

# New Disclosure Rules and Guidance Related to the 2016 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 and stock exchanges 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 and additional policies relating to specific matters.

## Overview

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

- summarize changes and proposed changes to the continuous disclosure and proxy rules under the following instruments (as well as any related forms and companion policies) (the “**CD Rules**”):
  - National Instrument 51-102 - *Continuous Disclosure Obligations* (“**NI 51-102**”)
  - National Instrument 52-110 - *Audit Committees* (“**NI 52-110**”)
  - National Instrument 58-101 - *Disclosure of Corporate Governance Practices* (“**NI 58-101**”);
- discuss areas where the Canadian Securities Administrators (CSA) or the Ontario Securities Commission (OSC) have provided new guidance in respect of the CD Rules;
  - summarize changes to the disclosure and proxy rules under the Toronto Stock Exchange (TSX) Company Manual (the “**Company Manual**”);
  - discuss the areas on which the CSA or OSC have indicated an intention to focus during their 2016 reviews;
  - identify changes in Institutional Shareholder Services Inc. (ISS) and Glass Lewis & Co. (“**Glass Lewis**”) proxy voting guidelines applicable for the 2016 proxy season; and
  - discuss any other relevant guidance that has 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 connection with the preparation of this year’s annual proxy materials. Copies of any or all of the materials can be provided by any member of our Corporate Securities group upon request.

## Summary of Relevant Updates and Guidance

The following briefly summarizes the primary updates to, and guidance in respect of, the disclosure and proxy rules for the 2016 proxy season described in this update:

### *Guidance and Areas of Focus for 2016*

- the CSA provided the results of its 2015 continuous disclosure review;
- the CSA published a review of compliance with corporate governance disclosure related to gender diversity, as the relevant amendments to NI 58-101 have been in force for one full year;
- ISS and Glass Lewis released proxy policy updates in the areas of, among other things, director overboarding; equity compensation plans; externally-managed issuers; by-law amendments and board performance; and
- the Canadian Coalition for Good Governance (CCGG) released its annual guide on best practices for disclosure, as well as policy papers relating to proxy access, universal proxies and board gender diversity.

### *Changes in Disclosure and Proxy Rules*

- the TSX adopted amendments to the Company Manual that expand the exemptions available to issuers that list on the TSX and one or more other exchanges (“**Interlisted Issuers**”);
- NI 51-102 and NI 52-110 were amended to simplify the disclosure requirements applicable to issuers listed on the TSX Venture Exchange (“**Venture Issuers**”)

## Guidance and Areas of Focus for 2016

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

### **CSA Staff Notice 51-344 – Continuous Disclosure Review Program Activities for the Fiscal Year Ended March 31, 2015**

Staff Notice 51-344 – *Continuous Disclosure Review Program Activities for the fiscal year ended March 31, 2015* summarizes the results of CSA reviews of compliance by reporting issuers during the year ended March 31, 2015 (“**Continuous Disclosure Review Program**”). The Continuous Disclosure Review Program focused on deficiencies relating to financial statements, management’s discussion and analysis (MD&A), certification of disclosure, filing of material contracts, material change reports and news releases and investor presentations of mining companies, among other things. The results are summarized in greater detail in our July 27, 2015 Update, *CSA Announce Results of Continuous Disclosure Review for Fiscal 2015*, and highlight, as a common theme, the CSA’s expectation that reporting issuers provide meaningful disclosure, not boilerplate.

### **CSA Staff Notice 58-307 – Staff Review of Women on Boards and in Executive Officer Positions – Compliance with NI 58-101**

The CSA published a review of over 700 reporting issuers’ compliance with recent amendments to NI 58-101 requiring corporate governance disclosure on matters relating to gender diversity.

The CSA’s review revealed that many issuers did not satisfy the level and detail of required disclosure. Issuers should expect continued scrutiny and review of their gender diversity disclosure in 2016.

## ISS and Glass Lewis Canadian Proxy Voting Guidelines: 2016 Updates

The following is a summary of certain policy changes being adopted by ISS and Glass Lewis for the 2016 proxy season in Canada, which are summarized in greater detail in our November 23, 2015 Update, *ISS 2016 Proxy Season Policy Updates*, and in our December 3, 2015 Update, *Glass Lewis 2016 Proxy Season Policy Updates*, respectively. Other than the changes relating to director overboarding, which will be implemented for the 2017 proxy season, the updated guidelines will be effective for shareholder meetings held on or after February 1, 2016. For a full description of each new policy initiative, including the application of, and rationale for, those initiatives, refer to ISS's "Americas Proxy Voting Guidelines Updates – 2016 Benchmark Policy Recommendations" and Glass Lewis's "Proxy Paper Guidelines – 2016 Proxy Season," each available online.

### (i) Director Overboarding

Both ISS and Glass Lewis have introduced enhanced standards for evaluating whether a director serves on an excessive number of boards.

For shareholder meetings held in 2016:

- ISS will generally issue a "withhold" recommendation for directors of companies listed on the TSX who attended less than 75% of meetings held within the past year without a valid reason and (i) sat on more than two outside public company boards (for directors who are CEOs); or (ii) sat on more than six total public company boards (for non-CEO directors). Cautionary language will be included in ISS reports where directors are overboarded, regardless of attendance.
- Glass Lewis will continue to recommend against a director who (a) sat on more than three boards (for directors who are executives); or (b) sat on more than six total public company boards (for non-executive directors). Glass Lewis will note as a concern instances where a director (a) who is an executive of a public company serves on more than a total of two boards; or (b) serves on more than five public company boards.

For shareholder meetings beginning in February of 2017:

- ISS will decrease the overboarding limits to one outside public company board for directors who are CEOs and to four total public company boards for non-CEO directors.
- Glass Lewis will decrease the overboarding limits to two total public company boards for directors who are executives and to five total public company boards for non-executive directors. However, a "withhold" recommendation will be limited to companies where the director does not serve as an executive officer.

### (ii) Externally Managed Issuers

To increase board accountability and improve disclosure for externally managed issuers (EMIs), ISS will make recommendations on a case-by-case basis for say-on-pay resolutions and elections of directors and committee members of an EMI that has provided minimal or no disclosure about its management services agreement and how senior management is compensated. In making its recommendation, ISS will consider the size and scope of the management services agreement, compensation in comparison to issuer peers, board and committee independence and conflicts of interest. EMIs should consider the scope of their disclosure in this regard and contact any member of our Corporate Securities group with questions.

### (iii) Equity Compensation Plans

In addition to continuing to make recommendations on equity-based compensation plans for TSX-listed companies on a case-by-case basis, ISS will adopt a "scorecard" model for such plans similar to the model it introduced in the United States for the 2015 proxy season. Under the scorecard approach, ISS will assess a range of factors and apply a total score to each plan, recommending against a plan if the total score indicates that the plan is not in shareholders' interest. The factors ISS will consider fall within three categories:

- Plan Cost: the total estimated cost of the subject issuer's plans relative to similar issuers based on industry and market capitalization.

- **Plan Features:** specific features of the plan, including problematic change-in-control provisions, financial assistance given to plan participants for the exercise of awards and reasonable dilution from equity plans, as well as whether the full text of the plan has been publicly disclosed.

- **Grant Practices:** the average burn rate, the vesting requirements for the CEO's most recent grants, the issuance of performance-based equity to the CEO, claw-back provisions and post-exercise holding requirements.

#### (iv) By-Law Amendments

Glass Lewis has updated its guidance regarding amendments to an issuer's charter or by-laws in the following areas:

- **Exclusive Forum:** Absent a compelling justification, Glass Lewis will generally recommend against any by-law or charter amendment to adopt an exclusive forum provision.
- **Director Quorum:** Glass Lewis will generally consider a majority of the board's directors to constitute an acceptable quorum for a meeting of directors.

#### (v) Performance Matters

Glass Lewis has clarified its policy on board performance in the following areas:

- **Board Composition:** Glass Lewis may recommend a "withhold" vote for the chair of the nominating committee where it concludes that the board's failure to ensure its directors have relevant experience has contributed to poor performance.
- **Environmental and Social Risk Oversight:** Where Glass Lewis perceives that the board or management has failed to sufficiently identify and manage a material environmental or social risk that could reduce shareholder value, it will recommend a "withhold" vote for directors who are responsible for such risk oversight.

Glass Lewis did not specify how it intends to determine a connection between the company's performance and the nominating committee's purported failure or how it will assess identification and management of environmental and social risks.

## Canadian Coalition for Good Governance: 2015 Updates

The CCGG made the following suggestions in its annual guide on best practices and other publications in 2015:

- **Proxy Access:** Issuers should consider adopting a policy enabling shareholders to communicate with independent directors about director candidates and board composition on a regular basis and should provide shareholders who own no less than 5% of the outstanding shares (3% for companies with a market capitalization greater than \$1 billion) with the opportunity to include director nominees in the issuer's proxy materials. CCGG also suggests that all shareholders be given an opportunity to suggest nominees.
- **Universal Proxy:** The CCGG recommends the use of a single form of universal proxy listing the names of all director nominees with equal prominence in contested director elections and has proposed legislative amendments in this regard.
- **Shareholder Engagement:** Issuers should describe shareholder outreach and communication practices in the circular. The chair of the board should use a letter to shareholders contained in the information circular to describe important corporate governance-related activities.
- **Voting Results:** Proxy circulars should include summaries of prior years' voting results on individual director voting and say-on-pay.
- **Risk Management:** Boards should describe their role in overseeing risk and the processes used to identify and monitor risk management efforts, and should avoid boilerplate language.
- **Executive Compensation:** Issuers should evaluate and disclose how their executive compensation plans and policies discourage risk-taking beyond levels they have determined acceptable. Issuers should assess executive performance over periods longer than one year, and consider long-term exercise restrictions of options and other share-based incentives to promote long-term performance.

- *Say-on-Pay*: Issuers should adopt a say-on-pay vote, and provide a means to address shareholder concerns in the event a majority or significant proportion of shareholders vote against the say-on-pay advisory resolution.
- *Board Gender Diversity*: CCGG has encouraged the CSA to implement ‘best practice’ guidelines that recommend issuers adopt written gender diversity policies for board composition and management succession planning, instead of merely disclosing that such policies exist.

For a full description of all guidelines and best practices, including the application of, and rationale for, those guidelines and best practices, please refer to “CCGG 2015 Best Practices for Proxy Circular Disclosure,” available online at [www.ccg.ca](http://www.ccg.ca).

## Changes in Disclosure and Proxy Rules

### Amendments to the Company Manual

The amendments to the Company Manual will expand the scope of exemptions available to certain Interlisted Issuers and the number of Interlisted Issuers that can rely on them.

Provided that another recognized exchange is reviewing a transaction in question, Interlisted Issuers can rely on the exemptions if less than 25% of their trading volume (rather than trading value and volume) has occurred in Canada in the 12 months immediately preceding notification of the transaction.

Qualifying Interlisted Issuers will now be exempt from certain requirements relating to:

- *acquisitions;*
- *private placements;*
- *prospectus offerings;*
- *rights offerings;*
- *convertible securities;*
- *special requirements for non-exempt issuers; and*
- *securities issued to registered charities.*

Interlisted Issuers incorporated or organized in a recognized jurisdiction may apply for an annual exemption from certain corporate governance requirements, including those relating to director elections and annual meetings.

### Amendments to NI 51-102 and NI 52-110 for Venture Issuers

#### *Amendments to NI 51-102 – Continuous Disclosure Obligations*

The amendments to NI 51-102 affect three areas of Venture Issuers’ continuous disclosure obligations:

- *Quarterly Highlights*: Venture Issuers can meet interim MD&A requirements by preparing brief “quarterly highlights” rather than a full interim MD&A. The option to file quarterly highlights as an alternative to interim MD&A will apply to financial years beginning on or after July 1, 2015.
- *Executive Compensation Disclosure*: Venture Issuers will now have the option to use a new form disclosing executive compensation for financial years beginning on or after July 1, 2015 (Form 51-102F6V Statement of Executive Compensation – Venture Issuers). The new form allows less extensive compensation discussion and analysis, reduces the number of individuals for whom historical disclosure is required to three and the number of years of such disclosure to two, and exempts Venture Issuers from disclosing fair value calculations for stock options and other share-based awards.
- *Significant Acquisition Threshold Increased*: The threshold requiring Venture Issuers to file a business acquisition report has increased from 40% to 100%.

#### *Amendments to NI 52-110 – Audit Committees*

Venture Issuers are now required to have an audit committee of at least three members, the majority of whom cannot be executive officers, employees or control persons of the Venture Issuer or of an affiliate of the Venture Issuer. There are limited short-term exemptions for events beyond the control of Venture Issuers and for death, disability or resignation of an audit committee member. These obligations will apply to Venture Issuers for financial years beginning on or after January 1, 2016.

## About Goodmans

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The firm represents a broad range of Canadian and foreign clients from entrepreneurial businesses to multinational corporations, financial institutions, pension funds and governments and has a reputation for handling challenging problems, often international in scope, which demand creative solutions.

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