect of each of their security based compensation plans. This will include the annual burn rate for the three most recently completed financial years (or fewer years to the extent that a plan was more recently established or approved by shareholders). The annual burn rate is calculated as the number of securities granted under an arrangement in a fiscal year divided by the weighted average of outstanding securities for that fiscal year.

In addition, disclosure with respect to the plans and the securities granted thereunder, will be required to be presented: (i) for an annual meeting, as at the end of the issuer's most recently completed fiscal year; and (ii) for meetings where security holder approval is being sought in respect of a security based compensation arrangement, as at the date of the meeting materials.

Update for TSX Notices of Private Placement

On November 2, 2017, the TSX provided guidance on the completion of TSX Form 11 Notice of Private Placement. The guidance provides that issuers are required to disclose any significant information regarding the private placement. Significant information will include, but is not limited to, any upcoming shareholders meeting for which a record date has been or is shortly expected to be determined, any pending mergers, acquisitions, take-over bids, changes to capital structure or other significant transactions, and any details regarding potential dissident shareholders and/or anticipated proxy contests.

This bulletin originally appeared on McMillan.ca (<http://mcmillan.ca/Key-Corporate-Governance-and-Disclosure-Developments-in-2017>) For updates please follow @McMillanLLP.

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A Cautionary Note

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