

MATTERS TO CONSIDER FOR THE 2021 ANNUAL MEETING AND PROXY SEASON

Every year, in the course of preparing for their annual general meeting (“AGM”), reporting issuers are faced with changes to corporate and securities laws, updates to stock exchange rules, new guidance from proxy advisors and regulators, and developing corporate governance practices and trends. Due to the rapidly evolving market landscape, including as a result of the COVID-19 global pandemic (“COVID-19”), many of these considerations have become more complex for the upcoming 2021 proxy season.

The checklist and overview of certain matters relevant to the 2021 proxy season that follows is intended to help reporting issuers in Canada prepare for their upcoming AGMs by identifying certain developments in disclosure rules and governance practices over the past year, particularly given the unprecedented challenges faced by reporting issuers in light of COVID-19. We have prepared the checklist below to set out from a high-level some key considerations that have arisen from the proliferation of virtual-only AGMs, increasing disclosure requirements and expectations relating to diversity, climate change and other environmental and social factors, updates from proxy advisory firms in their proxy voting guidelines, and the areas where the Canadian Securities Administrators (the “CSA”) and the Ontario Securities Commission (the “OSC”) have provided guidance on or updates to their respective disclosure rules. While COVID-19 has impacted issuers’ businesses from many angles, including in relation to the disclosure and implementation of corporate governance practices, it has not impeded the governance trends that have been gathering momentum over recent years, particularly on the themes of diversity, climate change and sustainability more generally. On the contrary, the focus on resilience wrought by the pandemic appears to have increased the demand for broader and more comparable disclosure of issuers’ sustainability profiles.

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. VIRTUAL SHAREHOLDER MEETINGS



With COVID-19 restrictions unlikely to have ended for the coming proxy season, consider the benefits and costs of a virtual or hybrid meeting

Enhancing shareholder participation at virtual meetings and disclosure in proxy materials will continue to be dominant themes for the 2021 proxy season – *for more, please see pages 3 and 4*

II. CONSIDERATIONS RELATING TO DIVERSITY AND ESG



Ensure diversity practices are clearly disclosed in light of heightened investor and regulatory scrutiny

ISS and Glass Lewis have both raised their existing gender diversity thresholds for 2022, and recent developments suggest that the focus is beginning to shift to other aspects of diversity – *for more, please see pages 4 and 5*



Assess sustainability practices and disclosure, particularly relating to climate change, in light of regulatory initiatives and investor focus and increasing support for standardized disclosure

The increasing demand for substantive ESG disclosure – particularly relating to climate change – will continue in 2021. Major investors continue to identify sustainability as central to their investment criteria, with major investors and regulators recognizing the need for standardized disclosure in these areas – *for more, please see pages 5-7*

III. PROXY ADVISOR VOTING GUIDELINES FOR 2021



Consider the impact of 2021 proxy guideline updates from proxy advisory firms

In their guidelines for the 2021 proxy season, proxy advisory firms focused on board gender diversity, environmental and social risk oversight, exclusive forum provisions, equity-based compensation plans, board skills and refreshment, financial expertise and inadequate disclosure practices – *for more, please see pages 7-10*

IV. UPDATES AND GUIDANCE FROM CANADIAN SECURITIES REGULATORS



Provide clear, transparent and issuer-specific disclosure, particularly in respect of the effects of COVID-19

Canadian securities regulators continue to focus on improving vague, boilerplate and otherwise inadequate disclosure by issuers for the upcoming 2021 proxy season, and have provided guidance on specific areas of disclosure that may need enhancement in light of the pandemic - *for more, please see pages 10-12*

Lessons from 2020 Virtual Annual Meetings

One of the most immediate issues brought by the COVID-19 pandemic for reporting issuers was the need to swiftly pivot to holding a virtual shareholders meeting. Canadian securities regulators, stock exchanges, and federal and provincial governments quickly responded to the outbreak of the pandemic to accommodate virtual and hybrid meetings where otherwise not permitted and thereby mitigate the potential public health impacts of COVID-19.

The CSA issued guidance permitting issuers seeking to change the date, time, location or format of their in-person annual meetings to do so by promptly issuing a news release and taking all reasonable steps necessary to inform all parties involved in the proxy voting infrastructure of such change. Issuers that had not sent and filed their proxy-related materials were advised to include disclosures regarding the possibility of changes in meeting format due to COVID-19. Also, the Toronto Stock Exchange (“**TSX**”) and the TSX Venture Exchange (“**TSX-V**”) issued orders permitting issuers to hold their annual meetings at any date in 2020, subject to compliance with the applicable governing corporate statute.

The Government of British Columbia issued a ministerial order (the “**BC Order**”) permitting B.C. companies to hold meetings by telephone or other communications medium (e.g. video conferencing) as long as all persons participating are able to communicate with each other and, if applicable, vote at the meeting, regardless of whether the company’s constating documents allowed for such meetings. The BC Order also clarified that such meetings are not required to have a physical location and are deemed to be held in British Columbia. The BC Order has since been formalized by the *COVID-19 Related Measures Act* (British Columbia), which provides a 90-day transition period after the date on which the last extension of the state of emergency expires or is cancelled, and thereby ensuring the provisions of the BC Order will not abruptly end when the declaration of state of emergency is lifted. The state of emergency remained in place as at February 9, 2021.

Similarly, the Government of Alberta issued Ministerial Order No. SA:009/2020 (the “**Alberta Order**”) suspending the requirement pursuant to section 132 of the *Alberta Business Corporations Act* for annual meetings to be held 18 months following incorporation or within 15 months of the last preceding annual meeting. The order noted that nothing in the Alberta Order precluded a corporation from conducting a meeting through remote means, such as videoconference, teleconference or other means. The Alberta Order expired on August 14, 2020 and the annual shareholder meeting requirements pursuant to section 132 of the *Alberta Business Corporation Act* resumed.

Corporations Canada also confirmed that, where a federally-incorporated corporation’s by-laws do not allow for a virtual meeting, or are otherwise silent on whether the corporation can hold a virtual meeting, the board of directors can amend the by-laws effective until the next shareholders’ meeting where the amendment can be ratified or rejected by shareholders. Proxy advisory firms, such as Institutional Shareholder Services Inc. (“**ISS**”) and Glass Lewis & Co. (“**Glass Lewis**”) also immediately updated their guidelines and indicated they would not penalize issuers holding virtual-only meetings until such time that it is safe to hold in-person meeting again.

These interim measures had a significant impact on the manner in which annual meetings were conducted in the 2020 proxy season, with a dramatic increase in fully virtual and hybrid meetings.

While virtual meeting platforms are available in Canada and were widely used in 2020, usage cost has been an important concern for smaller issuers. Some smaller issuers have utilized other, less specialized, video-conferencing software or a teleconference system to conduct their annual meetings, subject to the

transfer agent's ability to act as scrutineer using those systems. The limitations of these alternatives, however, should be carefully considered based on the issuer's circumstances.

Glass Lewis has expressed concern that virtual meetings may restrict meaningful communication with the management team and reduce the board's accountability to shareholders. In [*Glacier Media Inc \(Re\)*](#)¹, the British Columbia Supreme Court similarly cautioned that the restrictive effects virtual meetings may have on shareholder participation are compounded in respect of shareholders who are not computer literate or who do not own a computer.

Software providers are striving to enhance the virtual meeting experience by improving video functions and introducing "speak from the floor" options that aim to enable shareholders to participate in real-time during virtual meetings. As the technology improves, issuers planning to use virtual meeting platforms for the 2021 proxy season should assure shareholders of their ability to exercise participation rights with robust disclosures in their management information circulars by addressing, for example:

- reasons for implementing (or continuing to implement) virtual-only meetings;
- procedures for answering shareholder questions, including rules regarding the types of questions permitted and how questions will be recognized and disclosed;
- procedures (if any) for posting shareholder questions and the management's responses on the issuer's website following the meeting; and
- availability of technical support for shareholders in accessing and using virtual meeting software.

Disclosure of how an issuer may continue to be affected by COVID-19 (and its variants) in proxy-related materials is expected to be a dominant theme for the 2021 proxy season. Issuers that are considering a return to an in-person meeting or a hybrid-meeting should include disclosure advising shareholders that, on the meeting date, the issuer will comply with all applicable regulatory restrictions restricting the size of gatherings and that shareholders may be refused entry if more individuals attend the meeting than are permitted under applicable laws and regulations in effect on the meeting date.

Diversity

While gender diversity remains a key corporate governance issue, recent developments suggest that attention is beginning to shift to include other aspects of diversity as well. Currently, under Canadian corporate law, reporting issuers are subject to certain disclosure obligations based on a "comply or explain" regime in respect of diversity. This regime is reflected in National Instrument 58-101 - *Disclosure of Corporate Governance Practices* ("NI 58-101"), which came into force in 2015, and requires issuers to either take certain actions, such as adopting a diversity policy or target in respect of the representation of women on the board and in executive officer positions, or disclose why they have not done so.

However, as discussed in our [May 2018](#) blog post and [2020 Proxy Guide](#), the Canadian federal government has broadened its focus on corporate diversity beyond gender. Effective as of January 1, 2020, certain amendments to the *Canada Business Corporations Act* ("CBCA") broadened diversity disclosure requirements for CBCA reporting issuers (including venture issuers), also on a "comply or explain" model, by requiring them to make disclosure regarding the representation of all "designated groups", which include not only women but also Indigenous peoples, persons with disabilities and members of visible

¹ *Glacier Media Inc (Re)*, 2020 BCSC 591

minorities on their boards and in executive officer positions. Corporations Canada, Canada's federal corporate regulator, published [guidelines](#) in February 2021 to assist issuers with these new diversity disclosure requirements.

Similarly, in February 2020, the Government of Ontario established the Capital Markets Modernization Taskforce (the “**Taskforce**”) to review and modernize Ontario’s capital markets regulatory framework. In January 2021, after extensive stakeholder consultations, the Taskforce released its final report which recommends requiring reporting issuers to set their own board and executive management diversity targets, and to annually provide data in relation to the representation of women, black, indigenous and people of colour (“**BIPOC**”), persons with disabilities, and individuals identifying as LGBTQ+ on boards and executive management. The final report also recommended that reporting issuers set an aggregated target of 50% for women and 30% for BIPOC, persons with disabilities and LGBTQ+.

Proxy advisory firms such as ISS and Glass Lewis also remain focused on diversity, generally. As discussed in further detail below, beginning in 2022, both ISS and Glass Lewis will raise their existing gender diversity thresholds. In addition, ISS has indicated that it will begin to look for disclosure beyond gender. Specifically, in 2021, ISS will highlight in its research reports any issuers in the Russell 3000 or S&P 1500 whose boards have “no apparent racial and/or ethnic diversity”, and beginning in 2022, ISS will apply a new policy of generally recommending against the chair of the nominating committee (or other relevant directors on a case-by-case basis) where the board has no apparent racial and/or ethnic diversity.

In addition, certain voluntary initiatives have also contributed to an increased emphasis on diversity. For example, the 30% Club Canada, which is largely comprised of chairs and chief executive officers, specifically aims to achieve a minimum of 30% women on the boards and at the executive management level of S&P/TSX composite index issuers by 2022. According to its [statement of intent](#), the goal of 30% was chosen because this “is the level at which critical mass is achieved and contributions of a minority group cease being representative of that particular group and begin to be judged on their own merits”. Further, other recent initiatives, such as the BlackNorth Initiative launched by the Canadian Council of Business Leaders Against Anti-Black Systemic Racism formed in June 2020, appear to indicate an amplified focus on diversity beyond gender. As part of the BlackNorth Initiative, senior Canadian business leaders have pledged their commitment to implementing specific actions and targets aimed at ending anti-black systemic racism, including ensuring that members of the Black community represent at least 5% of student hires and at least 3.5% of executive and board roles based in Canada by 2025.

While such changes do not impose diversity quotas on issuers at this time, reporting issuers should remain cognizant of the rapidly evolving demands of the law and the markets, and the increased scrutiny by regulators and investors, in this area.

Environmental and Social Factors

Environmental and social factors beyond diversity continue to be key issues for institutional investors and regulators, even in the context of (and possibly encouraged by) the COVID-19 pandemic.

Following the same trend as the federal government’s amendments to the CBCA codifying disclosure requirements relating to the well-being of employees (discussed in our [2020 Proxy Guide](#), but which are not yet in force), the broad push from institutional investors and regulators for standardized disclosure of environmental and social matters, with measurable metrics where appropriate, has continued to intensify, with a continued convergence on the frameworks provided by the Sustainability Accounting Standards Board (“**SASB**”) and the Financial Stability Board’s Task Force on Climate-related Financial

Disclosures (the “TCFD”). SASB’s framework focuses broadly on industry-relevant sustainability reporting while TCFD’s framework focuses on climate-specific disclosures.

A survey of institutional investors conducted by RBC Global Asset Management in 2020 found that 97.5% of Canadian survey respondents believe environmental, social and governance (“ESG”) integrated portfolios are likely to perform as well or better than non-ESG integrated portfolios (an increase from 90% in 2019).² As a result of the COVID-19 pandemic, 53% of survey respondents globally believe that issuers should disclose more information about worker safety, employee health benefits, workplace culture and other social factors. Also of note, over 28% of respondents globally reported that the COVID-19 pandemic caused them to place greater importance on ESG considerations. Furthermore, for the 36% of global respondents who reported that the COVID-19 pandemic made them pay closer attention to specific ESG factors, the top three factors selected were: (i) supply chain risk (43%); (ii) climate risk (37%); and (iii) workplace culture (31%).

In November 2020, the chief executive officers of the eight largest Canadian pension plan investment managers released a joint statement expressing their commitment to “creating more sustainable and inclusive growth by integrating [ESG] factors into [their] strategies and investment decisions”. Doing so, they suggest, “will unlock opportunities and mitigate risks, supporting [their] mandates to deliver long-term risk-adjusted returns”. Citing the need for greater transparency from issuers in order to deliver on their mandates, these institutional investors are calling for standardized disclosure from issuers with respect to performance on material ESG factors and have explicitly endorsed the SASB and TCFD disclosure frameworks.

Similarly, the Canadian Coalition for Good Governance has also announced its public support for the TCFD framework in respect of climate change-related financial disclosures, and has recognized both TCFD and SASB as good models for ESG disclosures.

Notably, as discussed in our [May 2020](#) blog post, the federal government’s Large Employer Emergency Financing Facility program ties pandemic-related financial support to, among other things, new annual climate-related disclosure requirements consistent with the TCFD framework relating to the government’s climate goals.

Recognizing the desire by investors for issuers to provide better disclosure around environmental and social matters, the OSC noted in its Statement of Priorities for 2020-2021 that “growing interest in [ESG] factors means that regulators need to consider how best to support investors in getting the information they reasonably need to make informed investment and voting decisions and encourage public companies to consider the direct and indirect effect of climate change on their businesses and disclose any related material risks”.

More recently, as part of its final report, the Capital Markets Modernization Taskforce recommends the adoption of enhanced, standardized disclosure requirements with respect to material ESG information. The report recommends that the OSC implement, through a phased process, standardized metrics for climate change-related disclosures in compliance with the TCFD framework and encourages the Canadian Securities Administrators to implement similar requirements across Canada.

The concept of “sustainability” for businesses is broad, capturing not only the physical and transitional risks and opportunities relating to climate change and the importance of diversity at the board and executive level, but a wide range of other issues that can impact an issuer’s business over the long-term.

² A news release issued by Royal Bank of Canada dated October 14 2020 highlighting results of the survey can be found [here](#).

Investors are increasingly concerned with the effects on long-term value of matters such as supply chain sustainability and resilience, workplace diversity more generally, employee well-being and workplace culture, particularly in a remote-work environment, and relationships with Indigenous peoples. Reporting issuers should be aware of these trends, the current demands for disclosure they represent and how they may manifest themselves in disclosure requirements and best practices in coming years. Reporting issuers should also consider the disclosure frameworks available and their applicability to the issuer's business.

Proxy Advisor Guidelines

For the 2021 proxy season, the updated guidelines of ISS and Glass Lewis both continue to focus on themes that have gained momentum in previous years, including board gender diversity, environmental and social risk oversight, and shareholder rights in connection with exclusive forum provisions. ISS and Glass Lewis have also made separate updates to their guidance in differing areas. Specifically, ISS has stated an intention to extend the application of its policy guidance published in April 2020 in light of the unprecedented challenges presented by the COVID-19 pandemic and has provided further guidance on its treatment of equity-based compensation plans. Glass Lewis adopted certain changes to its guidelines in respect of board skills and refreshment, financial expertise and other areas of inadequate disclosure.

Board Gender Diversity

Effective February 2022, in the case of a S&P/TSX Composite Index issuer ("**S&P Issuer**") in respect of which women constitute less than 30% of the board, and either: (i) the issuer has not disclosed a formal written gender diversity policy or (ii) its existing gender diversity policy does not include a commitment to achieve 30% representation within a reasonable timeframe, ISS will generally recommend withholding votes from the chair of the nominating committee (or committee designated with similar responsibility) or chair of the board of directors if no nominating committee has been identified or no chair of such committee has been identified.

In the case of non-S&P Issuers that are designated by ISS as "widely held companies", ISS will continue to apply its existing policy of recommending withholding votes from the chair of the nominating committee (or committee designated with similar responsibility) or chair of the board of directors if no nominating committee has been identified or no chair of such committee has been identified, if the issuer has no women on its board and has not disclosed a formal written gender diversity policy with measurable goals and/or targets.

In contrast, in 2021, Glass Lewis will continue to base its voting recommendations on the current requirement of having at least one female board member but will note any boards consisting of fewer than two female directors as a concern. Beginning in 2022, Glass Lewis will recommend voting against the nominating committee chair of a board with fewer than two female directors (or one female director for boards with six or fewer total members). In making its recommendations, Glass Lewis will continue to consider whether boards have provided sufficient rationale or a plan to address the lack of gender diversity on the board.

Environmental and Social Risk Oversight

Glass Lewis has updated its guidelines with respect to board-level oversight of environmental and social issues with respect to boards of issuers in the S&P/TSX 60 Index and, in 2021, Glass Lewis will note as a concern when issuers do not provide clear disclosure concerning the board-level oversight afforded to environmental and/or social issues. Beginning in 2022, Glass Lewis will generally recommend voting against the governance chair of an issuer that fails to provide explicit disclosure concerning the board's

role in overseeing these issues. Glass Lewis clarified that issuers should determine the best structure for this oversight. For example, issuers should consider whether the responsibility for such risk oversight should be reserved to specific directors, the entire board, a separate committee or combined with the responsibilities of a key committee.

Similarly, for the 2021 proxy season, ISS added an express reference to “demonstrably poor risk oversight of environmental and social issues, including climate change” to its list of examples of material failure of risk oversight that can result in adverse vote recommendations with respect to director nominees, committee members or the entire board.

Shareholder Rights – Exclusive Forum Provisions

Exclusive forum provisions seek to limit where certain claims can be litigated by the relevant parties by designating a court in a certain jurisdiction as the exclusive forum where such claims can be brought. In recent years, issuers have increasingly sought to incorporate such provisions in their constating documents.

In its 2021 proxy voting guidelines, ISS has codified its approach as currently applied with respect to exclusive forum provisions. ISS will vote on a case-by-case basis on proposals of issuers to adopt an exclusive forum by-law in their respective governing documents or to amend such governing documents to add an exclusive forum provision. In making its recommendation, ISS will consider the following factors: (i) jurisdiction of incorporation; (ii) board rationale for adopting exclusive forum; (iii) legal actions subject to the exclusive forum provision; (iv) evidence of past harm as a result of shareholder legal action against an issuer originating outside of the jurisdiction of incorporation; (v) issuer corporate governance provisions and shareholder rights; and (vi) any other problematic provisions that raise concerns regarding shareholder rights.

Glass Lewis recommends that shareholders vote against any amendments to constating documents seeking to implement exclusive forum provisions unless the issuer: (i) provides a compelling argument on why the provision would directly benefit shareholders; (ii) provides evidence of abuse of legal process in other, non-favoured jurisdictions; (iii) narrowly tailors such provisions to the risks involved; and (iv) maintains a strong record of good corporate governance practices. Under Glass Lewis guidelines, if a board seeks shareholder approval of an exclusive forum clause as part of a package of amendments, rather than a stand-alone document, Glass Lewis will assess the importance of the accompanying provisions in determining the vote recommendation for the proposal.

ISS Policy Guidance and the COVID-19 Pandemic

As a result of the continuing COVID-19 pandemic and the resulting uncertainties faced by market participants in 2020, on April 8, 2020, ISS issued additional policy guidance, which can be found [here](#). This policy guidance recognized that greater flexibility was appropriate for issuers given the circumstances and covered a number of topics, such as annual general meeting postponements, virtual-only meetings, poison-pills, shareholder rights, board composition, compensation issues, dividends and share repurchases.

In response to stakeholder feedback, ISS has stated that it intends to extend this policy guidance into 2021, with updates to be made in the future as needed. Given the uncertain impact of COVID-19 on the

market landscape over the coming months, it remains to be seen how ISS' approach to corporate governance matters will shift over the course of the 2021 proxy season.

Equity-Based Compensation Plans

Unlike the TSX and the TSX-V, the Canadian Securities Exchange does not require periodic shareholder approval of rolling equity compensation plans. In 2019, ISS introduced a policy to address this gap. As part of that policy, beginning February 1, 2021, ISS will generally recommend withholding votes from continuing compensation committee members (or the board chair, if no such committee has been identified) if an issuer maintains an evergreen plan for which it has not sought shareholder approval in the past two years and does not do so at its upcoming meeting.

Board Skills and Refreshment

In its updated guidelines, Glass Lewis may now recommend voting against the chair of the nomination committee if a board has not addressed major issues of board composition, including the composition, skills and experience of the non-executive board. For an overview of the skills that Glass Lewis considers in relation to certain key sectors, please see Glass Lewis' [Board Skills Appendix](#).

In addition, beginning in 2021, Glass Lewis will note as a potential concern instances where the average tenure of non-executive directors is 10 years or more and no new independent directors have joined the board in the past five years. While Glass Lewis has clarified that it will not be making voting recommendations solely on this basis in 2021, it may consider insufficient board refreshment a contributing factor in recommendations when additional board-related concerns have been identified.

Financial Expertise

Glass Lewis has also increased its scrutiny of the level of professional expertise on audit committees. Glass Lewis believes that at least one member of such committees should have experience as a certified public accountant, chief financial officer or corporate controller of similar experience, or demonstrably meaningful experience overseeing such functions as senior executive officers. Issuers should note that this is a slightly stricter definition than the "financial literacy" requirement imposed under National Instrument 52-110 – *Audit Committees*. While Glass Lewis will flag as a concern such shortfalls in audit committee member professional experience, it will generally refrain from making recommendations solely on this basis except where there are other concerns with the performance of the audit committee.

Other Inadequate Disclosure

Glass Lewis has also included in its guidelines for the 2021 proxy season updated expectations for adequate disclosure practices in respect of matters such as board and committee meeting attendance and a proposed continuation of an issuer to another jurisdiction.

Specifically, Glass Lewis recommends withholding votes from: (i) the governance committee chair, when the records for board and committee meeting attendance are not disclosed, and the number of audit committee meetings held in the past year is not disclosed; and (ii) the audit committee chair, where the audit committee did not meet at least four times during the year.

Further, where a change of jurisdiction of incorporation of an issuer is presented before shareholders at an annual or special meeting, Glass Lewis expects shareholders to be provided with a comparison of the substantive changes between the two jurisdictions, allowing shareholders to weigh the advantages and

disadvantages of each option. Glass Lewis will continue to evaluate each proposal on a case by case basis to determine if, on balance, the change is in the best interests of an issuer and its shareholders.

Finally, Glass Lewis continues to monitor disclosure practices, generally, and enacted a stricter voting policy for issuers with poor, unclear, outdated or contradictory disclosure. Notably, in light of recent diversity-related amendments to the CBCA, Glass Lewis has indicated it will focus on issuers governed by the CBCA. Please see our [2020 Proxy Guide](#) for more information on such disclosure of “designated groups”.

Regulatory Guidance

In November 2020, the CSA and OSC published the CSA’s Multilateral Staff Notice 51-361 – *Continuous Disclosure Review Program Activities for the fiscal years ended March 31, 2020 and March 31, 2019* (“**Staff Notice 51-361**”)³ and the OSC’s Corporate Finance Branch 2020 Annual Report (“**OSC Report**”), respectively. While the CSA and OSC have acknowledged that compliance with continuous disclosure requirements has become more nuanced in light of the unprecedented challenges presented by the ongoing COVID-19 pandemic, these regulators continue to stress the importance of providing investors with clear, transparent and issuer-specific disclosure to support investors in making informed decisions.

In particular, the CSA and OSC flagged certain common deficiencies including in respect of: (i) management’s discussions and analyses (“**MD&A**”); (ii) mining disclosure; and (iii) non-GAAP financial disclosure and provided some guidance on disclosure related specifically to COVID-19.

MD&A

In reviewing MD&A, both the CSA and OSC identified various issues relating to incomplete and boilerplate disclosure, including in respect of liquidity and capital resources, issuer operations, forward-looking information and risks and uncertainties.

Liquidity and Capital Resources

In Staff Notice 51-361, the CSA reminded issuers that in discussing cash requirements, issuers must present an analysis in both the short and long term and should include issuer-specific disclosure respecting commitments, capital expenditures and working capital requirements. Further, the CSA emphasized that issuers must have a reasonable basis to assume sources of funding are available and that there should be clear disclosure respecting any financings that are not yet finalized or require certain conditions to be fulfilled. Similarly, the OSC Report noted that issuers should provide insight beyond the financial numbers, be specific about the time period(s) to which the discussion applies, identify concrete milestones in business plans and describe the steps, costs and timing relating to such milestones.

In terms of the impacts of COVID-19 on liquidity and capital resources, the regulators provided examples of items that may require additional disclosure, which included the receipt of government subsidies and/or funding, any increased counterparty risk, the effects of cost-cutting efforts and discussions in respect of reduced cash flow. The OSC also indicated that, given COVID-19, issuers should consider

³ While Staff Notice 51-361 was originally published in other CSA jurisdictions on October 29, 2020, it was updated in November 2020 to reflect the British Columbia Securities Commission publication date, as well as contact persons in British Columbia for questions.

whether previously disclosed milestones or business plans can still be reasonably expected, both in terms of the timelines disclosed and the relevant issuer's current financial resources.

Discussion of Operations

The CSA and OSC reminded issuers that they should make entity-specific and transparent disclosure in discussing their operations. Particularly, both Staff Notice 51-361 and the OSC Report stressed that issuers should provide detailed explanations and breakdowns of the impact of COVID-19 on revenues and expenses, as well as any other factors contributing to variances from period to period, rather than generally listing COVID-19 as the sole reason for such variances or other negative news. Issuers should also discuss actions and remedies taken in response to COVID-19.

Forward-Looking Information ("FLI") and Risks and Uncertainties

Staff Notice 51-361 noted that certain issuers continue to provide boilerplate disclosure of FLI or disclosure that fails to identify material risk factors or material factors or assumptions used to develop the FLI. Along the same vein, the OSC reminded issuers that they should be specific about the material risks and uncertainties applicable to them and the anticipated significance such risks may have on their financial position, operations, cash flows and future prospects.

In light of COVID-19, both the OSC and the CSA flagged that issuers should consider whether there remains a reasonable basis for previously announced FLI and that issuers may need to consider either updating or withdrawing such FLI.

Mining Disclosure

While the OSC noted that mineral resource estimate disclosure by issuers was generally compliant, the OSC Report identified the following areas where issuers frequently provided inadequate disclosure: (i) demonstrating that a mineral resource had reasonable prospects of eventual economic extraction; (ii) performing and documenting verification of drill hole data; (iii) setting out project-specific risk factors that could affect mineral resource estimates; and (iv) displaying such estimate's sensitivity to changes in cut-off grade. Further, the OSC reminded issuers that forecasts of cash flows, operating costs, capital costs, production rates or mine life based on mineral resources are all results of a preliminary economic assessment, and may therefore trigger the requirement to file a technical report.

The CSA was similarly focused on technical reports supporting the disclosure of mineral resource estimates. In particular, Staff Notice 51-361 reminded issuers that technical reports should sufficiently discuss the key assumptions, parameters and methods used to estimate the mineral resource and that, examples of inadequate disclosure included omitting the proposed mining method, metallurgical recovery factors and the cut-off grade and how it was determined. Other common deficiencies in technical reports included inadequate descriptions of verification procedures or the adequacy of data used (particularly where the data used was generated by earlier project operators), and boilerplate risk disclosure in respect of the mineral project.

Non-GAAP Disclosure

The regulators also remain focused on the use of non-GAAP financial measures. Specifically, the OSC and the CSA noted that they continue to be concerned with prominence given to non-GAAP financial disclosure, the lack of transparency about adjustments made in making such non-GAAP disclosure and the appropriateness of such adjustments. Issuers were cautioned to properly label such measures to avoid

misleading investors and were reminded to consult [CSA Staff Notice 52-306 \(Revised\) - Non-GAAP Financial Measures](#) for further guidance on disclosure of non-GAAP measures.

The OSC and CSA also noted that issuers should not define adjustments or alternative profit measures as “COVID-19 related”. The regulators emphasized that not all COVID-19 effects are non-recurring and that there may be a limited basis for issuers to characterize a loss or expense as non-recurring, infrequent or unusual, including where the impacts of COVID-19 span across multiple reporting periods. Further, issuers were reminded that it could be misleading to investors to describe an adjustment as “COVID-19 related” if there is no explanation as to how such adjustment was specifically associated with the pandemic.