Canada

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Sources of corporate governance rules and practices

1 Primary sources of law, regulation and practice

What are the primary sources of law, regulation and practice relating to corporate governance?

The basic governance framework for Canadian corporations is set out in the corporate statutes (in addition to the standards established by the common law). A corporation may be formed federally or under the laws of any of Canada's 10 provinces and three territories. Although the governance framework varies with the statute, the approach in the federal corporate statute, the Canada Business Corporations Act (CBCA) is the most common. References to corporate law requirements in this summary are based on the CBCA.

One of the most important remedies available to shareholders under the CBCA and many other corporate statutes is the oppression remedy. Any 'complainant' (which includes shareholders, directors and officers – and, in many cases, creditors) may apply to the court for an order on the basis that an action by the corporation or its directors is oppressive or unfairly prejudicial to or unfairly disregards the interests of any security holder, creditor, director or officer. The court may make any order it sees fit in connection with the matter. The oppression remedy is used frequently, particularly by minority shareholders and creditors. Courts have been prepared to provide relief under the oppression remedy even when there was a valid business purpose for the action taken by the corporation.

Securities regulation and stock exchange listing requirements are also important sources of corporate governance regulation. Securities law is currently a matter of provincial and territorial law in Canada and public companies may therefore be subject to securities laws in a number of jurisdictions. The federal government has announced an agreement in principle with the provinces of British Columbia and Ontario to establish a cooperative securities regulator. The government hopes that all provinces and territories with ultimately participate in the initiative.

2 Responsible entities

What are the primary government agencies or other entities responsible for making such rules and enforcing them? Are there any well-known shareholder activist groups or proxy advisory firms whose views are often considered?

Governance standards established in federal and provincial legislation are generally enforced through the courts. Many provincial securities regulatory authorities have the authority to make and enforce rules. The stock exchanges impose conditions of listing and continued listing, which must generally be approved by securities regulators.

Some of Canada's largest institutional investors publish proxy voting guidelines setting out how they intend to vote in respect of particular governance matters. These guidelines have a significant influence on governance practices in Canada. In addition, the Canadian Coalition for Good Governance (CCGG), a membership-based organisation representing pension funds, mutual funds and money managers in Canada, issues position papers and recommendations on appropriate governance practices. It also promotes robust engagement between its members and the issuers in which they invest. Members of the CCGG have agreed to share information and to take the initiative to hold management accountable for growing long-term shareholder value.

In addition, certain organisations have provided leadership in establishing and promoting best practices. In particular the Institute of Corporate Directors, CPA Canada, ISS and Glass Lewis provide corporate governance research and related services to institutional investors and have been influential in the development of corporate governance practices in Canada. The CCGG and the International Corporate Governance Network are important organisations representing the views of investors.

The rights and equitable treatment of shareholders

3 Shareholder powers

What powers do shareholders have to appoint or remove directors or require the board to pursue a particular course of action? What shareholder vote is required to elect directors?

Generally it is the shareholders who elect the directors, although there are several statutes that allow creditors and employees to elect directors under certain circumstances. If a vacancy occurs, the directors then in office may appoint a director to fill that vacancy, subject to certain restrictions. Only the shareholders (and under some statutes, the creditors or employees who have the power to elect certain directors) have the power to remove directors from office.

Shareholders do not have the authority direct the board to pursue any particular course of action that is otherwise within the scope of the board's authority. However, shareholders do have the right to restrict some or all of the powers of the directors and exercise those powers themselves through a 'unanimous shareholder agreement' signed by all of the shareholders. While this is generally impractical in the context of a public company, it is frequently used in private companies.

Companies listed on the Toronto Stock Exchange (TSX) are subject to individual director voting and majority voting policies (see 'Update and trends').

4 Shareholder decisions

What decisions must be reserved to the shareholders? What matters are required to be subject to a non-binding shareholder vote?

Generally, it is the shareholders that elect the directors and appoint the auditors and only the shareholders that have the power to remove a director or auditor from office. Shareholder approval is required to amend the corporation's articles in most circumstances and directors must submit by-laws (and amendments and repeals of by-laws) to the shareholders for ratification. Shareholder approval is also required for the corporation to amalgamate with another

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corporation (other than certain corporations in the same corporate family), reorganise under a plan of arrangement, sell all or substantially all of its assets, make certain changes in its stated capital or dissolve. In some cases, a majority of the votes cast is required for shareholders to approve a matter put before them and in other cases two-thirds is required. In some circumstances, corporate and securities laws and stock exchange requirements will also require the approval of a 'majority of the minority' in the context of a transaction with a related party.

The TSX requires shareholder approval for certain transactions involving the issuance of shares, including transactions that would materially affect control of the corporation and transactions that have not been negotiated at arm's length. The TSX also requires approval of certain stock-option plans and share-compensation arrangements.

There is no requirement in Canada for non-binding shareholder votes. However a number of publicly traded corporations have placed non-binding say-on-pay votes on the agendas of their shareholder meetings (see question 36).

5 Disproportionate voting rights

To what extent are disproportionate voting rights or limits on the exercise of voting rights allowed?

Corporate law requires that the corporation have at least one class of share that carries the right to vote. Typically, a corporation will have at least one class of common share, with each common share entitled to one vote. However, there is no prohibition on the issuance of classes of stock with different voting rights and it is not uncommon for a corporation to have restricted shares (meaning equity shares that have a lesser right to vote than other shares). Securities laws and stock exchange listing requirements may require shareholder approval, stipulate what the shares may be called and impose additional disclosure requirements. The TSX also requires the corporation's articles to include takeover protection for the restricted shares referred to as 'coat-tail provisions'.

6 Shareholders' meetings and voting

Are there any special requirements for shareholders to participate in general meetings of shareholders or to vote? Can shareholders act by written consent without a meeting?

A corporation must hold an annual meeting of shareholders within the time frames set out in the applicable corporate statute (generally within 15 months after the last annual meeting) and the TSX (within six months of the release of the annual audited financial statements). Shareholders entitled to vote at the meeting are entitled to receive notice of the meeting, a form of proxy and a management information circular in prescribed form.

Shareholders have a specified period of time prior to the meeting by which to deposit their proxies with the corporation. The corporation will typically propose certain members of management to act as the proxy holders, but a shareholder may name another proxy holder (who need not be a shareholder).

A number of corporations have voluntarily adopted a system of confidential voting to prevent management from knowing how particular shareholders have instructed proxy holders to vote. Typically, this is effected by having the proxies received, tabulated and sometimes retained by an independent third party (often the corporation's transfer agent).

7 Shareholders and the board

Are shareholders able to require meetings of shareholders to be convened, resolutions to be put to shareholders against the wishes of the board or the board to circulate statements by dissident shareholders?

Shareholders holding 5 per cent of the voting shares have the right to requisition a meeting of shareholders (under the CBCA) for the purposes stated in the requisition. Shareholders also have the right to make proposals with respect to matters that may be raised at a shareholder meeting, including director nominations.

8 Controlling shareholders' duties

Do controlling shareholders owe duties to the company or to non-controlling shareholders? If so, can an enforcement action against controlling shareholders for breach of these duties be brought?

Controlling shareholders owe no duty to the company or to non-controlling shareholders.

9 Shareholder responsibility

Can shareholders ever be held responsible for the acts or omissions of the company?

Shareholders are not responsible for acts or omissions of the company. There have been examples of the corporate veil being pierced, but these cases are rare.

Corporate control

10 Anti-takeover devices

Are anti-takeover devices permitted?

Devices that may adversely affect or defeat takeovers are allowed only if they are in the best interests of the corporation, in the reasonable opinion of the board. A court may find that the directors have breached their fiduciary duty if they approve a defensive tactic for the purpose of entrenching the current board or management.

Securities regulators may be prepared to intervene if a defensive tactic is likely to deny or severely limit the ability of the shareholders to respond to a takeover bid or a competing bid in circumstances that do not enhance value for shareholders. For example, if a significant block of securities is issued or an option over a significant block of securities or assets of the target company is granted during or immediately before a bid, securities regulators may review the transactions. However, courts have repeatedly affirmed the business judgement of boards of directors that have pursued alternative measures reasonably intended to enhance value for shareholders.

Poison pills are common in Canada. As a result of the regulatory environment, however, they tend to be benign, providing the target board with little tactical support other than some extra time to respond to an unsolicited offer. The more exotic pills developed in the United States, including 'dead hand', 'no hand' and 'chewable' pills, have not been widely adopted in Canada. The TSX requires shareholder ratification of a pill within six months of its being adopted and many of Canada's large institutional investors are opposed to provisions that make the pill too potent. Many corporations prefer to put a pill of limited duration (six months or less) in place once an unsolicited offer is made or is imminent, thereby avoiding the need for shareholder approval. Whatever the provisions of the pill, a hostile bidder will typically seek to have it terminated by the securities regulators. The regulators will generally not allow the pill to stay in place beyond the time necessary to allow the board time to consider all reasonable alternatives to enhance shareholder value. Securities regulators will typically cease-trade a poison pill within 45 to 60 days of the launch of a takeover bid. Proposed amendments to this regulatory approach are currently under consideration, as discussed in 'Update and trends'.

11 Issuance of new shares

May the board be permitted to issue new shares without shareholder approval? Do shareholders have pre-emptive rights to acquire newly issued shares?

Boards may not issue new shares having provisions that are in conflict with an outstanding class or series of shares without the

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approval of the holder of that class of shares. For example, if the shares of an existing class carry the right to the payment of dividends in preference of any other class, approval of that existing class would be required before a class of shares with a superior preference could be created or issued.

It is permissible (although not common in the public company context) for pre-emptive rights to be included in the share conditions attaching to any class or series, but shareholders have no statutory pre-emptive right.

12 Restrictions on the transfer of fully paid shares

Are restrictions on the transfer of fully paid shares permitted, and if so what restrictions are commonly adopted?

Transfer of shares of a private company is typically subject to requirements for board or shareholder approval as set out in the company's articles. The shares of public companies are generally freely tradable. However, the issue, transfer or ownership of shares may be constrained in some cases, for example, to allow the corporation to comply with legislation that prohibits any person from holding more than 10 per cent of the corporation's voting shares or that requires a majority of the shares to be held by resident Canadians.

In addition, shares may not be issued or transferred except in accordance with applicable securities laws and stock exchange requirements. Shares issued pursuant to a private placement, for example, may be subject to restrictions on transfer for a period.

13 Compulsory repurchase rules

Are compulsory share repurchases allowed? Can they be made mandatory in certain circumstances?

Corporations may issue shares that are redeemable (at the option of the corporation) or retractable (at the option of the holder). The corporation must provide certain disclosure with respect to these shares and must satisfy certain solvency requirements before it may reacquire these (or any other) shares. Corporate statutes also provide for the compulsory acquisition of shares following a takeover bid or going private transaction if a certain threshold of shares were acquired pursuant to the original transaction.

14 Dissenters' rights

Do shareholders have appraisal rights?

If shareholders have dissented from an action or transaction in accordance with the provisions of the corporate statute, the statute gives them appraisal rights (the right to be paid fair value for their shares).

The responsibilities of the board (supervisory)

15 Board structure

Is the predominant board structure for listed companies best categorised as one-tier or two-tier?

Canadian corporate statutes require a single board of directors (ie, a one-tier structure). It is common for the chief executive officer to sit on the board of directors. It is not uncommon for other members of management to sit on the board of an early-stage public company, but this would be unusual for larger issuers.

Advisory boards are sometimes used. An advisory board has no legal authority and typically comprises individuals from whom the board of directors wishes to obtain strategic advice and assistance from time to time.

16 Board's legal responsibilities

What are the board's primary legal responsibilities?

The mandate of the board is typically to 'manage or supervise the management of the business and affairs of the corporation'. The Canadian Securities Administrators (CSA) list the following areas of responsibility that every board should explicitly assume as part of its overall stewardship responsibility:

- integrity of CEO and other executive officers;
- adoption of a strategic planning process and approval of a strategic plan;
- identification of the principal risks of the corporation's business and ensuring the implementation of appropriate systems to manage these risks;
- succession planning, including appointing, training and monitoring senior management;
- communications policy for the corporation;
- the corporation's internal control and management information systems; and
- development of the issuer's approach to corporate governance.

17 Board obligees

Whom does the board represent and to whom does it owe legal duties?

The board is elected by the shareholders and owes its legal duties to the corporation. The corporate statutes in Alberta, Saskatchewan and the Yukon permit creditors or employees to elect or appoint directors (if the articles or a unanimous shareholder agreement so provide). A director who is elected or appointed by employees or creditors (or holders of a class or series of shares) under the Alberta statute may give special, but not exclusive, attention to the interests of those who elected him or her. In 2004, the Supreme Court of Canada held that directors owe a fiduciary duty only to the corporation and specifically not to the corporation's creditors. In 2008, the Supreme Court of Canada again considered the issue in the context of a change of control transaction and reiterated that a director owes his or her fiduciary duty to the corporation and not to any of the corporation's stakeholders (including shareholders and creditors). The Court went on to say that where the interests of the stakeholders conflict, it falls to the board to resolve conflicts between the interests of different corporate stakeholders.

None of the Canadian corporate statutes specifically provides that the directors may take the interests of other stakeholders into account (except as described above), but it is generally accepted that they may do so, provided that they are acting at all times 'honestly and in good faith with a view to the best interests of the corporation'.

18 Enforcement action against directors

Can an enforcement action against directors be brought by, or on behalf, of those to whom duties are owed?

Directors owe their duty to the corporation. However, stakeholders may bring an action in the name of and on behalf of a corporation (ie, a derivative action) if they fall within the definition of 'complainant'. The definition of complainant may include shareholders, directors and officers.

Canadian courts will not substitute their own business judgement for that of the directors, provided that the directors have followed an appropriate and independent process in arriving at their decision. This 'business judgement rule' in Canada is not as structured as the same rule in the United States. The oppression remedy is an important overlay on this principle and is discussed in greater detail in question 1.

19 Care and prudence

Do the board's duties include a care or prudence element?

Directors and officers have two fundamental duties in exercising their powers and discharging their duties. First, they must act honestly and in good faith, with a view to the best interests of the corporation. This is a codification of the common law fiduciary duty which, inter alia, precludes directors from exercising their authority

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in their own self-interest. Conflict-of-interest issues are dealt with in most statutes by providing a procedure for directors and officers who have an interest in a contract or transaction with the corporation to declare the interest and refrain from voting. The contract or transaction must also be fair and reasonable to the corporation. The fiduciary duty also precludes directors and officers from appropriating corporate opportunities.

Secondly, directors and officers must exercise the care, diligence and skill that a reasonably prudent person would exercise in comparable circumstances. The inclusion of the words 'in comparable circumstances' allows a court to consider all aspects of an impugned transaction in determining whether a director has acted in accordance with his or her duty of care. This may include the kind of business carried on by the corporation, the nature of the transaction in question, the relationship of the director to the corporation (for example, whether the director is also a member of management) and the expertise and experience of the director.

20 Board member duties

To what extent do the duties of individual members of the board differ?

All directors are subject to the fiduciary duty and duty of care described in question 19. Pursuant to the duty of care, every director must apply the skills and experience he or she possesses to the discharge of his or her duties. Directors whose skills and experience are directly relevant to a particular matter may have more to contribute to board deliberations with respect to that issue and will likely be subject to greater scrutiny by the shareholders, regulators and the courts if the board fails in some way in the discharge of its duty with respect to that matter. In the context of a single action, it is possible for a court to find that one director has discharged his or her duty of care and to find that another director has not.

21 Delegation of board responsibilities

To what extent can the board delegate responsibilities to management, a board committee or board members, or other persons?

Corporate law prohibits the corporation from delegating certain specific functions, such as issuing securities, declaring dividends, purchasing or acquiring shares of the corporation, approving the annual audited financial statements, approving management information, takeover bids and directors' circulars and adopting, amending or repealing by-laws.

Subject to these restrictions, the board may delegate any of its authority to management or to committees of the board (or individual directors). Public company boards typically delegate responsibility for day-to-day operations to management (either tacitly or pursuant to written position descriptions). Having delegated to management, however, a board must monitor management's activities and performance. The board must reserve to itself the ability to intervene in management decisions and to exercise final judgement on any matter that is material to the corporation. If the board delegates responsibility to a committee of the board (or individual director), it must likewise continue to perform an oversight function with respect to the activities of that committee or director.

22 Non-executive and independent directors

Is there a minimum number of 'non-executive' or 'independent' directors required by law, regulation or listing requirement? If so, what is the definition of 'non-executive' and 'independent' directors and how do their responsibilities differ from executive directors?

Most corporate statutes require public companies to have at least two 'outside' directors (directors who are not officers or employees of the corporation or its affiliates). The Ontario corporate statute requires one-third of the directors of public companies to be outside directors.

The CSA recommend that a majority of the directors be independent directors. Many institutional investors prefer to see a board composed of two-thirds independent directors.

A director is 'independent' if he or she has no direct or indirect material relationship with the corporation (meaning a relationship that could, in the view of the corporation's board of directors, be reasonably expected to interfere with the exercise of a member's independent judgement). Certain relationships specifically preclude a director from being considered independent.

23 Board composition

Are there criteria that individual directors or the board as a whole must fulfil? Are there any disclosure requirements relating to board composition? Are there minimum and maximum numbers of seats on the board? How is the size of the board determined? Who is authorised to make appointments to fill vacancies on the board?

Some Canadian corporate statutes require that a board be composed of a minimum number of resident Canadians. Most Canadian statutes disqualify an individual from serving as a director if he or she is an undischarged bankrupt and some also disqualify individuals from serving as a director if they have been subject to certain criminal convictions. Publicly traded corporations are required to provide disclosure about the independence of the members of their boards from management and about the qualifications of the members of the audit committee. Other disclosure is required about the personal backgrounds of individual directors and their investment in shares of the corporations.

24 Board leadership

Do law, regulation, listing rules or practice require separation of the functions of board chairman and CEO? If flexibility on board leadership is allowed, what is generally recognised as best practice and what is the common practice?

Although the separation of the functions of board chair and CEO is not required in Canada, it is very common among larger public companies. The CSA recommends the separation of the two functions as one way – but not the only way – to promote board independence from management.

25 Board committees

What board committees are mandatory? What board committees are allowed? Are there mandatory requirements for committee composition?

Public company boards must have an audit committee, consisting of at least three independent directors. Members of an audit committee must be financially literate (or become financially literate in a reasonable period of time after their appointment to the audit committee). Boards of financial institutions (such as chartered banks) are required to have a conduct review committee and must designate a committee to perform certain other prescribed functions.

Fully independent compensation committees are very common. Although they are not required, they are recommended by the CSA and expected by investors. Securities laws in most jurisdictions require the corporation to include in its proxy circular a report on executive compensation, describing the policies of the compensation committee (or of another committee performing that function; or in the absence of such committee, the full board).

Fully independent nominating committees are also common. Like compensation committees, they are not required, but they are recommended by the CSA and expected by investors. Many corporations also have a governance committee to discharge certain other functions recommended by the CSA, such as developing the

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Update and trends

Governments and regulators across Canada are moving forward with changes that will affect the governance and disclosure practices of Canadian companies:

- The federal government is considering amendments to the Canada Business Corporations Act (the federal corporate statute), many of which relate to corporate governance (including executive compensation, board diversity, shareholder rights, socially responsible enterprises and corporate social responsibility).
- The Canadian Securities Administrators (CSA) have proposed the following:
  - guidance for proxy advisory firms, addressing issues that had been raised as concerns to market participants during a consultation process in 2013. Those issues include conflicts of interest, transparency and accuracy of vote recommendations, development of proxy voting guidelines and communications with clients, market participant, the media and the public;
  - major amendments to the system for 'early warning' of acquisitions by Canadian public companies of 10 per cent or more of any class of equity or voting securities, including a lowering of the reporting threshold to 5 per cent; and
  - a new approach for dealing with poison pills. The CSA are proposing a regime which would permit a shareholder rights plan adopted by a board of directors to remain in place provided majority security holder approval of the rights plan is obtained within specific times. Quebec's Autorité des marchés financiers released its own proposals on defensive tactics, which would give considerable deference to target boards, subject to limited review by the regulator for abusive measures and proposed rules to minimise any coercive effect when a bid is made directly to shareholders.
- The CSA also solicited comments on ways to address marketplace concerns with the proxy voting system, in particular as it relates to accurate vote reconciliation and end-to-end vote confirmation.
- The Ontario Securities Commission has proposed a disclosure requirement intended to increase the representation of women on boards and in senior management, through annual reporting of policies on gender diversity, how the representation of women is factored into the recruitment of directors and executive managers and targets (if any) for the numbers of women in these positions and actual numbers.
- The Toronto Stock Exchange implemented a new rule requiring listed issuers to adopt majority voting policies in uncontested director elections. Where a director fails to be elected by a majority of the votes cast, he or she must immediately offer to resign and the board must issue a news release indicating whether it has accepted the resignation (and if not, why not). Issuers must also issue a news release disclosing the detailed voting results for the election of individual directors. This extends a 2012 rule change that eliminated slate voting and staggered boards, but which merely required issuers to disclose whether or not they had voluntarily adopted a majority voting policy.
- The Canadian Coalition for Good Governance (CCGG) released guidelines on 'dual-class' shares, which discuss the pros and cons of this share structure and director elections where there are shares with multiple voting rights. The CCGG recommends collapsing dual-class share structures and the exchange of shares with multiple voting rights for shares with a single vote.
- There continues to be significant activity on the proxy battlefront, including the highly contested fight between Agrium Corp and its largest shareholder, Jana Partners LLC (which resulted in the re-election of Agrium's management slate); that between Smoothwater Capital Partners LP and Equity Financial Holdings Inc, which resulted in a settlement; and one between Clarke Inc, on behalf of a group of concerned shareholders, and Sherritt International Corporation. InnVest REIT also settled a proxy battle with Orange Capital.
- Shareholder activism continues to focus on executive and director compensation:
  - 'say-on-pay' votes are not mandatory in Canada but there has been increasing pressure from shareholders for companies to hold non-binding advisory votes. In one such vote, more than 85 per cent of the shareholders of Barrick Gold Corp (with the support of eight institutional investors) expressed their disapproval of a C$17 million pay packet (including a C$11.9 million signing bonus) for the company's new co-chairman, and withheld up to 28 per cent of the votes for certain directors. The company subsequently consulted shareholders and made significant changes to its executive compensation programme; and
  - the first 'say on board pay' was successfully proposed by dissident shareholder Clark Inc to the board of Sherritt International Corporation.

corporation's approach to governance. The functions of the nominating committee and the governance committee are typically combined. Risk review committees, environmental committees, pension administration committees and health and safety committees are also common, depending on the industry in which the corporation operates. Executive committees are considered undesirable from a governance perspective but still exist in some corporations, generally to deal with unforeseen developments. In most cases the executive committee meets rarely and immediately reports its activities to the full board.

26 Board meetings

Is a minimum or set number of board meetings per year required by law, regulation or listing requirement?

There is no requirement for any minimum or set number of board meetings (except in respect of some regulated entities, such as financial institutions). Best practice codes are generally silent on this point. In the absence of any unusual challenges facing the corporation, many public company boards have four meetings a year, timed to coincide with the release of financial information. Other boards meet every two months. Committees of the board will have their own schedule of meetings, the frequency of which will depend primarily on the nature of the committee's mandate.

Boards will meet more frequently when something out of the ordinary course occurs. This will be the case, for example, if a takeover bid is made or threatened or if the corporation is experiencing financial difficulty or faces another type of crisis.

27 Board practices

Is disclosure of board practices required by law, regulation or listing requirement?

Securities laws require disclosure of certain aspects of a corporation's corporate governance in materials that are delivered to the corporation's shareholders each year. Certain financial institutions must disclose the number of directors' meetings and committee meetings held during the year and the number of those meetings attended by each director. Other corporations provide this disclosure voluntarily.

28 Remuneration of directors

How is remuneration of directors determined? Is there any law, regulation, listing requirement or practice that affects the remuneration of directors, the length of directors' service contracts, loans to directors or other transactions between the company and any director?

Remuneration of directors is determined by the board and is not subject to shareholder approval. The only requirements affecting remuneration of directors, loans to directors and other transactions between the company and any director are disclosure requirements. Under some statutes, the corporation may not provide financial assistance to a director if the corporation is insolvent or if the financial assistance would cause it to become insolvent.

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29 Remuneration of senior management

How is the remuneration of the most senior management determined? Is there any law, regulation, listing requirement or practice that affects the remuneration of senior managers, loans to senior managers or other transactions between the company and senior managers?

Remuneration of the chief executive officer is determined by the board. Remuneration of other senior executives is typically approved by the board on the recommendation of the CEO. Officers are subject to the same provisions as directors (see question 28) with respect to loans and other transactions.

30 D&O liability insurance

Is directors' and officers' liability insurance permitted or common practice? Can the company pay the premiums?

It is common practice for the corporation to maintain directors' and officers' liability insurance (and for the company to pay the premiums), provided that such insurance is available. Under some statutes, a corporation is prohibited from maintaining insurance for breach of fiduciary duty.

31 Indemnification of directors and officers

Are there any constraints on the company indemnifying directors and officers in respect of liabilities incurred in their professional capacity? If not, are such indemnities common?

A company may not indemnify a director for breach of fiduciary duty or if the director knew that his or her conduct was illegal. Most corporate statutes obligate the company to indemnify its directors in certain circumstances and companies typically provide broader indemnities in their by-laws and in contractual arrangements with their directors.

32 Exculpation of directors and officers

To what extent may companies or shareholders preclude or limit the liability of directors and officers?

The corporate statutes typically provide that no provision in a contract, the articles, the by-laws or a resolution relieves a director from the duty to act in accordance with the statute or its by-laws or relieves him or her from liability for a breach thereof. Accordingly, neither companies nor shareholders may preclude or limit the liability of directors and officers.

33 Employees

What role do employees play in corporate governance?

There is no formal role for employees in the governance process, except when they are also shareholders, directors or officers of the corporation (or are entitled to elect or appoint directors under the Alberta, Saskatchewan or Yukon corporate statutes).

Disclosure and transparency

34 Corporate charter and by-laws

Are the corporate charter and by-laws of companies publicly available? If so, where?

The corporation's articles of incorporation are on the public record. By-laws of public companies are also publicly available.

35 Company information

What information must companies publicly disclose? How often must disclosure be made?

Public companies must disclose a wide range of information on a continuous basis. They must deliver to their shareholders (and file with the regulators) audited annual financial statements and unaudited quarterly statements, accompanied by a narrative discussion of those statements referred to as management's discussion and analysis of financial condition and results of operation (MD&A). The MD&A must include a description of any known trends or uncertainties that affect (or the corporation thinks will affect) the results of continuing operations.

The corporation must deliver an information circular in connection with any meeting of the shareholders. The disclosure in the circular relating to the annual general meeting includes: the names of shareholders holding more than 10 per cent of the voting shares; the number of voting securities held by any director; financial assistance given to shareholders, directors, officers, employees and certain other persons (if the financial assistance was material to the corporation); indebtedness of directors and officers to the corporation; and interests of insiders (which includes 10 per cent shareholders, directors and officers) in material transactions. It also includes executive compensation disclosure and disclosure of amounts paid to directors. In addition, securities laws require that listed corporations incorporated in a Canadian jurisdiction include a disclosure relating to their governance practices in their management information circulars.

Corporations must file an annual information form (AIF) with securities regulators. The AIF is intended to provide background information on the corporation necessary to understand the nature of the corporation, its operations and prospects. It includes a history and description of the business, financial information, information

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about the capital structure and the market for the corporation's securities as well as information about the directors and officers.

Finally, corporations must issue a press release forthwith upon the occurrence of any 'material change'. Insiders of the corporation must file reports about any trades in securities of the corporation.

Hot topics

36 Say-on-pay

Do shareholders have an advisory or other vote regarding executive remuneration? How frequently may they vote?

The shareholder proposal provisions of the corporate statutes may allow shareholders to pass precatory (or advisory) resolutions relating to executive remuneration. However, decisions with respect to executive remuneration remain within the authority of the board. The CCGG (see question 2) recommends that boards add to each annual meeting agenda a shareholder advisory vote on the board's and company's reports on executive compensation. The CCGG has also recommended a form of resolution in connection with that advisory vote. See 'Update and trends'.

37 Proxy solicitation

Do shareholders have the ability to nominate directors without incurring the expense of proxy solicitation?

The shareholders proposal provisions of the statute allow shareholders to nominate directors. However, where the shareholder putting forward nominees is seeking to influence the votes of other shareholders (often beyond a certain number), a dissident circular must be provided that complies with specific disclosure requirements. The issuer is not obliged by statute to reimburse the dissidents for their costs.

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