Goodmans LLP

New Disclosure Rules and Guidance Related to the 2015 Proxy Season

Reporting issuers in Canada are subject to continuous disclosure obligations imposed by securities laws and the rules of stock exchanges. From time to time, the securities regulators revise these disclosure rules or publish guidance to clarify points that may be ambiguous in the rules themselves. In addition, proxy advisory firms such as Institutional Shareholder Services Inc. and Glass Lewis & Co. publish annual voting guidelines, providing issuers with guidance on what the advisors consider best practices for disclosure. Finally, the Canadian Coalition for Good Governance publishes an annual "best practices" guideline for disclosure by reporting issuers.

Overview

The purpose of this update is to, among other things:

- provide an update regarding changes and proposed changes to the continuous disclosure and proxy rules for the 2015 proxy season under the following instruments (as well as any related forms and companion policies) (the "**CD Rules**"):

  - National Instrument 58-101 – *Disclosure of Corporate Governance Practices* ("**NI 58-101**");

  - National Instrument 51-102 – *Continuous Disclosure Obligations* ("**NI 51-102**");

  - National Instrument 52-110 – *Audit Committees* ("**NI 52-110**");

- discuss areas where the Canadian Securities Administrators (CSA) and/or the Ontario Securities Commission (OSC) have provided new guidance in respect of the CD Rules;

- provide an update regarding changes to the disclosure and proxy rules under the Toronto Stock Exchange (TSX) Company Manual (the "**TSX Company Manual**");

- discuss the areas on which the CSA and/or OSC have indicated an intention to focus during their 2015 reviews;

- identify changes in Institutional Shareholder Services Inc. ("**ISS**") and Glass Lewis & Co. ("**Glass Lewis**") proxy voting guidelines applicable for the 2015 proxy season; and

- discuss any other relevant guidance and best practices that have emerged since the last proxy season.

This update does not provide a comprehensive description of the content of the documents referenced below. It would be advisable to review each of those documents in preparing this year's annual materials. Copies of any or all of the materials can be provided upon request.

Summary of Relevant Updates and Guidance

The following briefly summarizes the primary updates to, and guidance in respect of, the CD Rules for the 2015 proxy season described in this update:

Changes in CD Rules

- the OSC and the securities regulatory authorities in certain other Canadian jurisdictions announced amendments to NI 58-101 to increase transparency regarding the representation of women on boards of directors and in senior management;
- the CSA proposed amendments to NI 51-102 and NI 52-110, as well as conforming and certain other changes *to National Instrument 41-101 – General Prospectus Requirements* ("**NI 41-101**"), applicable only to venture issuers;
- the TSX announced amendments to director voting requirements;

Guidance and Areas of Focus for 2015

- the CSA provided the results of its 2014 continuous disclosure review;
- the OSC published its report on its review of Management Discussion and Analysis (MD&A) disclosure of mining issuers;
- ISS and Glass Lewis released proxy policy updates in the areas of, among other things, director independence, performance-based recommendations, majority voting policies, advance notice policies and executive compensation; and
- the Canadian Coalition for Good Governance (CCGG) released its annual guide on best practices for disclosure.

Changes in CD Rules

Gender Diversity – Amendments to NI 58-101

The Minister has approved amendments to Form 58-101F1 of NI 58-101 and they are now in force. The amendments are intended to increase transparency regarding the representation of women on boards of directors and in senior management of reporting issuers.

The amendments require issuers listed on the TSX and other non-venture issuers reporting in a participating jurisdiction to provide annual disclosure regarding:

- director term limits and other mechanisms of board renewal or why there are no such limits;
- policies regarding the representation of women on the board of directors or why there are no such policies;
- the board's or nominating committee's consideration of the representation of women in the director identification and selection process or why there is no such consideration;
- the issuer's consideration of the representation of women in executive officer positions when making executive officer appointments or why there is no such consideration;
- targets for the representation of women on the board and in executive officer positions or why there are no such targets; and
- the number and proportion of women on the board and in executive officer positions.

Venture Issuers – Proposed Amendments to NI 51-102, NI 52-110 and NI 41-101

In 2014, the CSA published for comment proposed amendments to NI 51-102 and NI 52-110, as well as conforming and certain other changes to NI 41-101, applicable only to venture issuers, with the intent of focusing disclosure on information that reflects the needs and expectations of venture issuer investors. These amendments will not be in force for the 2015 proxy season. Broad highlights of the amendments include:

- *Quarterly Highlights.* Venture issuers without significant revenues would be able to fulfill the quarterly MD&A requirement by preparing and filing a streamlined disclosure document, referred to as a "Quarterly Highlight," in each of their first three quarters.

- *Business Acquisition Reports.* The threshold for a "significant acquisition" would increase from 40% to a 100% of the value of the consolidated assets of the venture issuer based on the asset or investment test and the requirement for *pro forma* financial statements would be eliminated.

- *Executive Compensation Disclosure.* A new executive compensation disclosure form would replace Form 51-102F6 for venture issuers which would, among other things: (i) reduce the number of executives for whom disclosure is required from five to three; (ii) reduce the number of years required for disclosure of past executive compensation from three to two; and (iii) eliminate the requirement to calculate and disclose the grant date fair value of stock options and other share-based awards in the summary compensation table.

- *Audit Committee.* A venture issuer would be required to have at least three members on its audit committee, the majority of whom must be independent of the issuer. Venture issuers listed on the TSX Venture Exchange must currently meet a similar requirement under exchange policies.

Amendments to TSX Company Manual

Director Voting Requirements

The TSX amendments will require listed issuers to adopt a majority voting policy requiring each director of a listed issuer who does not receive a majority (50% + 1) of the votes cast with respect to his or her election to tender his or her resignation. These rules do not apply in relation to contested meetings.

Each listed issuer (other than a majority-controlled issuer or an issuer that otherwise satisfies the requirement in a manner acceptable to the TSX, for example through its constitution or incorporating statute), must have a majority voting policy, in substance providing that:

- any director must immediately tender his or her resignation if he or she is not elected by at least a majority of votes cast;

- the issuer's board of directors must determine whether or not to accept the resignation within 90 days after the relevant meeting;

- the resignation becomes effective when accepted by the board;

- the director who tenders a resignation pursuant to a majority voting policy cannot participate in any board meeting at which the resignation is considered; and

- the issuer must promptly issue a news release disclosing the board's decision. If the board does not accept the resignation, the news release must fully state the reasons for that decision.

Proxy advisory firms such as ISS indicate that they will scrutinize any non-acceptance of a resignation and the reasons given for a board's decision. This will, in turn, influence a proxy advisory firm's recommendations on voting for continuing directors in future elections.

Guidance and Areas of Focus for 2015

The following is a summary of the areas where the OSC and CSA have provided new guidance or have indicated they intend to focus during their subsequent reviews. Refer to the text of the applicable staff notice for a full description of the guidance provided by the OSC and CSA.

CSA Staff Notice 51-341 – Continuous Disclosure Review Program Activities for the Fiscal Year Ended March 31, 2014

Staff Notice 51-341 – Continuous Disclosure Review Program Activities for the fiscal year ended March 31, 2014 summarizes the results of CSA reviews of compliance by reporting issuers with certain continuous disclosure provisions of securities legislation during the year ended March 31, 2014 ("**Continuous Disclosure Review Program**"). The following is a summary of relevant findings of the Continuous Disclosure Review Program:

(i) Financial Statement Deficiencies

Disclosure of Interest in Other Entities. International Financial Reporting Standards 10, 11 and 12 came into effect for the annual period beginning on or after January 1, 2013, changing the definition of control and joint control requiring additional disclosure for all entities with subsidiaries, joint arrangements, associates and structured entities. Where these standards require significant reporting changes for an issuer, the CSA found many examples of in sufficient disclosure explaining the issuer-specific factors that led to the changes, such as underlying structure, agreements in place or relevant activities. In many cases, the issuer only disclosed what the change was and how it was accounted for, but did not explain the significant judgments and assumptions made in arriving at management's conclusion.

Revenue Recognition. In certain instances, issuers recognized revenues as either a principal or an agent but their financial statements, MD&A and other periodic disclosure documents contradicted or did not support the accounting treatment. The CSA expect issuers to provide sufficient disclosure of the accounting policies and judgments applied in making revenue recognition determinations, including any applicable facts and circumstances surrounding such a determination.

Impairment of Assets. Issuers often neglected to disclose the following information in connection with an impairment of assets: (i) the events and circumstances that led to the recognition of the impairment; (ii) whether the recoverable amount of the assets is its fair value less cost of disposal or its value in use; (iii) if the recoverable amount is fair value less cost of disposal, how the fair value was determined; and (iv) if the recoverable amount is value in use, the discount rate(s) used.

(ii) Management Discussion and Analysis Deficiencies

Non-GAAP Measures. The CSA reported that EBITDA was often used inconsistently with its commonly understood meaning by including adjustments to make the metric look more positive, which could be misleading or confusing for investors. More transparent disclosure is required where adjustments are made to an EBITDA calculation that deviate from its commonly understood meaning, including a reconciliation to the applicable GAAP measure in accordance with Staff Notice 52-306.

Forward Looking Information. The CSA identified four areas requiring improvement in the disclosure of material forward-looking information (FLI): (i) clear identification of the FLI; (ii) disclosure of the material assumptions used to develop the FLI; (iii) updates on previously disclosed FLI; and (iv) comparison of actual results to the financial outlook previously disclosed.

Additional Disclosure for Venture Issuers without Significant Revenue. The CSA reported that when venture issuers disclose their exploration expenditures on a property-by-property basis, they often fail to disclose the material components of those expenditures, preventing investors from understanding where and how the money was spent.

(iii) Other Regulatory Disclosure Deficiencies

Mineral Properties. Common deficiencies in complying with the technical report requirements of Form 43-101F1 Technical Report included: (i) not clearly disclosing how "reasonable prospects for economic extraction" were established for projects with mineral resource estimates; (ii) insufficient discussion concerning social or community-related requirements and the status of any related negotiations; (iii) failure to provide the required context and justification for capital and operating cost estimates; (iv) inadequate economic analysis information for advanced properties, particularly disclosing only pre-tax cash flows or upside sensitivity analyses; (v) lack of disclosure related to project-specific risks and uncertainties; (vi) incomplete disclosure of key findings about mineral properties in the summary section; and (vii) missing statements required in a qualified person's certificate.

Executive Compensation. A number of issuers did not include a sufficient explanation in their compensation discussion and analysis concerning how each element of compensation was tied to a named executive officer's performance and how executive compensation decisions were made.

Filing of News Releases and Material Change Reports. Common deficiencies in news releases and material change reports included: (i) filing documents when the timing is inappropriate and/or the content is inadequate (e.g., announcing a change in the issuer's business before meeting the regulatory requirements for such change and failing to

disclose the existence of such requirements); (ii) inconsistency concerning the circumstances under which disclosure is made (e.g., announcing the appointment but not resignations of officers or directors); and (iii) failing to make filings on a timely basis.

OSC Staff Notice 51-722 – Report on MD&A Disclosure for Mining Issuers

OSC Staff Notice 51-722, which summarizes the OSC's review of MD&A disclosure filed by 100 Ontario mining issuers with market capitalization under $100 million, was published as an educational tool to help issuers understand and comply with MD&A reporting requirements.

The Staff Notice identified four specific areas for improvement:

- Venture issuers without significant revenues should provide a breakdown of material components of exploration and evaluation assets or expenditures on a property-by-property basis and include a qualitative discussion of those expenditures, as well as general and administrative expenses and other materials.
- Issuers with significant exploration projects should discuss and itemize their exploration expenditures for each material property that is not at the development or production stage.
- Issuers with a working capital deficiency should discuss in detail all future cash requirements of an operating and capital nature and how projects will be funded.
- Issuers should disclose the identity of parties involved in related party transactions, as well as the business purpose and economic substance of the transaction.

ISS and Glass Lewis Canadian Proxy Voting Guidelines: 2014 Updates

The following is a summary of certain policy changes being adopted by ISS and Glass Lewis for the 2015 proxy season in Canada. For a full description of each new policy initiative, including the application of, and rationale for, those initiatives, refer to "ISS Canadian Corporate Governance Policy – 2015 Updates" and "Glass Lewis & Co. Proxy Paper Guidelines – 2015 Proxy Season", each available online.

(i) Director Independence

ISS will now consider a former CEO serving on the board to be an independent director following a five year cooling-off period (i.e., starting five years after the director ceased to act as CEO). ISS has also added a general requirement that an independent director must not have any "material relationships" with the company or any member of management. No guidance was provided on what ISS would consider to be a material relationship in this context.

(ii) Performance Based Recommendations

Glass Lewis provided guidance regarding its practice of taking past performance into account when making recommendations on directors. Glass Lewis will be inclined to recommend against a director who has a history of serving on boards or as an executive of companies with records of poor performance, inadequate risk oversight, excessive compensation, auditor accounting-related concerns or other indicators of mismanagement.

Glass Lewis will also recommend against a director who:

- fails to attend at least 75% of board meetings or committee meetings in the absence of a reasonable explanation for their poor attendance record;

- is also the CEO of a company where a serious and material restatement has occurred after the CEO had previously certified the pre-restatement financial statements;

- has received two "against" recommendations from Glass Lewis for identical reasons within the prior year at different companies (the same situation must also apply at the company being analyzed); or

- exhibits a pattern of poor oversight in the areas of executive compensation, risk management or director recruitment/nomination.

(iii) Advance Notice Policies[1]

Glass Lewis and ISS will now both consider recommending against advance notice policies that do not allow for a new time period for shareholder nominations when an annual meeting is adjourned or postponed.

[1] Advance notice by-laws and policies, generally speaking, require that advance notice be given to an issuer of shareholder proposals relating to the nomination of directors at a meeting of shareholders.

ISS highlighted the following potentially problematic features of advance notice policies:

- any maximum upper limit on the time period for shareholder nominations (in contrast, Glass Lewis will support a notice period of not less than 30 and not more than 70 days before the meeting date);

- any restriction on the board's ability to waive the entire advance notice policy;

- any requirement that a shareholder deliver information in respect of a nominee beyond what is required in a dissident proxy circular or is otherwise required to determine the nominee's qualifications;

- any requirement for nominees to agree, in advance, to comply with company policies; and

- stipulations that the company will not be required to include information provided by nominating shareholders or their nominees in any shareholder communications.

ISS will now recommend withholding votes from members of a board that adopted an advance notice policy and did not submit it to shareholders for ratification.

For assistance in updating advance notice by-laws or policies, please contact any member of our corporate securities group.

(iv) Executive Compensation

Glass Lewis provided additional guidance with respect to:

- qualitative factors (such as an effective overall incentive structure, significant forthcoming enhancements or reasonable long-term payout levels) that may result in Glass Lewis overriding a negative result from its quantitative analysis of executive compensation; and

- "one-off awards," which Glass Lewis generally opposes (if existing executive compensation programs are providing adequate incentives, Glass Lewis would prefer to see the compensation plans redesigned instead of having additional awards granted under the existing plans).

In addition to the proxy guidelines issued by ISS and Glass Lewis, it should be noted that the CSA also published their proposed National Policy 25-201 – Guidance for Proxy Advisory Firms, which is proposed to create guidelines for proxy advisory firms relating to, among other things, conflicts of interest, transparency, communications with clients, market participants, the media and the public and corporate governance practices.

Canadian Coalition for Good Governance: 2014 Updates

The CCGG's annual guide on best practices for disclosure suggests, among other things, that:

- reports of voting results should include a detailed breakdown of votes on each motion and each director election;
- boards should limit the number of board "interlocks" and disclose the number that exist;
- the Chair and the CEO should be separate individuals and the Chair should be chosen from among the independent directors;
- boards should have a plan in place for orderly succession of directors, should maintain an evergreen list of candidates and should use, and disclose in the proxy circular, a skills matrix for current directors. The Board should remain aware of and monitor succession planning efforts for all critical roles;
- issuers should provide all shareholders (regardless of whether they hold the minimum 5% threshold) with an opportunity to suggest nominees for election to the board;
- issuers should disclose the role of their board in overseeing the determination, execution and monitoring of the issuer's strategic plan;
- boards should disclose the processes used that enable them to identify and monitor risk management efforts, including the board's perspective on primary risks, an explanation of the board's involvement in overseeing risk management and how the board independently validates and scrutinizes the perspective presented by management on key risk issues; and
- disclosure of an issuer's compensation plan should describe clearly how it is linked to the issuer's strategy,

objectives and risk management and should communicate the role of the board in designing executive compensation, including key factors considered by the board.

For a full description of all guidelines and best practices, including the application of, and rationale for, those guidelines and best practices, refer to "CCGG 2014 Best Practices for Proxy Circular Disclosure", available online at www.ccgg.ca.

Please contact any member of our Corporate Securities Group to discuss these latest developments.

About Goodmans

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