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- ▶ Removal of slate voting and adoption of majority voting on the agenda
- ▶ OSC will work closely with other regulators, oversight bodies and exchanges
- ▶ Issuers need to improve their governance and disclosure processes

By Aarti Maharaj

Adjusting to the OSC's new goals

Canadian companies should start preparing to deal with the new and improved Ontario Securities Commission (OSC). The regulator rolled out its statement of priorities for 2012-2013 in March, identifying five major governance and compliance strategies it hopes will enhance its efforts to promote transparency and accountability.

Among the items on the OSC agenda are restoring investor confidence, multi-jurisdictional enforcement investigations, the regulatory framework for over-the-counter (OTC) derivatives, and oversight of credit rating agencies and hedge funds. Current market conditions have also forced the regulator to deal with rules surrounding international business transactions.

'One theme running through the OSC's discussion of its priorities is the significant challenge all regulators face in trying to effectively address rapidly evolving markets and emerging risks, including systemic risks,' says Christopher Jones, a partner at Canada-based Blake Cassels & Graydon. 'One way the OSC plans to deal with this is by increasing its reliance on targeted reviews of high-risk areas identified by the commission.'

Over the past four years, the quantity of full reviews of continuous disclosure documents conducted by the Canadian Securities Administrators (CSA) has remained fairly constant, adds Jones; meanwhile, issue-oriented reviews have skyrocketed. 'Issuers should be

familiar with the risks and major concerns identified by securities regulators and, where appropriate, proactively implement recommended improvements to their governance and disclosure processes,' Jones explains.

Indeed, each of the new OSC priorities may have implications that could affect the governance and compliance measures of many Canadian companies. Here are the regulator's five goals, and how some experts say companies should react.

1. Deliver responsive regulation. By pushing for more stringent reforms and standards, the OSC hopes to evade loopholes in the existing regulatory system, maintain or improve public faith, reduce financial crimes and safeguard investors.

The regulator will also conduct extensive research to help mitigate future risks. A major focus is improving the incumbent proxy voting system through dialogue between companies and their investors. This will equip shareholders with enough power to sway director elections through the removal of slate voting and the adoption of majority voting policies.

2. Provide effective enforcement and compliance. Compliance is always seen as a major issue that companies and even regulators often struggle with. The OSC has observed the costly hurdles involved and is now planning on shifting its attention to preventing non-compliance by issuers and registrants. In order to execute this goal effectively, the OSC will work closely



MILLER THOMSON COMMENTS ON OSC GOALS

Jay Hoffman, partner and co-chair, and Ormonde Benson, partner, at the Miller Thomson Business Law Group, suggest companies should consider the following regarding the Ontario Securities Commission's (OSC) priorities for 2012–2013.



Jay Hoffman



Ormonde Benson

Goal 1: The key takeaway for boards is to be prepared to review their slate voting practices, if any. Slate voting will likely come under increased scrutiny, and boards that use the process should be able to clearly articulate the reasons why they continue to support it, and consider having a plan in place to transition away from it if necessary.

The OSC is also planning to advocate for the adoption of majority voting policies for director elections. In 2011 Toronto Stock Exchange (TSX) published proposed amendments that require individual director elections and oblige issuers to either implement a majority voting policy or provide an explanation of the rationale for not doing so in their meeting materials. In addition, issuers would also have to provide TSX with notice if a director receives a majority of withhold votes.

Boards or their advisers should also monitor OSC communications to understand what type of 'enhanced disclosure of voting results' and 'improvements to the proxy voting system' the OSC is considering.

Goal 2: With regard to issuers that operate in emerging markets, the OSC will put forth greater compliance and enforcement measures. In recent years we have seen the OSC take a strong stance on matters such as deficient executive compensation disclosure and inadequate financial disclosure; the second goal indicates that the OSC intends to continue with vigorous and effective monitoring and enforcement action in many areas.

Boards need to understand that providing

sufficient disclosure is a necessary practice that cannot be ignored. The key challenge is not providing adequate disclosure of issuers' practices, but seeing that such practices reflect the necessary elements: if a company's practices are not up to standard, its

disclosure will necessarily be deficient.

Boards cannot afford to wait until AGM season to review their practices and procedures – they need to start doing so now.

Goal 3: Generally, we do not see the third goal as being of particular relevance to issuers and corporate secretaries as it focuses on investor protection instead of disclosure/compliance issues.

There is, however, one important exception. The OSC has indicated that it will reconsider the way in which it regulates shareholder rights plans. Under the existing regime, Canadian securities regulators are often asked to strike down a rights plan on the basis that the target board has had insufficient time to explore alternative offers. Canadian securities regulators are now considering a new proposal that would permit a US-style 'just say no' defense, provided that the target's shareholders have approved the proposed plan.

It is also contemplated that a rights plan could be removed by a majority of disinterested shareholders. This would be a significant departure from the current regime.

Goal 4: The fourth goal contains more of an OSC procedure/mission statement, but issuers should keep an eye out for a review of the commission's current fee model and for the implementation in April 2013 of a revised OSC fee rule.

Goal 5: The last goal focuses on the OSC's continued efforts to support and promote financial stability but is not, we believe, of particular note for the *Corporate Secretary* audience.

with other regulators, oversight bodies and exchanges to carry out compliance reviews of websites and marketing disclosures by smaller issuers, examine the listing requirements emerging markets often follow, and implement an enhanced risk-based model to monitor issuer regulation and compliance oversight.

3. Stronger investor protection. The OSC is in the midst of creating an Office of the Investor to bridge the gap between stakeholders and companies. This office will collaborate with the OSC Investor Advisory Panel and OSC Research and Data Analysis Group and serve as the place where investors can go to voice concerns and obtain information about a firm or a particular market.

4. Promote a modern, accountable and efficient organization. Through the establishment of an emerging risk committee, the regulator will be able to create the right framework to help identify and analyze risks. In order to support this initiative, enhanced internal work processes will be released to accompany the new goals. The OSC will present a more effective approach to issuer regulation by continuing to improve screening and review protocols for future transactions and by actively overseeing compliance measures.

5. Support and promote financial stability. When it comes to managing risks, derivatives are seen as an integral part of the whole process. In an effort to better regulate OTC derivatives trading, the commission will unveil proposed rules about the oversight of trade repositories and a requirement to report all derivatives trades to an approved trade repository. Rules for comment may be published in late 2012. In addition, the OSC will increase cooperation by developing more formal and regular working relationships with the CSA and other financial service regulators, both in Canada and internationally.

What issuers should do

Some of these areas of concern will be relevant only to certain issuers, but Jones says all issuers should be aware of the goals identified by regulators in their periodic summaries of the results of compliance reviews.

'These reviews can help issuers highlight areas where action may be required so they can proactively strengthen compliance,' he explains. 'The goal of supporting and promoting financial stability relates

largely to the need for regulators to identify and address systemic risks to financial markets.

'Some of the issues to be addressed transcend the purview of the securities regulator for a single jurisdiction, and issuers should anticipate an even greater emphasis on the need for financial services regulators. Issuers are well advised to take a cue from the regulators and ensure they place sufficient emphasis on identifying, disclosing and managing risks.'

Many Canadian businesses see booming opportunities in emerging markets, but issuers that do business in emerging markets have been under greater scrutiny by the OSC. According to Ormonde Benson, partner, and Jay Hoffman, partner and co-chair of the Business Law Group at Miller Thomson, issuers should carefully

'Issuers should anticipate an even greater emphasis on the need for financial services regulators'

Christopher Jones



review OSC Staff Notice 51-719 for suggested guidelines in corporate governance.

'Suggestions include thorough disclosure to investors of risk factors associated with emerging markets, explanation of complex corporate structures employed by issuers in emerging markets, and keeping paramount policies that reflect the goal of investor protection,' says Benson. 'The OSC is of the view that governance challenges may arise where a board is resident in Canada and company management that operates pursuant to local and custom law is located in the emerging market of the issuer in question.'

All in all, the regulator plans on digging its claws into every nook and cranny of emerging markets. Companies should not wait until the OSC's goals go into effect; instead, it is important to start reviewing and testing your governance and compliance programs, otherwise you may be slapped with a hefty fine at the start of the new fiscal year. CS

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