

# Goodmans<sup>LLP</sup> Update

## Key Areas of Focus for the 2020 Proxy Season

During 2019, securities regulators, including the Canadian Securities Administrators (CSA) and the Ontario Securities Commission (OSC), published 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 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 2020 proxy season. Click [here](#) to access a more comprehensive discussion of the disclosure rules and guidance updates.

## Diversity

As of January 1, 2020, the diversity disclosure requirements for *Canadian Business Corporations Act* (CBCA) corporations under the federal government's Bill C-97 An Act to implement certain provisions of the budget tabled in Parliament on March 19, 2019 and other measures ("**Bill C-97**") came into force. Bill C-97 requires all CBCA public companies to comply with new and broader diversity disclosure rules. The new regulations mirror the "comply or explain" regime mandated by National Instrument 58-101 *Disclosure of Corporate Governance Practices* ("**NI 58-101**"), under which issuers must disclose (i) the number and percentage of women on their board of directors and in executive officer positions, and the consideration given to female representation; (ii) whether there are targets for the number or percentage of women in these positions; and (iii) whether there are written policies relating to the identification and nomination of female directors.

The new disclosure requirements in Bill C-97 apply to all "designated groups", which includes not only women, but also Aboriginal peoples, persons with disabilities and members of visible minorities. Publicly-listed CBCA corporations must now disclose targets, statistics and term limits of the designated groups, as well as describe written policies relating to the identification and nomination of directors from the designated groups, and how the level of representation of the designated groups is considered when nominating and appointing directors and senior management, respectively. The new regulations will require this disclosure from both "venture" and "non-venture" issuers. Furthermore, all CBCA public companies must send the foregoing disclosure to Corporations Canada, and may do so by submitting their circular through the [Online Filing Centre](#) for free. For further details on the CBCA diversity disclosure amendments, refer to our August 8, 2019 Update, [CBCA Diversity Disclosure Requirements Effective for 2020 Proxy Season](#).

Glass Lewis has not changed its board diversity voting policy, but it will consider the broadened disclosure requirements in its analysis for the election of directors of TSX-listed companies.

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## Director Election Matters

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 (“Bill C-25”), received royal assent on May 1, 2018 and certain provisions came into force on June 13, 2019. One amendment of Bill C-25, while not yet in force, will implement majority voting for directors into the CBCA, requiring shareholders to vote “for” or “against” each director nominee (as opposed to the current “for” or “withhold” options), and requiring each nominee director to receive a majority of votes cast to be elected.

ISS and Glass Lewis implemented new guidelines for director elections as follows:

### *Director Attendance and Committee Meetings*

- Glass Lewis recommends voting against the governance committee chair when (i) records for board and meeting attendance are not disclosed, and beginning 2021 (ii) the number of audit committee meetings that took place is not disclosed.
- Beginning 2021, Glass Lewis will recommend voting against the audit committee chair if the audit committee did not meet at least four times that year.
- ISS clarified that its voting policy concerning directors who do not meet certain attendance thresholds does not apply where a nominee has served only part of the fiscal year leading up to the annual general meeting.

### *Board Skills*

- Glass Lewis clarified its expectation for companies to disclose sufficient information to allow a meaningful assessment of a board’s skills and competencies via its board skills matrix. Failure to provide adequate information could lead to negative voting recommendations on director elections.

### *Board Responsiveness*

- If 20% or more of the votes cast by shareholders are against a management recommendation, Glass Lewis will evaluate whether the board responded appropriately to the negative vote. The appropriate level of responsiveness depends on the severity and persistence of shareholder opposition, but may include robust disclosure of engagement activities and specific changes made in response to shareholder feedback.

### *Non-Audit Fees*

- Glass Lewis may recommend voting against all audit committee members in the second successive year of excess non-audit fees.
- Further, in determining whether non-audit fees are excessive, ISS allows the exclusion one-time capital structure events, such as initial public offerings and spin-offs. For 2020, ISS expanded these events to include M&A transactions provided there is adequate disclosure about the transaction and a clear fee breakdown.

### *Independence*

- To align with its definition of independence, ISS updated its voting policy for former executives serving on audit and compensation committees. ISS recommends a vote withhold for any director who served as CEO or CFO of the company, its affiliates, or a company acquired within the past five years and three years, respectively.

### *Overboarded Directors*

- ISS amended its overboarding policy to clarify it will not include a board position if it has been publicly disclosed the director will be resigning at the next annual meeting. Conversely, ISS will include any new boards a director is joining, even if the election has not yet taken place.

## Executive Compensation

The TSX Venture Exchange requires periodic shareholder reconfirmation of rolling equity plans (evergreen plans), while the Canadian Securities Exchange does not. To address this gap, ISS implemented a new policy that has adverse vote implications for certain evergreen plans and, beginning February 1, 2021, adverse vote implications for compensation committee members who maintain certain evergreen plans.

ISS also introduced a new executive compensation performance metric for the 2020 proxy season, Economic Value Add (EVA), calculated as follows:

$$\text{EVA} = \text{Net Operating Profit after Taxes} - (\text{Cost of Capital} * \text{Capital})$$

ISS will use EVA for say-on-pay analyses by looking at EVA Margin (EVA as a ratio of Sales), EVA Spread (EVA as a ratio of Capital), and the annual change in both. ISS will assess EVA as part of its quantitative analysis of executive compensation.

Both Glass Lewis and the CCGG highlight the importance of transparency and fairness to shareholders with respect to executive compensation practices. Glass Lewis will oppose excessively restrictive compensation practices that favour the executive, including excessive severance payments, new or renewed single-trigger change-in-control arrangements, multi-year guaranteed awards, and excessive sign-on agreements. For companies that significantly incorporate non-GAAP measures in their executive compensation schemes, the CCGG recommends comprehensive disclosure for investors, including an explanation of any adjustments, clear definitions of all non-GAAP measures, a detailed reconciliation of non-GAAP measures to the closest GAAP measure, and confirmation of year-to-year consistency in calculating non-GAAP measures.

## Other Key Updates

- *Climate Change-Related Disclosure.* Securities legislation in Canada requires reporting issuers to disclose the material risks affecting their businesses and, where practicable, the financial impacts of such risks. 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. The CSA recommend that boards and management assess their expertise with respect to sector-specific climate change-related risks, and encourage boards and management to avoid vague or boilerplate disclosure.
- *Cannabis Issuers.* The OSC is cracking down on cannabis issuers, noting the cannabis industry has benefited from increasingly permissive legal frameworks. In its Staff Notice 51-730 *Corporate Finance Branch 2019 Annual Report*, the OSC emphasizes cannabis issuers need to provide investors with transparent information about financial performance and risks and uncertainties to support informed investing decisions.
- *Other Legislative Amendments.* Bill C-25 amended the CBCA to permit CBCA corporations to make use of the notice-and-access procedures available under provincial securities legislation.

For further information concerning these changes, please contact our [Corporate Finance and Securities Group](#).