

CSA STAFF NOTICE 58-303 CORPORATE GOVERNANCE DISCLOSURE COMPLIANCE REVIEW

Staff of the securities regulatory authorities in British Columbia, Alberta, Saskatchewan, Manitoba, Ontario, Québec and New Brunswick (the participating jurisdictions) conducted a review of compliance with the requirements of National Instrument 58-101 *Disclosure of Corporate Governance Practices* (the Instrument). The Instrument came into force on June 30, 2005 in conjunction with National Policy 58-201 *Corporate Governance Guidelines* (the Policy).

The Instrument

The Instrument applies to all reporting issuers with limited exceptions. Part 2 of the Instrument requires a reporting issuer to disclose its corporate governance practices and file any written code it has adopted. TSX-listed issuers must comply with the disclosure requirements in Form 58-101F1 *Corporate Governance Disclosure*. Because smaller issuers may have less formal procedures in place to ensure effective corporate governance, the Instrument's disclosure requirements for venture issuers (as defined) are less extensive than those applicable to TSX issuers. These requirements for venture issuers are set out in Form 58-101F2 - *Corporate Governance Disclosure (Venture Issuers)*.

The Policy

The Policy provides guidance on corporate governance practices for all reporting issuers, other than investment funds. The guidelines, which are included in Part 3 of the Policy, are not intended to be prescriptive. We provide them to assist issuers in developing their own corporate governance practices.

The Review Program

We selected a sample of 100 reporting issuers for review. Our selection criteria included the size of the issuer's market capitalization, its industry sector, and its listing status to achieve a broad cross-section of all reporting issuers. Our sample included 65 TSX issuers and 35 venture issuers. We reviewed each issuer's corporate governance disclosure to determine whether it complied with the Instrument's requirements. We also reviewed the substance of the disclosure to assess whether the quality was sufficient to provide a clear and complete account of its governance practices, while taking account of the realities faced by a diversity of issuers in a changing corporate governance landscape. In our view, disclosure that is not of sufficient quality does not meet the requirements of the Instrument.

Results

TSX Issuers

Form 58-101F1 requires a TSX issuer to disclose its governance practices. The table below sets out the average response rate for the required disclosure in each category. The response rates do not necessarily reflect the quality of the disclosure. We comment on the quality of disclosure in the discussion that follows the table.

| Category | Item Number of Form 58-101F1 | Response Rate |
|------------------------------------|------------------------------|---------------|
| Board Independence | 1 | 94% |
| Board Mandate | 2 | 77% |
| Position Descriptions | 3 | 70% |
| Orientation & Continuing Education | 4 | 85% |
| Ethical Business Conduct | 5 | 86% |
| Nomination of Directors | 6 | 82% |
| Compensation | 7 | 80% |
| Assessments | 9 | 85% |

To assist issuers to make disclosure that meets the requirements of the Instrument, we provide some examples of deficient disclosure in each category of disclosure required in Form 58-101F1:

- **Board Independence - Leadership for Independent Directors**

Item 1(f) requires a TSX issuer to disclose what the board does to provide leadership for its independent directors if it has neither a chair nor a lead director that is independent.

One issuer disclosed that leadership is provided through contact with the independent directors, but failed to disclose how or when such contact is established, nor the forum for the contact. It was therefore unclear from the disclosure what the measure was or how the measure provided leadership for the independent directors.

- **Board Mandate**

Item 2 requires a TSX issuer to disclose the text of the board's written mandate or, if it does not have a written mandate, to describe how the board delineates its roles and responsibilities.

Several issuers disclosed summarized information that was insufficient for a reader to fully understand the board's responsibilities. In addition, several issuers disclosed a cross-reference to their website for the text of the mandate. Any information

required to be included in a management information circular may be incorporated by reference, but the document from which it is incorporated must be filed on SEDAR.¹

- **Position Descriptions**

Item 3(a) requires a TSX issuer to disclose whether or not the board has developed written position descriptions for the chair and the chair of each board committee. Item 3(b) requires a TSX issuer to disclose whether or not the board and CEO have developed a written position description for the CEO. In both instances, a TSX issuer is required to disclose how the board delineates the role and responsibilities of the individual if a written position description has not been developed.

Where there was not a position description for one or more of these parties, the disclosure as to how the board delineates their respective roles and responsibilities was often vague and uninformative. In some instances, it was not obvious how the measures the board adopted facilitated the delineation. For example, one issuer merely disclosed that it relied on a “mutual understanding” without further explanation. In connection with the CEO’s position description, it was sometimes unclear whether both the board and the CEO had been involved in the development of the position description.

- **Orientation and Education of Directors**

Item 4 requires a TSX issuer to disclose what measures the board takes to orient new directors regarding their role and the nature and operations of the issuer’s business, and to provide continuing education for all directors.

Several issuers disclosed that they provide a package of materials to the directors to address these responsibilities. Without knowing the general nature and content of the materials, a reader could neither discern the range of matters the materials addressed nor assess their adequacy.

- **Ethical Business Conduct - Monitoring Compliance with Code of Conduct**

Item 5(a) (ii) requires a TSX issuer to describe how the board monitors compliance with its code, or if the board does not monitor compliance, explain whether and how the board satisfies itself regarding compliance with its code.

One issuer disclosed that its board delegated this responsibility to its governance committee. However, the disclosure did not indicate how the governance committee fulfilled this responsibility. Another issuer disclosed that it addressed this responsibility through interviews or discussions, without further explanation. It was unclear from these brief accounts how either measure enabled the board to monitor or otherwise satisfy itself regarding compliance with its code.

- **Nomination of Directors**

Item 6 requires a TSX issuer to describe the process by which the board identifies new candidates for board nomination, and to describe what steps the board takes to encourage an objective nomination process if it does not have a nominating committee composed entirely of independent directors.

¹ Part 1(c) of Form 51-102F5 – *Information Circular*.

In several instances, the disclosure was vague and uninformative with issuers merely disclosing that the board fills vacancies with required skill sets. In other instances, the disclosure included descriptions of the required skill sets, but not the process by which the board identifies new candidates.

- **Compensation**

Item 7 requires a TSX issuer to describe the process by which the board determines the compensation for the issuer's directors and officers, and to describe what steps the board takes to ensure an objective process for determining such compensation if it does not have a compensation committee composed entirely of independent directors.

The disclosure in this area was often vague and uninformative. For directors, several issuers disclosed the amount of their compensation but not the process by which it is determined. Where issuers did not have a fully independent compensation committee, there was often either no disclosure or only a very general description of how the board determines compensation that did not focus on the objectivity of the compensation setting process.

- **Assessments**

Item 9 requires a TSX issuer to disclose whether or not the board, its committees and individual directors are regularly assessed with respect to their effectiveness and contribution. If assessments are regularly conducted, the issuer is required to describe the process used for the assessments. If assessments are not regularly conducted, the issuer is required to describe how the board satisfies itself that these parties are performing effectively.

Where issuers included disclosure of this nature, it was often vague and uninformative. In some instances, it was not obvious how the measures adopted enabled the board to satisfy itself that the board, its committees, and individual directors are performing effectively. For example, several issuers disclosed that the performance of officers and directors is informally touched on in board meetings. Another issuer disclosed that the board informally supervises its officers and directors, without further elaboration.

TSX Issuer Outcomes

As a result of our review, we required 27 TSX issuers to address the deficiencies identified in our review in their next management information circular or annual information form, as applicable.

Venture Issuers

The disclosure requirements for venture issuers included in Form 58-101F2 are less extensive than those applicable to TSX issuers. However, the requirements generally cover the same categories as those for TSX issuers, with the exception of the board mandate and position descriptions. There were significant deficiencies in the quality of the disclosure that was filed. Eight issuers, representing 23% of the 35 venture issuers reviewed, did not provide any corporate governance disclosure.

Similar to the disclosure for TSX issuers, there were instances where the nature of a practice was not adequately described, where it was unclear how a practice achieved its purpose, or both. This was particularly evident in the following three areas:

- **Board Supervision over Management**

Item 1 requires a venture issuer to disclose how the board facilitates its exercise of independent supervision over management, including (i) the identity of directors that are independent, and (ii) the identity of directors who are not independent, and the basis for that determination.

Several issuers did not provide disclosure with a sufficiently comprehensive description for a reader to understand how the board facilitates its exercise of independent supervision over management.

- **Nomination of Directors**

Item 5 requires a venture issuer to disclose what steps, if any, are taken to identify new candidates for board nomination, including who identifies new candidates and the process for identifying new candidates.

Several issuers merely disclosed that the board fills vacancies with required skill sets, without further elaboration. Those issuers did not discuss how the board determines the competencies and skills it should possess or how it identifies potential candidates to address its needs.

- **Assessments**

Item 8 requires a venture issuer to disclose what steps, if any, the board takes to satisfy itself that the board, its committees, and its individual directors are performing effectively.

One issuer disclosed that the board conducts assessments without identifying who is assessed or how assessments are performed.

Venture Issuer Outcomes

As a result of our review, we required two venture issuers that did not provide any corporate governance disclosure to restate and refile their management information circulars. In addition, we required the other six venture issuers that did not provide any corporate governance disclosure to include the relevant disclosure in their imminent management information circular filing. We also required three other venture issuers to address significant deficiencies identified in our review in their next management information circular, annual information form, or annual management discussion and analysis, as applicable.

Future Reviews

Reporting issuers must provide corporate governance disclosure that addresses the requirements of the Instrument by providing meaningful information to capital market participants.

We are concerned about those issuers that did not comply with all of the Instrument's disclosure requirements. We are equally concerned about the qualitative deficiencies in the disclosure that was provided by both TSX and venture issuers, in particular, the

extent to which issuers failed to provide clear or complete accounts of their governance practices in their disclosures. To comply with the requirements of the Instrument, issuers must provide meaningful, informative disclosure of their corporate governance practices. Avoiding the use of boiler-plate language would help issuers to provide investors with more specific information about their corporate governance practices.

We intend to selectively review issuers' compliance with the Instrument as part of our ongoing continuous disclosure review program and will take appropriate regulatory action for non-compliance.

Questions

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