

MATTERS TO CONSIDER FOR THE 2020 ANNUAL MEETING AND PROXY SEASON

Every year, reporting issuers are faced with the task of tailoring the disclosure for their annual general meeting (“AGM”) to an ever-evolving list of changes in corporate and securities laws, updates to stock exchange rules, new guidance from proxy advisors and regulators and developing corporate governance trends.

The checklist and overview of certain matters relevant to the 2020 proxy season that follows is intended to help reporting issuers in Canada prepare for their upcoming annual meetings by identifying relevant developments in disclosure rules and governance practices over the past year. We have prepared the checklist below to set out very briefly some key changes to the *Canada Business Corporations Act* that have come into force for this proxy season, the areas where the Canadian Securities Administrators (the “CSA”) have provided guidance on or updates to their respective disclosure rules, where proxy advisory firms have updated their proxy voting guidelines, and where trends or best practices have emerged or evolved. As we began to see last year, governance trends that have been gathering momentum over previous years have consolidated into themes where the focus of legislatures, regulators, proxy advisors and investors now clearly overlap. While certain perennial matters, such as executive compensation and non-GAAP measures, remain in the spotlight, they have now been joined and informed by issues such as sustainability and diversity, which are now firmly ensconced in the governance framework in which reporting issuers must operate and base their disclosure.

Greater detail on the changes, guidance, updates and developments identified in the checklist is available on subsequent pages.

If you have any questions about any of the matters discussed in this publication, please contact any member of our Corporate Finance & Securities Group.



I. CORPORATE LAW UPDATES



Issuers organized under the *Canada Business Corporations Act (Canada)* (“CBCA”) should ensure diversity disclosure is compliant with new requirements and begin preparing for further changes

As of January 1, 2020, public companies governed by the CBCA (including venture issuers) must disclose information regarding the representation of “designated groups” (i.e. women, Aboriginal peoples, persons with disabilities and members of visible minorities) on their boards and in executive officer positions, as well as mechanisms for board renewal. Other amendments, which are not yet in force, have also been introduced regarding additional disclosure, majority voting and mandatory annual “say-on-pay” votes – *for more, please see pages 3 and 4.*

II. UPDATES AND GUIDANCE FROM CANADIAN SECURITIES REGULATORS



Assess environmental and social practices and disclosure, particularly relating to climate change, in light of regulatory initiatives and investor focus

The increasing scrutiny on ESG disclosure – particularly relating to climate change – will continue in 2020. Canadian securities regulators issued guidance on climate change-related disclosure in 2019, proxy advisory firms continue to focus on issuers’ ESG practices and major investors have identified sustainability as central to their investment criteria – *for more, please see page 3.*



Ensure gender diversity practices are clearly disclosed in light of continued regulatory scrutiny

Canadian securities regulators have released the results of their fifth annual review of disclosure relating to gender diversity, which revealed slow progress. As noted, changes to the CBCA relating to diversity beyond gender have also come into force as of January 1, 2020 – *for more, please see page 6.*



Ensure disclosure of non-GAAP measures and forward-looking information is compliant with current guidance, and keep apprised of proposed changes

The Canadian Securities Administrators (“CSA”) continue to focus on non-GAAP financial measures and forward-looking information, with each of the OSC and the ASC noting ongoing deficiencies in their respective annual reports – *for more, please see pages 5 and 6.*



Review assessments of director “independence” in light of recent guidance

CSA Multilateral Staff Notice 51-359, issued in late 2019, while generally focused on issuers in the cannabis industry, includes guidance on the “independence” of directors that applies to all reporting issuers. Ensuring that the independence of directors is properly assessed and disclosed is relevant to ordinary course continuous disclosure documents as well as being key to transaction-related disclosure and structuring. Issuers should be aware that following the announcement in Multilateral Staff Notice 61-302 that the OSC will review disclosure relating to material conflict of interest transactions, the Alberta Securities Commission has noted that it is also conducting an active review program.

III. PROXY ADVISOR VOTING GUIDELINES FOR 2020



Consider the impact of the 2020 proxy guideline updates from proxy advisory firms

In their guidelines for the 2020 proxy season, proxy advisory firms focused on director attendance and overboarding, environmental and social matters, board independence, board skills, executive compensation, equity compensation plans and excessive non-audit fees – *for more, please see pages 7, 8 and 9.*

IV. OTHER POLICIES AND TRENDS



With interest in ESG matters intensifying, assess disclosure practices, board oversight of environmental and social risks and stakeholder engagement practices

Following the trend of prior years, major investors in both the United States and Canada have publicly declared their focus on the relationship between ESG factors and long-term value. Issuers should assess their disclosure, including with regard to increasingly accepted independent disclosure frameworks, and directors should be prepared to engage with shareholders and other stakeholders on the role of ESG in the issuer’s long-term strategy – *for more, please see page 3.*

Focus on Environmental and Social Factors Across Policy-Makers, Regulators and Stakeholders

The new year began with the CEO of Blackrock Inc. announcing in his annual letter to CEOs that “climate change has become a defining factor in companies’ long-term prospects” and that, in his view, as a result, “we are on the edge of a fundamental reshaping of finance.” Not long ago, this statement, from such an institution, would have been revolutionary; but taken in light of the governance trends of recent years and the legislative, regulatory and investor-driven developments described in the checklist above, it rings more as a confirmation.

Long-term “sustainability”, including but not limited to environmental practices and disclosure, is now the driving theme in the corporate governance discourse. There appears to have been a recognition across the investor community - reflected in investor demands and proxy advisor guidance - and society more broadly - reflected in the changes to the CBCA and regulatory initiatives - that so-called “ESG factors” are inextricably linked to long-term value.

As described in further detail below, the Canadian Securities Administrators (“CSA”) published Staff Notice 51-358 *Reporting of Climate Change-related Risks* in 2019, in response to investors’ increasing focus on climate change-related risks and concern that they are receiving insufficient disclosure in this regard. The CSA’s suggestions can be considered in light of the disclosure standards set by independent bodies, such as the Sustainability Accounting Standards Board and Task Force on Climate-related Financial Disclosures, which are gaining recognition and endorsement by major investors.

In addition, amendments to the CBCA relating to corporate diversity, summarized in our [May 2018 blog](#) post, are now in force, requiring public CBCA corporations to provide disclosure to shareholders relating to the representation of “designated groups” as directors and executive officers. Designated groups include women, Aboriginal peoples, persons with disabilities and members of visible minorities. In a similar vein, as noted in our [October 2019 blog](#) post, the CSA published a staff notice in the fall of 2019, summarizing its fifth annual review of disclosure relating to gender diversity on boards and in executive officer positions, and the Ontario Securities Commission (“OSC”) noted in its Statement of Priorities for the year 2019-2020 that it will continue to monitor developments and work with the CSA to identify opportunities to improve ESG-related disclosure.

For their part, proxy advisory firms such as Institutional Shareholder Services Inc. (“ISS”) and Glass Lewis & Co. (“Glass Lewis”) have confirmed that ESG factors have become a key area of focus for institutional investors, with ISS adding ESG-related factors to its “Governance QualityScore” corporate governance scoring tool and Glass Lewis considering gender diversity in forming certain recommendations.

While legislative and regulatory changes, along with proxy advisor voting recommendations and shareholder engagement, have created pressure externally, changes internal to corporations have also been announced that conform to similar themes. As discussed in our [August 2019 blog](#) post, the CEOs of numerous major public companies have publicly shifted their commitment from shareholder primacy to “corporate purpose.”

For the 2020 proxy season, reporting issuers in Canada should be aware of these trends and how they have manifested themselves in the requirements for this year’s disclosure. The pages that follow provide further details.

CBCA Amendments

As of January 1, 2020, the CBCA requires “distributing corporations” (*i.e.* public CBCA corporations, including venture issuers) to disclose to shareholders information relating to the representation of “designated groups” (being women, Aboriginal peoples, persons with disabilities and members of visible minorities) on their boards and in executive officer positions on a “comply or explain” basis, similar to the approach required under National Instrument 58-101 - *Disclosure of Corporate Governance Practices*. In particular, these amendments require disclosure of, among other things, any policies relating to selecting designated group members as directors and whether and how the level of representation of the designated groups is considered in identifying and nominating candidates as directors and executive officers. Further, distributing corporations must provide disclosure (also on a “comply or explain” basis) regarding term limits for their directors or other mechanisms of board renewal.

In addition to board diversity and renewal, as discussed in our [May 2018](#) and [April 2019 blog](#) posts, the Canadian federal government has also introduced amendments to the CBCA which are not yet in force relating to majority voting, annual “say-on-pay” votes, and disclosure relating to claw-backs and employee well-being.

With respect to “majority voting”, the amendments to the CBCA will require annual elections of directors and implement a mandatory “majority voting” regime for public companies. This new regime will allow shareholders to vote against the election of a director (as opposed to merely “withholding” a vote). Effectively, this will prevent directors of CBCA companies from being elected by a mere plurality, and require instead a true majority.

Unlike the majority voting rules under the TSX Company Manual, which require a director who does not receive a majority of the votes to resign (but allows the board to reject the resignation in exceptional circumstances), the CBCA’s “true” majority voting regime will prevent any director who does not receive a majority of the votes at the meeting from being elected in the first place.

Further, other CBCA amendments will require “prescribed corporations” to put non-binding resolutions on executive compensation to their shareholders (also known as “say-on-pay” votes) and will require additional disclosure relating to claw-backs of benefits paid to directors and senior management and the well-being of employees, retirees and pensioners. Precisely which corporations will be prescribed will be set out in the regulations.

Finally, the statutory duty of loyalty was amended in a manner that appears intended to codify the assessment of stakeholder interests identified as an element of the fiduciary duty by the Supreme Court of Canada in *BCE Inc. v. 1976 Debentureholders*. However, as discussed in our April 2019 blog post, [Corporate Duties, Indeterminacy and the 2019 Federal Budget](#), these amendments do not all precisely track the *BCE Inc.* case and are unlikely to have a practical effect on board procedures.

Regulatory Guidance

Liquidity and Capital Resources

In its 2019 Corporate Finance Disclosure Report (the “**ASC Report**”), the Alberta Securities Commission (the “**ASC**”) stated that disclosure of liquidity and capital resources, a key element of an issuer’s MD&A disclosure, continued to be a focus of its reviews. The ASC identified cash requirements, funding, and trends, fluctuations and risks as areas in which disclosure could improve. The ASC reminded issuers that they are required to present an analysis of their cash requirements, including the expected resources necessary for capital and operational needs as well as the repayment of obligations. With respect to funding, the ASC distinguished between funding currently arranged but not yet used, for which issuers must assess if there are any restrictions that would prevent a further draw on their facility, and funding not currently arranged, for which issuers must have a reasonable basis for assuming that the sources of funding are available. Finally, with respect to trends, fluctuations and risks, the ASC recommended disclosure regarding potential dispositions, risk of default, counterparty risk associated with working capital amounts and changes in the mix and cost of capital available to the issuer.

In its 2019 Corporate Finance Branch Annual Report (the “**OSC Report**”), the OSC identified liquidity and capital resources disclosure as a key item in its MD&A reviews and recommended that issuers provide insight beyond the numbers by discussing material cash requirements, explaining how liquidity obligations have been or will be settled and quantifying working capital needs and how they relate to future business plans or milestones.

Mining Disclosures

The OSC Report also included guidance regarding mining disclosures, particularly with respect to the disclosure of the assumptions and methods used by a qualified person in determining mineral resource estimates. The OSC specified that disclosure should include the following criteria: cut-off grade (and continuity of mineralization at the selected cut-off grade), metallurgical recoveries of the commodities or products of interest, smelter payments, commodity price or product value, methods for mining and processing the mineralization, and costs related to mining, processing and general administration.

The OSC reminded issuers that (a) if data collected by previous operators is relied upon, details regarding verification must be disclosed, (b) disclosure of potential economic outcomes based on mineral resources are all considered to be the results of a preliminary economic assessment (“**PEA**”), and such disclosure may trigger the requirement to file a technical report, (c) combining outcomes from PEAs and outcomes based on more advanced mining studies may result in the issuer being required to amend and refile a report and (d) issuers with mineral reserves on undeveloped mineral projects should regularly determine whether that mineral reserve is still economically viable, typically by applying a discounted cash flow analysis with updated assumptions.

Non-GAAP Financial Measures

The CSA continue to identify problems with the presentation of, and disclosure surrounding, non-GAAP financial measures (“**NGMs**”), notwithstanding the results of the OSC’s 2018 review program and the proposal for a new National Instrument 52-112 - *Non-GAAP and Other Financial Measures Disclosure* (“**NI 52-112**”) that would replace the existing guidance, discussed in our September 2018 blog post, [CSA Announces Proposed National Instrument Governing Disclosure of Non-GAAP and Other Financial](#)

Measures. The CSA is continuing to review and incorporate feedback into the proposed instrument, and will be publishing a second request for comment on a revised revision of this proposed instrument in 2020. In the meantime, both the OSC Report and the ASC Report noted the continued problematic use and disclosure of NGMs in 2019.

The ASC Report notes that while the ASC has no objection to the use of NGMs, they must be accompanied by appropriate disclosure. To this end, the ASC included a list of considerations which, if answered in the affirmative, would reduce the likelihood of comment from ASC staff with respect to NGMs. As with other guidance, including in the OSC Report and staff notices from prior years, the ASC is focused on the identification, labeling, prominence and reconciliation of NGMs.

Forward Looking Information

Regulators also continued to identify deficiencies in the disclosure of forward looking information (“FLI”). The OSC Report notes that such deficiencies include a lack of balanced discussion of the key assumptions used and the risk factors inherent in the FLI. The OSC referred to guidance provided in prior Annual Reports, where it has described that best practices for the presentation of FLI include: (a) clearly identifying FLI to prevent confusion; (b) adequately describing the key assumptions used and how primary risks may impact future performance; (c) disclosing the reasonable qualitative and quantitative assumptions specific to the issuer that support the FLI in question, particularly if the FLI covers multiple years; and (d) comparing the actual results to the initially disclosed future-oriented financial information or financial outlook.

Similarly, the ASC Report also reminds issuers to discuss material differences between actual results and the previously disclosed FLI, as well as the requirement to disclose the events and circumstances leading to a decision to withdraw previously disclosed FLI. To reduce the risk of non-compliance, the ASC recommends that any material information included in voluntary disclosure also be included in regulatory filings.

Environmental Disclosure

CSA Staff Notice 51-358 *Reporting of Climate Change-related Risks* (“**Staff Notice 51-358**”) provides guidance to assist reporting issuers in identifying and improving their disclosure of material risks posed by climate change. It groups these risks into two broad categories: physical risks and transition risks. Physical risks include those risks that a change in climate itself could have on a reporting issuer’s business, while transition risks are a broader set of risks associated with the consequences of the global transition to a less-carbon intensive economy. The guidance notes that while there is no bright-line threshold for materiality, issuers should consider both quantitative and qualitative factors in determining materiality of climate change-related risks, including an assessment of context, timing, trends, demands, commitments, events and uncertainties. Staff Notice 51-358 should be read in conjunction with CSA Staff Notice 51-333 *Environmental Reporting Guidance*.

Gender Diversity

CSA Multilateral Staff Notice 58-311 *Report on Fifth Staff Review of Disclosure Regarding Women on Boards and in Executive Officer Positions* (“**Staff Notice 58-311**”) outlines key trends and observations from reviews of disclosure regarding women on boards and in executive officer positions. The annual review is based on disclosure required by certain reporting issuers under changes to National Instrument

58-101 - *Disclosure of Corporate Governance Practices* (“NI 58-101”) that came into force on December 31, 2014. Because the disclosure requirements under both NI 58-101 and the CBCA apply a “comply or explain” model, requiring companies to either take certain actions (such as adopting a policy) or disclose why they have not done so, public companies, particularly those governed by the CBCA, may wish to consider whether adopting a diversity policy would be appropriate in their circumstances. Staff Notice 58-311 is discussed in more detail in our October 2019 blog post, [Diversity and Corporate Governance - CSA Review Shows Steady, but Slow, Progress in Corporate Diversity](#).

Balanced Disclosure

The ASC Report also noted the presence of less balanced disclosure on social media platforms. As with the guidance from the CSA discussed in our August 2018 blog post, [Social Media and Reporting Issues](#), the ASC reminded issuers that the requirement to provide factual and balanced disclosure extends to social media, even if these activities are not directly intended to communicate with investors. The ASC also noted deficiencies with respect to the presentation of market data that is not attributed to its third party source, or that includes markets outside those in which the issuer operates.

2020 Proxy Advisor Guidelines

ISS’ and Glass Lewis’ updated guidelines for the 2020 proxy season focus on director attendance and overboarding, environmental and social matters, board independence, board skills, executive compensation, equity compensation plans and excessive non-audit fees.

Director Attendance and Overboarding

For the 2020 proxy season, Glass Lewis will generally recommend withholding votes from the chair of the governance committee of TSX-listed issuers when records for board and committee meeting attendance are not disclosed. Beginning from the 2021 proxy season, Glass Lewis will recommend withholding votes from: (i) the chair of the governance committee of TSX-listed issuers when the number of audit committee meetings held in the past year is not disclosed; and (ii) the chair of the audit committee if the audit committee did not meet at least four times during the year.

ISS clarified that director nominees who served for only part of the fiscal year and companies newly listed or recently graduated to the TSX may be exempt from ISS’ board attendance policy for TSX-listed companies. ISS also clarified that it will assess whether a continuing director has attended at least 75% of the *aggregate* of board and audit, compensation and nominating committee meetings during the year. In evaluating overboarded directors at TSX-listed companies, ISS will generally not count a board if the company’s circular discloses that the director will be stepping off the board at the next annual meeting, but will count new boards that the director is joining whether or not the shareholder meeting with his or her election has taken place.

Environmental and Social Matters

Glass Lewis will generally recommend voting against the chair of the nominating committee of TSX-listed issuers if: (i) the board has no female directors; or (ii) the board has not adopted a written diversity policy, unless such issuers have provided sufficient explanation as to why they do not currently have any female board members or have disclosed a plan to address the lack of diversity on the board. Further, Glass Lewis will review any new diversity disclosure resulting from the CBCA amendments noted above and, where

relevant, reflect such expanded disclosure in its analysis for the election of directors of TSX-listed issuers. ISS added two new “Compensation/Remuneration factors” to its “Governance QualityScore” scoring tool in November 2019 to assess whether companies disclose an environmental and social (“E&S”) performance measure for their short-term and long-term executive incentive plans, and a “Shareholder Rights factor” identifying the greatest percentage of vote support for an E&S shareholder resolution at the last annual meeting. These factors will not be scored for the first year.

Board Independence

Glass Lewis will not require controlled companies (which are companies with a single individual or entity owning more than 50% of the voting shares) to meet its standard independence thresholds (five directors for TSX issuers and four for TSX-V issuers).

ISS will generally recommend withholding votes from directors of TSX-listed companies who served as the company’s CEO within the past five years or CFO within the past three years. ISS will now extend this policy to directors who served as former CEOs or CFOs of affiliates or of companies acquired within the corresponding time frame. Additionally, ISS clarified that the majority-owned companies exemption relating to board independence cannot be applied to management directors in any case.

Board Skills

Glass Lewis continues to expect large-cap TSX-listed issuers to disclose sufficient information to allow a meaningful assessment of a board’s skills and competencies. See the [Board Skills Appendix](#) for an overview of the skills that Glass Lewis considers in relation to certain key sectors. Glass Lewis’ confirmation of this expectation may prompt more issuers to consider including a board skills matrix in their disclosure.

Executive Compensation

Glass Lewis added the following items to its indicative list of problematic pay practices: (i) targeting overall levels of compensation at higher than median without adequate justification; (ii) discretionary bonuses paid when short- or long-term incentive plan targets were not met; and (iii) insufficient response to low shareholder support for a say-on-pay resolution. Glass Lewis also clarified that it generally disapproves of contractual arrangements that are excessively restrictive in favour of the executive, including, for example, excessive or single-trigger change in control arrangements, excessive severance entitlements, multi-year guaranteed awards and failures to address concerning practices in renewed or revised employment agreements. Glass Lewis believes, based on its view of the Canadian market, that companies should maintain severance entitlements at no more than three times salary and, if applicable, bonus.

Glass Lewis clarified that, in measuring compensation and performance, it considers quantitative factors, such as measuring against a peer group, as well as qualitative factors, such as overall incentive structure, significant forthcoming changes to the compensation program or reasonable long-term payout levels. Where a short-term bonus has been paid, Glass Lewis believes companies should disclose the extent to which performance has been achieved against relevant targets, including disclosure of the actual target achieved and why significant short-term payments were made. Where a company has lowered goals or increased calculated payouts mid-year, it should provide a robust discussion of the reasons.

Glass Lewis added two areas to its qualitative and quantitative review of say-on-pay proposals: (i) the selection and challenging nature of performance metrics; and (ii) the implementation and effectiveness

of the company's executive compensation programs, including pay mix and use of performance metrics. Further, Glass Lewis may review post-fiscal year-end changes and one-time awards, particularly where the changes touch upon issues that are material to its recommendations. For companies that receive significant shareholder opposition (20% or greater) to their say-on-pay proposals, Glass Lewis expects the board to demonstrate engagement and responsiveness to shareholder concerns at a level commensurate with the level of shareholder discontent. Issuers should provide robust disclosure of engagement activities and specific changes made or risk an adverse recommendation on the upcoming say-on-pay proposal.

Beginning February 1, 2020, ISS will replace the GAAP metrics previously used in the financial performance assessment component of its pay for performance evaluation with four new Economic Value Add ("EVA") performance metrics. The new EVA metrics will impact the quantitative analysis in the pay for performance evaluation and therefore say-on-pay recommendations.

Equity-Based Compensation Plans

Unlike the TSX and TSX-V, the Canadian Securities Exchange does not require periodic shareholder approval of rolling equity compensation plans. To address this, ISS will now generally recommend shareholders vote against a rolling plan that does not require shareholder reconfirmation at least every three years. Beginning February 1, 2021, ISS will generally recommend withholding votes from continuing compensation committee members if the company has not sought such shareholder reconfirmation within the past two years and does not do so at the meeting.

Excessive Non-Audit Fees

In evaluating excessive non-audit fees for votes on continuing audit committee members and the ratification of auditors, ISS will exclude fees related to significant one-time capital restructure events, which previously only included IPOs, emergence from bankruptcy and spinoffs. ISS has clarified this carve-out may also include additional events such as M&A transactions and re-domiciliation. Additionally, Glass Lewis may recommend withholding votes from continuing audit committee members in the second consecutive year of excessive non-audit fees.