It's Proxy Time!

February 09, 2016

BLG and the TSX jointly hosted representatives from various Canadian public companies for a panel discussion entitled "What Public Companies Should Expect in 2016."

For many Canadian public companies, a new year signals that a new proxy season is just around the corner. On January 12, 2016, BLG and the Toronto Stock Exchange (the "TSX") jointly hosted representatives from various Canadian public companies for a panel discussion entitled “What Public Companies Should Expect in 2016.” The panelists addressed some key issues in order to help public companies prepare for the upcoming 2016 proxy season.

Regulatory Developments

In the past year, there have been numerous significant regulatory developments. Top of mind for all is the new Cooperative Capital Markets Regulatory System (the "**CCMRS**") and the associated new statute, the *Capital Markets Act*. Through the proposed CCMRS, regulators in the participating jurisdictions (British Columbia, New Brunswick, Ontario, Prince Edward Island, Saskatchewan and the Yukon) will be replaced by a single regulator applying a single set of rules across all participating jurisdictions. It is proposed that the *Capital Markets Act* will be the platform for the main principles of securities law in the participating jurisdictions, and specific details will be provided in the rules and regulations. The CCMRS is intended to streamline the process of the application of securities law but public companies should not notice a substantive difference between how they must comply with securities law today, and how they must comply once the CCMRS comes into effect. The new system is currently scheduled to launch between June and fall 2016.

Of interest to TSX Venture Exchange ("TSXV") issuers, is the TSXV Whitepaper that was published in December 2015. The Whitepaper focuses on three primary ways by which the TSXV can effect positive changes in the TSXV market: (i) by reducing issuers' administrative and compliance costs without compromising investor confidence, (ii) by expanding the base of investors in the market and increasing liquidity and (iii) by diversifying and growing its stock list to make the market more attractive.

Finally, there have been a number of key regulatory changes with respect to capital raising, including changes to exempt market offerings, an expanded use of offering memoranda, a new crowdfunding exemption, and a new rights offering regime.

Proxy Season Updates

Some noteworthy issues for consideration during this proxy season were as follows:

Forum Selection Bylaws

- In some circumstances, it may be prudent for issuers to adopt forum selection bylaws, which serve to limit the jurisdictions in which shareholders can bring actions related to corporate affairs (e.g. derivative actions, actions alleging breach of fiduciary duties, etc.).
- Such bylaws are intended to foster efficiency for issuers as particular jurisdictions will be better suited for litigation with respect to an issuer (e.g. the jurisdiction of an issuer's head office or jurisdiction of incorporation where courts would be more familiar with the corporate law applicable to the issuer).

Majority Voting Requirements

- Since June 2014, it has been mandatory for TSX issuers to implement a majority voting policy.
- Such policies must require a director to promptly resign if he/she has a majority of withhold votes with respect to his/her election. Following the resignation of a director, the board of directors has 90 days to consider the resignation and decide whether to accept it. "*Absent exceptional circumstances*", the board is expected to accept the resignation. Impacted directors may not participate in discussions regarding their resignations. Once a decision is made by the board of directors, a news release must be issued to inform the public of the resignation and of the board's decision whether or not to accept it. If the board does not accept the resignation, the news release must explain why not.
- If a board of directors does not accept a director's resignation after he/she receives a majority of withhold votes and if its bylaw or policy does not include the "absent exceptional circumstances" qualification, the TSX may consider the issuer to be in significant non-compliance with its rules.

Advance Notice Bylaws and Provisions

- Advance notice bylaws are intended to give shareholders adequate time and information to make informed decisions about the election of directors. They generally provide that if someone other than the company is going to nominate a director, such person must provide the company with sufficient notice (often 30 days prior to the meeting) and details of the nominee, such that the company can include the information in its circular and shareholders can weigh their options in advance of the meeting.
- The TSX has reviewed numerous advance notice bylaws and has concluded that although they include consistent timelines, they vary significantly on other terms such as the details to be provided with respect to the nominee and how the timelines operate in the context of a postponed meeting.

Say-on-Pay

- "Say-on-pay" votes are becoming increasingly common among Canadian issuers. Say-on-pay is a voluntary resolution Glass Lewis tions by casting advisory votes. Boards of directors and compensation committees are not obliged to follow the vote of the shareholders, however, proxy advisory firms such as Institutional Shareholder Services Inc. ("ISS") and Glass, Lewis & Co., LLC ("Glass Lewis") may recommend that shareholders withhold from voting for directors on compensation committees if there is not a sufficient number of votes cast in favour on a say-on-pay vote.
- In 2015, three Canadian companies failed say-on-pay votes for reasons such as shareholders' dissatisfaction with the amount of compensation for executives, a company awarding incentive compensation on a largely discretionary basis, and a company's weakness in succession planning.

Canadian Securities Administrators' ("CSA") Continuous Disclosure Review for Fiscal 2015

- Following its 2015 review of issuers' continuous disclosure documents, the CSA noted numerous issues with many companies' MD&A. It noted deficiencies in the discussion of the liquidity of capital resources of issuers and explained that such disclosure should help shareholders understand whether the company is generating sufficient liquidity to achieve its plans, and should not merely duplicate the disclosure of cash flow. The CSA also explained that issuers should not simply state changes in its metrics such as revenue of SG&A, but explain why such metrics have changed. Finally, the CSA noted that many issuers are not consistently identifying forward-looking information as such.
- In addition, the CSA noted that issuers must file material contracts unless they are entered into in the ordinary course of business. Certain types of contracts, however, must always be filed, such as credit and financing agreements that have a direct correlation with anticipated cash distributions and other agreements on which a business is significantly dependent. The CSA has found that many issuers are not adhering strictly to their obligations to file such contracts.

Glass Lewis and ISS' 2016 Proxy Voting Guidelines

- In November 2015, Glass Lewis and ISS published updates to their voting recommendations for the 2016 proxy season. Two key changes of note are that both proxy advisory firms have revised their director overboarding definitions and ISS will be adopting a scorecard system to assess and ultimately recommend voting for or against equity plans.

Board Diversity

- In 2014, the CSA amended its disclosure requirements with respect to gender diversity on boards of directors.
- In a review of the disclosure provided by companies in response to the new requirements, the CSA noted:
    - 15% of issuers have added at least one woman to their board since the new disclosure requirements have been in force;

- 45% of issuers have policies to identify and nominate women for board and executive positions;
- 65% do not and 11% have general diversity policies in place; and
- 7% of issuers had targets with respect to the number of women on boards and 2% of issuers had targets with respect to the number of women in executive officer positions.

Notice and Access Provisions

- Notice and access rules permit issuers to post certain continuous disclosure documents on a website other than SEDAR and to make materials available to shareholders through this media. Pursuant to this mechanism, shareholders are provided notice of shareholder meetings and with instructions regarding how to access electronic copies of the meeting materials or how to request paper copies.
- Issuers who distribute proxy materials by notice and access must deliver the notice package to shareholders at least 30 days prior to the meeting (as opposed to the statutory period of 21 days for paper proxy materials) and the record date must be set at least 40 days prior to the meeting (rather than 30 days which is required when hard copy materials are mailed). Issuers must also file notice of their intent to use notice and access procedures on SEDAR at least 25 days before a relevant record date.

TSX and TSXV Initiatives

The TSX is considering several initiatives including the simplification of the disclosure requirements with respect to share compensation and private placements. The TSX is also planning educational initiatives with respect to environmental and social governance and is likely to publish staff notices regarding majority voting and advance notice bylaws.

It is also expected that the TSXV has developed an application that will publish details of financings for TSXV issuers, which will be populated on a daily basis, and which is intended to attract more attention to the financings that TSXV issuers are pursuing.

By

Manoj Pundit, Laura Costen, Gordon G. Raman

Expertise

Capital Markets

BLG | Canada's Law Firm

As the largest, truly full-service Canadian law firm, Borden Ladner Gervais LLP (BLG) delivers practical legal advice for domestic and international clients across more practices and industries than any Canadian firm. With over 800 lawyers, intellectual property agents and other professionals, BLG serves the legal needs of businesses and institutions across Canada and beyond – from M&A and capital markets, to disputes, financing, and trademark & patent registration.

blg.com

BLG Offices

Calgary

Centennial Place, East Tower
520 3rd Avenue S.W.
Calgary, AB, Canada
T2P 0R3

T 403.232.9500
F 403.266.1395

Ottawa

World Exchange Plaza
100 Queen Street
Ottawa, ON, Canada
K1P 1J9

T 613.237.5160
F 613.230.8842

Vancouver

1200 Waterfront Centre
200 Burrard Street
Vancouver, BC, Canada
V7X 1T2

T 604.687.5744
F 604.687.1415

Montréal

1000 De La Gauchetière Street West
Suite 900
Montréal, QC, Canada
H3B 5H4

T 514.954.2555
F 514.879.9015

Toronto

Bay Adelaide Centre, East Tower
22 Adelaide Street West
Toronto, ON, Canada
M5H 4E3

T 416.367.6000
F 416.367.6749

The information contained herein is of a general nature and is not intended to constitute legal advice, a complete statement of the law, or an opinion on any subject. No one should act upon it or refrain from acting without a thorough examination of the law after the facts of a specific situation are considered. You are urged to consult your legal adviser in cases of specific questions or concerns. BLG does not warrant or guarantee the accuracy, currency or completeness of this publication. No part of this publication may be reproduced without prior written permission of Borden Ladner Gervais LLP. If this publication was sent to you by BLG and you do not wish to receive further publications from BLG, you may ask to remove your contact information from our mailing lists by emailing unsubscribe@blg.com or manage your subscription preferences at blg.com/MyPreferences. If you feel you have received this message in error please contact communications@blg.com. BLG's privacy policy for publications may be found at blg.com/en/privacy.

© 2026 Borden Ladner Gervais LLP. Borden Ladner Gervais LLP is an Ontario Limited Liability Partnership.