

Goodmans^{LLP} Update

Key Areas of Focus for the 2019 Proxy Season

Over the course of 2018, securities regulators, including the Canadian Securities Administrators (CSA) and the Ontario Securities Commission (OSC), published various revisions and clarifications with respect to their guidance regarding disclosure rules for reporting issuers. In addition, proxy advisory firms Institutional Shareholder Services Inc. (ISS) and Glass Lewis & Co. (Glass Lewis), and relevant organizations such as the Canadian Coalition for Good Governance (CCGG), published their respective annual guidelines which provide guidance on best practices for disclosure and corporate governance for the upcoming proxy season.

This Update provides a high level overview of the key areas of focus for these regulators and organizations, which we encourage reporting issuers to keep in mind for the 2019 proxy season. We have concurrently prepared a more comprehensive Memorandum describing the relevant updates to disclosure rules and guidance. For a copy of the Memorandum, please click [here](#).

Environmental and Social Responsibility Disclosure

Currently, securities legislation in Canada requires disclosure of certain climate change-related information in an issuer's regulatory filings, if such information is material. Issuers should expect increased scrutiny and review by the CSA and OSC of their environmental and social (E&S) disclosure in the upcoming proxy season. The CSA found that many of the issuers who disclose general climate change risks do not disclose risks sufficiently specific to the issuer and its operations or fail to disclose the potential impact resulting from climate change. When assessing the materiality of climate change-related risks and impacts, issuers should consider a wide range of risks, including physical (acute/chronic), regulatory, reputational and business model risks.

Both ISS and Glass Lewis will consider oversight issues concerning E&S risks in their case-by-case analyses of issuers. For further details on the ISS and Glass Lewis policies, refer to our November 21, 2018 Update, *ISS Releases 2019 Proxy Voting Guidelines Updates for Canada* and our December 6, 2018 Update, *Glass Lewis Releases 2019 Canadian Proxy Voting Guidelines*. See also the *ISS 2019 Americas Proxy Voting Guidelines Updates* and the *Glass Lewis 2019 Proxy Paper Guidelines Canada*.

CCGG's newly published Directors' E&S Guidebook and 2018 Best Practices for Proxy Circular Disclosure annual guide are useful resources for recommendations on effective board oversight and disclosure of E&S matters. See *The Directors' E&S Guidebook* and *2018 Best Practices for Proxy Circular Disclosure*.

Diversity

Issuers should expect their diversity disclosure to continue to be subject to scrutiny and review by the CSA and OSC in 2019. In 2014, the CSA implemented its "comply or explain" regime, requiring Toronto Stock Exchange (TSX) listed issuers to include, among other things, certain gender diversity information in their corporate governance disclosure. While no changes to the current gender diversity disclosure requirements have been proposed at this time, the CSA is considering whether changes are warranted.

ISS expanded its current board gender diversity policy for the 2019 proxy season to apply to "widely-held" companies, which includes S&P/TSX Composite Index companies and companies which ISS designates as such based on the number of ISS clients holding securities of the company. Glass Lewis' previously announced board gender diversity policy takes effect in the 2019 proxy season under which Glass Lewis will generally recommend voting against the nominating committee chair (and potentially other nominating committee members) if: (i) the board has no female members, or (ii) the board has not adopted a formal written gender diversity policy.

Non-GAAP Financial Measures

For several years now, the CSA have expressed concern regarding the use of non-generally accepted accounting principles (GAAP) financial measures. In late 2018, the CSA published a notice and request for comment in respect of proposed National Instrument 52-112 *Non-GAAP and Other Financial Measures Disclosure* (the “**Proposed Non-GAAP Instrument**”) and Companion Policy 52-112CP (the “**Proposed Non-GAAP Companion Policy**”) regarding disclosure requirements for non-GAAP financial measures. The Proposed Non-GAAP Instrument would apply to all issuers other than “SEC foreign issuers”. The rules in the Proposed Non-GAAP Instrument, as currently drafted, are broad and would apply to non-GAAP financial measures and other financial measures included in documents intended to be, or reasonably likely to be, made available to the public (regardless of whether those documents have been filed under securities legislation). The Proposed Non-GAAP Instrument and Proposed Non-GAAP Companion Policy, if implemented, will have the force of law and provide the CSA with a much stronger tool to take regulatory action to enforce compliance where warranted. For further details, refer to our September 25, 2018 Update, *Canadian Securities Regulators Introduce New Rules for Disclosure of Non-GAAP Financial Measures*.

Other Key Updates

- **Forward-Looking Information.** The CSA believes disclosure of forward-looking information is often deficient and reminds issuers that they must not disclose a financial outlook unless it is based on assumptions that are reasonable in the circumstances. The OSC cites certain best practices it expects from issuers with respect to disclosure of forward-looking information, including to: (i) clearly identify forward-looking information; (ii) adequately describe the key assumptions used and disclose assumptions specific to the issuer; and (iii) provide reasonable qualitative and quantitative assumptions to support forward-looking information for multiple years. The Proposed Non-GAAP Instrument may also impact disclosure practices with respect to financial outlook once implemented.
- **Social Media.** The CSA reminds issuers not to provide material information on their social media sites before it is generally disclosed to all investors, or to provide misleading or unbalanced information inconsistent with information already posted on SEDAR. The CSA suggests issuers should have a robust social media governance policy that specifies, among other things, who is authorized to post what type of information on which social media platforms.
- **Director Election Matters.** ISS moved forward with previously announced changes to its director overboarding policy, which increase the thresholds of an overboarded director to: (i) a CEO of a public company who sits on more than two (previously one) outside public company boards; and (ii) a director who is not a CEO of a public company and sits on more than five (previously four) public company boards. The new policy also removes the attendance factor from ISS’ considerations. Glass Lewis’ analysis of director elections for S&P/TSX 60 Index companies will now include board skills matrices to assist in determining the board’s skills and identifying any potential gaps.
- **Executive Compensation.** Glass Lewis updated certain evaluation criteria that will apply in its reviews of executive compensation for the 2019 season, including with respect to: (i) contractual payments and arrangements; (ii) grants of front-loaded awards; and (iii) clawback provisions.
- **Virtual Shareholder Meetings.** Glass Lewis’ previously announced policy regarding virtual-only shareholder meetings is now in effect for the 2019 proxy season. Under the new policy, Glass Lewis may recommend voting against members of the corporate governance committee if the board holds a virtual-only shareholder meeting and the company does not provide disclosure in its proxy circular assuring that shareholders will be afforded the same rights and opportunities to participate in the meeting as they would have in person.
- **Legislative Amendments.** On May 1, 2018, Bill C-25 *An Act to amend the Canada Business Corporations Act, the Canada Cooperatives Act, the Canada Not-for-profit Corporations Act, and the Competition Act* (the “**CBCA Amendment Act**”) received royal assent.

The CBCA Amendment Act contains, among other things, significant amendments to the *Canada Business Corporations Act* related to director elections, notice-and-access and diversity disclosure. It is anticipated these amendments will come into force once related regulations are enacted, which could occur as early as the end of 2019.

To discuss any of these developments in more detail, please contact any member of our [Corporate Securities Group](#).

Authors



Tim Heeney
theeney@goodmans.ca
416.597.4195



Tara Hunt
thunt@goodmans.ca
416.849.6969



Krysten Bortolotti
kbortolotti@goodmans.ca
416.849.6927

All Updates are available at www.goodmans.ca. This Update is intended to provide general comment only and should not be relied upon as legal advice. © Goodmans LLP, 2019.