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Prepping for the upcoming AGM and proxy season

COMMENTARY | CSA, TSX provide guidance on latest disclosure rules

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Special to The Northern Miner

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

The checklist and overview of certain matters relevant to the 2018 proxy season that follows is intended to help reporting issuers in Canada prepare for their upcoming AGMs by identifying relevant developments in disclosure rules and governance practices over the past year. We have prepared the checklist below to set out briefly the areas where the Canadian Securities Administrators (CSA) and the Toronto Stock Exchange (TSX) have provided guidance on or updates to their respective disclosure rules, where the major proxy advisors have updated their proxy voting guidelines, and where trends or best practices have emerged

or evolved, either at the instigation of advocacy groups or otherwise.

Gender diversity on boards and officer positions

The CSA released Staff Notice 58-309 *Staff Review of Women on Boards and in Executive Officer Positions* in late 2017 summarizing its third annual review of disclosure relating to gender diversity on boards and in executive officer positions. The review covers certain disclosure relating to gender diversity that is required for non-venture issuers under amendments to National Instrument 58-101 *Disclosure of Corporate Governance Practices* that came into force in 2015, including the number and percentage of women on boards and in executive officer positions; policies, targets and processes relating to the appointment of women on boards and in executive officer positions; and director term limits or other board renewal mechanisms.

After reviewing the disclosure of 660 issuers, the CSA noted disclosure deficiencies in the following five areas, where disclosure was vague, boilerplate or absent completely:

- Disclosure of both the number and percentage of women on boards and in executive officer positions is required each year;
- A description of the company's written policy regarding the representation of women on boards, if the company has adopted such a policy, including a clear explanation of how the policy applies to identification of women directors, must be included;
- If an issuer discloses adoption of targets for the representation of women on boards and in executive officer positions, it must also disclose annual and cumulative progress in achieving those targets;
- If an issuer considers the representation of women in its identification and selection process, it must include a description of how it does so; and,
- If an issuer discloses adoption of term limits or other mechanisms for board renewal, it must include a description of those limits and mechanisms.

The disclosure rules in NI 58-101 relating to gender diversity are intended to provide transparency to assist investors when making voting and investment decisions. The regulators have emphasized that this objective is most effectively achieved if the disclosure provides a clear description of the corporate governance practices that an issuer has adopted in respect of women, or the issuer's reasons for not adopting such practices. Continued scrutiny of this area of disclosure and governance by the regulators and various other market participants is assured.

THE OSC IS CONCERNED WITH NON-COMPLIANT PEAS THAT INCORPORATE ECONOMIC ANALYSES, PRODUCTION SCHEDULES, AND CASH FLOW MODELS BASED ON INFERRED MINERAL RESOURCES INTO ECONOMIC STUDIES BASED ON MINERAL RESERVES.

OSC priorities

Each year, the OSC's Corporate Finance Branch publishes its annual guidance on areas of concern identified during its annual disclosure review and a statement of priorities for the coming year. The following is a summary of certain key areas for this year.

Cybersecurity

Cybersecurity concerns and other technological threats remain a potentially significant risk for reporting issuers and, particularly in light of recent high-profile breaches, have remained a priority for securities regulators. The OSC has indicated in recent guidance and its most recent statement of priorities that it will continue to monitor and assess cyber-resilience and cyber-readiness of market participants.

Accordingly, issuers should continue to monitor their cybersecurity risk profile, develop and maintain appropriate risk management procedures and ensure their disclosure of both risks and breaches is in line with regulatory expectations.

Non-GAAP financial measures

The OSC expressed continued concern over the prominence of disclosure given to non-generally accepted accounting principles (GAAP) financial measures, the visibility and clarity of adjustments made and the appropriateness of the adjustments themselves, particularly in the mining, real estate, technology and biotechnology industries.

Issuers are reminded that disclosure of non-GAAP financial measures must be accompanied by the disclosure that is described in detail in Staff Notice 52-306 *Non-GAAP Financial Measures*.

Further, issuers must provide a clear quantitative reconciliation from the non-GAAP financial measure to the most directly comparable GAAP measure presented in its financial statements and present the non-GAAP financial measure on a consistent basis from period to period.

The OSC also reminded issuers that non-GAAP financial measures generally should not describe adjustments as non-recurring, infrequent or unusual when a similar loss or gain is reasonably likely to occur within the next two years, or occurred during the prior two years.

The OSC intends to continue reviewing disclosure of non-GAAP financial measures, and may take regulatory action if an issuer discloses information in a manner that is considered misleading or otherwise contrary to the public interest.

Forward-looking information

The OSC also noted its concern with generic factors and assumptions being disclosed in respect of forward-looking information (FLI), as well as assumptions not being quantified. It also noted a common deficiency of issuers failing to update previously disclosed FLI. Disclosure of specific and relevant material factors or assumptions is necessary for investors to understand how actual results may vary from FLI. For investors to assess whether assumptions underlying the FLI are reasonable, issuers should disclose those assumptions both quantitatively and qualitatively.

Where FLI is presented for multiple years and is not sufficiently supported by reasonable assumptions, the OSC may ask issuers to limit disclosure of FLI to a shorter period, for which reasonable support exists.

Mining disclosure

Issuers that disclose a preliminary economic assessment (PEA) on an advanced property containing mineral reserves are reminded that such disclosure is only permissible when results are disclosed in a manner consistent with the Canadian Institute of Mining, Metallurgy and Petroleum definitions.

The OSC is concerned with non-compliant PEAs that incorporate economic analyses, pro-

duction schedules and cash-flow models based on inferred mineral resources into economic studies based on mineral reserves.

Social media

The CSA conducted a review of the social media disclosure of 111 reporting issuers to determine whether disclosure was consistent with the principles of National Policy 51-201 *Disclosure Standards* and the requirements of National Instrument 51-102 *Continuous Disclosure Obligations*.

The review covered disclosure on Facebook, Twitter, YouTube, LinkedIn, Instagram and GooglePlus postings, amongst others, as well as disclosure on issuers' own websites, including any message boards or blogs hosted on those websites.

The CSA review identified three areas where issuers are expected to improve their social media disclosure practices:

1. *Selective or early disclosure* — When issuers disclose material information on social media, they must ensure that it is "generally disclosed" consistent with the expectations outlined in NP 51-201. Importantly, disclosure of material information on a social media website alone is insufficient to meet the standards of NP 51-201. Issuers must first disclose material information via a news release, in accordance with securities law requirements, before further disseminating the news on any social media website.

More specifically, FLI regarding revenue, earnings per share, cash flow targets and expected timing of future milestones, such as the timing for a new product launch or the amount of time before an asset can begin generating revenue, must be generally disclosed to all stakeholders and must not be selectively posted on social media websites in advance of general disclosure via press release and on the CSA's System for Electronic Document Analysis and Retrieval (SEDAR) filing system.

2. *Unbalanced or misleading disclosure* — Issuers must avoid exaggerated reports and promotional commentary on social media websites, and all information provided must be factual, balanced and consistent with continuous disclosure on SEDAR.

In particular, the CSA considers disclosure of non-GAAP financial measures not previously generally disclosed and not disclosed in regulatory filings to be misleading to investors (in addition to creating a selective disclosure concern). This could occur, for instance, if non-GAAP measures are only disclosed on social media.

When providing copies of reports from independent analysts, issuers should provide the names and/or recommendations of all independent analysts who cover the issuer and avoid selectively disclosing favourable analyst reports only. If issuers post links to analyst reports or other articles, they may be required to update the FLI about the issuer in such reports or articles in the future, as issuers will be deemed to have effectively endorsed any forward-looking targets linked in the reports or articles in their social media posts.

3. *Governance policies* — The CSA expects issuers to develop rigorous policies and procedures for the use of social media. A strong social media governance policy should include consideration of who can post information about the issuer on social media; what type of sites (including personal social media accounts vs. corporate) can be used; what type of information about the issuer (financial, legal, operational, marketing, etc.) can be posted on social media; what, if any, approvals are required before information can be posted; who is responsible for monitoring the issuer's social media accounts, including third-party postings about the issuer; and what other guidelines and best practices are followed (for example, if an employee posts about the issuer on a personal social media site they should identify themselves as an employee of the issuer).

TSX guidance

In 2014, the TSX adopted amendments to its Company Manual requiring each director of a TSX-listed issuer to be elected by a majority (50% + one vote) of the votes cast with respect to his or her election, other than at a contested meeting, with certain limited exceptions.

To comply with this requirement, since shareholders do not vote "against" directors, but rather must choose to vote "for" or "withhold" from voting, TSX-listed issuers were required to adopt a majority voting policy requiring directors who do not receive a majority of the votes cast to tender their resignation.

After a review of 200 randomly selected majority voting policies, the TSX identified a number of key deficiencies, largely relating to boards' ability to not accept resignations tendered under a majority voting policy.

In particular, the TSX clarified that majority voting policies must require a director to resign immediately if he or she is not elected by a majority of votes cast, must expressly state that the issuer's board will accept the resignation within 90 days — absent exceptional circumstances — and must not include provisions that have the effect of circumventing the policy objectives (including a higher quorum requirement for the election of directors, compared to the quorum requirement for other resolutions and provisions that treat certain nominees more favourably than other nominees).

Further, the TSX clarified that the "exceptional circumstances" under which a board need not accept a resignation should be interpreted narrowly, and do not include a director's length of service, qualifications, attendance at meetings, experience or contributions to the issuer.

Majority voting policies that are not compliant with the TSX Company Manual, in light of this recent guidance, should be amended as soon as practicable, and in any event sufficiently in advance of the next shareholder meeting.

Advance notice policies

The TSX recognizes that many listed issuers have chosen to adopt policies and bylaws prescribing time frames and procedures to nominate directors (known as "advance notice policies"), and acknowledges that such policies may be legitimately used to preserve security holder interests, provided they do not unreasonably limit the ability of security holders to nominate directors for election.

After reviewing a random selection of advance notice policies, the TSX found areas that are not consistent with TSX policy objectives, including provisions in advance notice policies requiring that a nominating security holder be present at the meeting at which his or her nominee is standing for election, or provide unduly burdensome or unnecessary disclosure that does not relate to the disclosure of the nominating security holder's economic and voting position, or documents, representations, consents or questionnaires that are not required by the issuer from management and board nominees.

The TSX considers the notification periods permitted under the current guidelines published by the major proxy advisors for Canada acceptable for its purposes.

Specifically, the following notice periods are consistent with the TSX's director election requirements: for an AGM, a notice period ending at least 30 days before the meeting date; for an AGM held on a date that is less than 50 days after the first public announcement of the date of the AGM (notice date); a notice period ending at least 10 days following the notice date; and for a special meeting for electing directors (whether or not also called

for other purposes), a notice period ending at least 15 days after the notice date.

Advance notice policies should give the board of directors discretion to waive any provision of the policy or bylaw, and issuers should adopt advance notice policies sufficiently in advance of a shareholder meeting to allow security holders to comply with applicable notice periods.

Website disclosure

The TSX amended its Company Manual in 2017 to adopt new website disclosure requirements. By April 1, 2018, all TSX-listed issuers, subject to certain exceptions, must maintain a website on which the public can access the following documents in a clearly identifiable way: articles and bylaws, or equivalent constating documents; majority voting policy; advance notice policy; position descriptions for the chairman of the board and the lead director; board mandate; and board committee charters.

The TSX believes that the new website disclosure requirements will create value for investors by establishing a centralized location for accessing key corporate governance documents. While certain that the documents identified above must already be disclosed on SEDAR, the TSX was of the view that these documents may be difficult to locate or access.

While the initial list of governance documents proposed by the TSX for company websites was whittled down to those listed above after feedback from market participants, the TSX believes that the enhanced accessibility of these governance documents will outweigh the additional obligations they impose on issuers.

Compensation plan disclosure

In late 2017, the TSX also amended its Company Manual to adopt more disclosure requirements relating to issuers' security-based compensation arrangements.

All TSX-listed issuers must, for financial years ending on or after Oct. 31, 2017, disclose in their management information circular (or other annual disclosure document distributed to all security holders) the annual burn rate for each of the issuer's three most recently completed fiscal years for each relevant compensation plan.

The burn rate for a plan is calculated by dividing the number of securities granted under the plan during the applicable fiscal year by the weighted average number of securities outstanding for the applicable fiscal year, and must be expressed as a percentage.

If securities awarded under a compensation plan include a multiplier, the details of the multiplier must also be disclosed.

The TSX clarified that the disclosure requirements relating to a Plan's vesting and term provisions apply to all Plans, not only to stock option plans, and that disclosure must include particulars of the maximum number of awards issuable, the number of outstanding awards and the number of awards available for grant under each Plan.

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