

Matters To Consider For The 2019 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 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 2019 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 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, either at the instigation of advocacy groups or otherwise. In certain cases this year, governance trends of previous years have developed into themes that link the requirements of regulators, legislatures, proxy advisors and investors.

Greater detail on the guidance, updates, trends 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***.



This publication is a general overview of the subject matter and should not be relied upon as legal advice or legal opinion.

**Ensure gender diversity practices are clearly disclosed in light of regulatory and investor scrutiny and imminent changes to corporate law**

Gender diversity continues to be a predominant governance issue this year, with Canadian securities regulators releasing the results of their fourth annual review of disclosure relating to gender diversity and noting it as a priority for the coming year, and with proxy advisory firms indicating that their relevant vote recommendations for the 2019 proxy season will take gender diversity into consideration – *for more, please see page 2*

**Assess environmental, social and governance (“ESG”) practices, including climate change disclosure, in light of regulatory initiatives and increasing investor interest**

ESG disclosure will be subject to increased scrutiny in 2019. Canadian securities regulators noted various deficiencies in their report on climate change-related disclosure released in April 2018. Proxy advisory firms are also focused on issuers' ESG practices in providing their voting recommendations, and major investors have made ESG a focus of their engagement – *for more, please see page 3*

**Ensure disclosure of non-GAAP measures and forward-looking information is compliant**

The CSA continue to focus on disclosure of non-GAAP financial measures and forward-looking information. Issuers should ensure that disclosure of non-GAAP information complies with the CSAs' guidance set out in CSA Staff Notice 52-306 (Revised) - Non-GAAP Financial Measures and prepare for the potential implementation of Proposed National Instrument 52-112 - Non-GAAP and Other Financial Measures Disclosure. In addition, issuers are reminded that disclosure of forward-looking information must be based on reasonable qualitative and quantitative assumptions – *for more, please see page 4*

**Review and monitor social media use to ensure compliance with securities laws**

The CSA continue to identify problems in the use of social media as a means of interacting with stakeholders. Issuers should consider adopting a robust social media governance policy, if not already in place, and take care that social media use remains compliant with securities laws – *for more, please see page 5*

II. PROXY ADVISOR VOTING GUIDELINES FOR 2019

**Consider the impact of the 2019 proxy guideline updates from proxy advisory firms**

In their guidelines for the 2019 proxy season, proxy advisory firms focused on gender diversity, ESG, director overboarding, board skills, virtual shareholder meetings, and executive compensation – *for more, please see pages 2, 3, and 5*

III. CORPORATE LAW UPDATES

**Issuers organized under the Canada Business Corporations Act (Canada) (“CBCA”) should prepare for new requirements relating to diversity disclosure and majority voting**

Once recently enacted amendments to the CBCA are in force, it is anticipated that reporting issuers organized under the CBCA will be required to: (i) comply with board diversity disclosure requirements in connection with not just women, but also members of visible minorities, persons with disabilities, and Aboriginal peoples; and (ii) implement mandatory majority voting with respect to director elections – *for more, please see pages 2 and 6*

IV. OTHER POLICIES AND TRENDS

**Assess engagement practices and board oversight and disclosure of ESG matters**

With the role of the public corporation increasingly the subject of discourse among market participants, advocacy groups, academics and legislators, major investors in both the United States and Canada have continued to broaden their participation in corporate governance. Issuers should remain aware of investors' growing interest in ESG matters and be prepared to articulate the role of ESG in business strategy and its relationship to value – *for more, please see page 3*

Matters on which Regulators, Legislatures, Proxy Advisors and Investors Converged

Gender Diversity

In 2018, Canadian securities regulators, proxy advisory firms, and the Parliament of Canada continued to focus on the issue of gender diversity in corporate Canada.

The CSA published [Staff Notice 58-310](#) in the fall of 2018, summarizing its fourth annual review of disclosure relating to gender diversity on boards and in executive officer positions. As noted in our October 2018 blog post, [CSA Publishes Staff Notice on Trends in Corporate Diversity](#), the CSA found that only 15% of board seats were occupied by women, women only filled 29% of board vacancies, and 34% of issuers did not have any women in executive officer positions. These results have led the CSA to consider whether to amend the existing disclosure requirements in [National Instrument 58-101 - Disclosure of Corporate Governance Practices](#) ("**NI 58-101**") or to introduce additional guidelines to corporate governance practices.

Similarly, the Ontario Securities Commission ("**OSC**") noted in its Corporate Finance Branch Annual Report published in October 2018 that disclosure on board diversity continues in many cases to be vague, boilerplate, or absent, and emphasized that issuers should clearly describe their corporate governance practices in connection with diversity or the reasons for not adopting such practices. The OSC has also noted that it has made a review of diversity disclosure requirements a priority in its Statement of Priorities for the year 2018-2019 (the "**Statement of Priorities**"), ensuring continued scrutiny in this area.

Proxy advisory firms such as Institutional Shareholder Services Inc. ("**ISS**") and Glass Lewis & Co. ("**Glass Lewis**") have also indicated that gender diversity remains an area of focus for institutional investors. ISS has now extended its board gender diversity policy to "widely-held companies", which includes companies not included in the S&P/TSX Composite Index but otherwise designated as such by ISS, based on the number of ISS clients holding securities of such companies. ISS will generally make a "withhold" recommendation for the Chair of the Nominating Committee (or in certain circumstances, the Chair of another committee designated with the responsibility of a nominating committee or the Chair of the board) where the issuer has both not disclosed a formal written gender diversity policy and has no female board members. For shareholder meetings held in 2019, Glass Lewis may recommend that votes be withheld where issuers have not adopted such a formal policy or have no female board members, though Glass Lewis has noted that its policy will largely be aimed at S&P/TSX Composite Index issuers.

In addition, as discussed in our May 2018 blog post, [Bill C-25 - A Catalyst for Corporate Diversity in Canada?](#), diversity disclosure requirements are a key element of recent amendments to the CBCA. When the regulations relating to these amendments are finalized, it is expected that reporting issuers governed by the CBCA - including venture issuers - will be subject to diversity disclosure requirements similar to those that already exist under NI 58-101, but relating to all "designated groups", which include not only women, but also members of visible minorities, persons with disabilities and Aboriginal peoples.

ESG Matters

Like gender diversity in corporate leadership, regulators, proxy advisors and investors have all signalled an increased focus on so-called “ESG”, or environmental, social and governance matters.

In April 2018 the CSA released Staff Notice 51-354 - Report on Climate Change-related Disclosure Project (“**Staff Notice 51-354**”), which sets out the results of its review of issuers’ risk disclosure relating to climate change and concludes that there continues to be insufficient disclosure of climate change issues. In light of its review, the CSA indicated that, in addition to continuing to monitor issuer disclosure, it intends to: (i) develop guidance for issuers respecting business risks and opportunities and the potential financial impacts of climate change; and (ii) consider new climate change disclosure requirements in connection with corporate governance and risk management.

Similar to Staff Notice 51-354, in light of growing investor interest in ESG matters, the OSC stated in its Corporate Finance Branch Annual Report and its 2018/2019 Statement of Priorities that it will continue to monitor issuers’ ESG disclosure and assess whether supplemental or new forms of disclosure are necessary.

ISS and Glass Lewis also updated their policies on environmental and social risk oversight, with ISS identifying certain factors it will take into consideration in making its case-by-case recommendations on shareholder proposals relating to social and environmental matters, and Glass Lewis noting that it will review an issuer’s overall governance practices and identify which board members are responsible for environmental and social risk oversight.

In May 2018, the CCGG published The Directors’ E&S Guidebook (the “**Guidebook**”), which provides practical insights and recommendations for effective board oversight and disclosure of environmental and social matters. The Guidebook highlights that environmental and social structures have the potential to significantly increase shareholder value and sets out numerous recommendations on related aspects of governance. In addition, shareholder proposals continue to raise ESG matters and, as discussed in our February 2018 and February 2019 blog posts, major investors have continued to make public statements indicating interest in issuers’ consideration of other stakeholders and social purposes.

If you are interested in receiving information related to the matters discussed and ongoing updates, please subscribe to our Business Law Blog at lawsonlundell.com/the-business-law-blog

Regulatory Guidance

Non-GAAP Financial Measures

The CSA continue to identify problems with presentation of, and disclosure surrounding, non-GAAP financial measures ("**NGMs**"). These concerns were reiterated in the [CSA's Staff Notice 51-355 - Continuous Disclosure Review Program Activities for the fiscal years ended March 31, 2018 and March 31, 2017 \("Staff Notice 51-355"\)](#), published in July 2018 and discussed in our July 2018 [blog post](#). In particular, the CSA note that the stated purpose and usefulness of some NGMs are unclear and fail to align with the nature of the adjustments being made in the issuer's reconciliation to the applicable GAAP measure. The CSA warn that without clear disclosure accompanying NGMs and the adjustments being made to the applicable GAAP measure, there is potential that investors may be confused or even misled.

In light of these concerns, and reflecting a heightened and concerted focus of regulators across Canada on NGMs, in the fall of 2018, the CSA issued a notice and request for comment in connection with [Proposed National Instrument 52-112 - Non-GAAP and Other Financial Measures Disclosure \("NI 52-112"\)](#). If implemented, NI 52-112 would replace the existing guidance set out in [Staff Notice 52-306 \(Revised\) - Non-GAAP Financial Measures](#). NI 52-112 would regulate the disclosure of NGMs, the definition of which has been updated from the current staff notice, and three additional types of financial measure not captured by that definition, in all publicly available documents (whether or not filed under securities legislation), with some limited exceptions. The disclosure requirements for NGMs are largely consistent with those in the current staff notice, with a focus on proper labeling, prominence and quantitative reconciliation, but the draft companion policy provides significantly more commentary and guidance on how these disclosure requirements are to be interpreted and implemented. NI 52-112 is discussed in more detail in our September 2018 [blog post](#).

Forward Looking Information

The CSA continued to identify problems with the disclosure of forward looking information ("**FLI**") in Staff Notice 51-355. In particular, the CSA note that some issuers have been disclosing financial outlook for a period beyond the issuer's next fiscal year end without providing reasonable and sufficient assumptions (which must be both qualitative and quantitative). Issuers must not disclose a financial outlook unless it is based on assumptions that are reasonable in the circumstances, and FLI must therefore be limited to a period for which information can be reasonably estimated. In many cases, this period will not go beyond the end of the issuer's next fiscal year.

The OSC also discussed FLI in its Corporate Finance Branch Annual Report, outlining best practices for the presentation of FLI that include: (a) clearly identify FLI to prevent confusion; (b) adequately describe the key assumptions used and how primary risks may impact future performance; (c) disclose 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) compare the actual results to the initially disclosed future-oriented financial information or financial outlook.

Social Media

As a popular platform for issuers to communicate with their shareholders and other stakeholders, the use of social media has been under increased scrutiny by regulators. In March 2017, the CSA published its review of social media disclosure by issuers in [Staff Notice 51-348 - Staff's Review of Social Media Used by Reporting Issuers](#), in which it emphasized that issuers must remain cognizant of disclosure obligations that social media activities may engage. Similarly, Staff Notice 51-355 reminded issuers that they should be aware of common pitfalls in the use of social media platforms, noting that some issuers have been providing material information on social media sites before it is generally disclosed to all investors, resulting in selective disclosure. Additionally, some issuers have been providing information on social media that may be inconsistent with the information filed on SEDAR or considered overly promotional, unbalanced, or misleading. As noted in our July 2018 [blog post](#), it is recommended that issuers adopt a robust social media governance policy that clearly delineates what information may be disclosed on social media and who is authorized to post such information. For more information on the potential interplay between an issuer's activities on social media and securities laws, please see our August 2018 [blog post](#).

2019 Proxy Advisor Guidelines

In addition to the issues of gender diversity and environmental and social risk described above, ISS and Glass Lewis's updated guidelines for the 2019 proxy season also focus on director overboarding, board skills, virtual shareholder meetings and executive compensation.

Director Overboarding

ISS has confirmed that it will implement its previously announced changes to its director overboarding guidelines for the 2019 proxy season. In particular, ISS will no longer consider attendance in its voting recommendations and will consider a director to be overboarded if he or she is: (i) a non-CEO director serving on more than five public company boards; or (ii) is a CEO of public companies and serve on more than two outside public company boards. These new overboarding thresholds mirror the overboarding guidelines set out in Glass Lewis' 2019 Proxy Paper Guidelines, except that Glass Lewis does not limit its analysis to directors who are also CEOs, but rather, executive officers generally.

Board Skills

In addition, Glass Lewis updated its guidelines with respect to the disclosure of board skills and competencies. Specifically, Glass Lewis is of the view that issuers should disclose sufficient information to allow a meaningful assessment of such skills and competencies, and has implemented the use of a board skills matrix in evaluating director elections for S&P/TSX 60 Index issuers.

Virtual Shareholder Meetings

Noting that virtual shareholder meetings may reduce the ability of shareholders to meaningfully communicate with management, Glass Lewis will, beginning in 2019, generally recommend voting

against members of a governance committee where the issuer is planning to hold a virtual-only shareholder meeting but does not provide adequate disclosure assuring shareholders that they will have the same rights and opportunities to participate as they would in person. Examples of the required disclosure include: (i) addressing the ability of the shareholders to ask questions; (ii) setting out procedures for posting appropriate questions and corresponding answers to the issuer's website after the meeting; and (iii) addressing technical and logistical issues associated with accessing the virtual meeting platform.

Executive Compensation

For the 2019 proxy season, Glass Lewis updated its approach to executive compensation with respect to: (i) contractual payments and arrangements; (ii) the grant of front-loaded awards; and (iii) clawbacks.

With respect to assessing an issuer's contractual payments and arrangements, Glass Lewis will consider general Canadian market practice and the size and design of entitlements. In terms of analyzing the risks of front-loaded awards, Glass Lewis will take into consideration factors such as quantum, design, and rationale. Finally, in respect of clawbacks, Glass Lewis will review clawbacks as part of its overall assessment of an issuer's compensation policy.

CBCA Amendments - Majority Voting

In addition to requirements relating to board diversity, as discussed in our May 2018 [blog post](#), the amendments to the CBCA include a new statutory requirement for majority voting. Once this provision is in force, reporting issuers governed by the CBCA will be subject to a mandatory "true" majority voting regime that allows shareholders to vote against the election of a director nominee (rather than simply withholding votes). Unlike the majority voting rules imposed by the TSX, 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 prevents any director who does not receive a majority of the votes at the meeting from being elected in the first place.

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