Key Areas of Focus for Proxy Season 2020

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Reporting issuers in Canada are subject to continuous disclosure obligations imposed by securities laws and the rules of stock exchanges. From time to time, securities regulators, including the Canadian Securities Administrators (CSA) and the Ontario Securities Commission (OSC), and stock exchanges revise these disclosure rules or publish guidance to clarify points that may be ambiguous in the rules. In addition, proxy advisory firms such as Institutional Shareholder Services Inc. (ISS) and Glass Lewis & Co. (Glass Lewis) publish annual voting guidelines, providing issuers with guidance on what the advisors consider best practices for disclosure. Finally, the Canadian Coalition for Good Governance (CCGG) publishes annual "best practice" guidelines for disclosure by reporting issuers and additional policies relating to specific matters.

This Memorandum discusses the key themes that emerge from the relevant disclosure rule updates and guidance for the upcoming 2020 proxy season, including with respect to diversity disclosure, climate change-related disclosure, financial interest disclosure, director election matters, executive compensation, notice-and-access, and regulatory burden reduction.

This Memorandum does not provide a comprehensive description of the documents referenced below. These documents should be reviewed when preparing this year's annual proxy materials. Copies of these materials can be provided by any member of our Corporate Securities Group upon request.

Highlights of Relevant Updates and Guidance

Following are highlights of the updates and guidance regarding disclosure and proxy rules for the 2020 proxy season, described in more detail below.

CSA/OSC

1. On May 28, 2019, the *CSA Business Plan, 2019-2022* (the "**CSA Business Plan**") was approved. This document describes general goals to, among other things, eliminate undue regulatory burden and streamline regulatory requirements without reducing investor protection or impeding the efficient functioning of capital markets.

2. On August 1, 2019, the CSA published CSA Staff Notice 51-358 *Reporting of Climate Change-related Risks* (the "**CSA Climate Change Notice**"), which provides guidance to boards of directors and management of reporting issuers on how to better identify and disclose material climate change-related risks. The Staff Notice does not modify or create new legal obligations for reporting issuers. For more information on this Staff Notice and other important takeaways regarding the public disclosures of climate change-related risks, refer to our August 7, 2019 Update, *CSA Provides Guidance Aimed at Improving Disclosure of Material Climate Change-Related Risks*, and our December 18, 2019 Update, *The Importance of Public Disclosures of Climate Change-Related Risks*.

3. On October 2, 2019, the CSA published CSA Multilateral Staff Notice 58-311 *Report on Fifth Staff Review of Disclosure Regarding Women on Boards and in Executive Officer Positions* (the "**CSA Diversity Notice**"), the objective of which is to increase transparency for investors and other stakeholders regarding the representation of women on boards and in executive officer positions, and the approach issuers take to this representation.

4. On November 12, 2019, the CSA published CSA Multilateral Staff Notice 51-359 *Corporate Governance Related Disclosure Expectations for Reporting Issuers in the Cannabis Industry* (the "**CSA Cannabis Notice**"), which provides supplementary guidance on the disclosure of financial interests in M&A transactions. While this notice is directed towards cannabis reporting issuers, its content is equally relevant to other issuers, including those operating in emerging growth industries. For further

details, refer to our November 13, 2019 Update, *CSA Further Scrutinizes Disclosure by Cannabis Reporting Issuers*.

5. On November 19, 2019, the OSC published a report *Reducing Regulatory Burden in Ontario's Capital Markets* (the "**OSC Burden Reduction Report**"), which outlines the actions that will be taken to save time and money for issuers, registrants, investors and other capital market participants, including streamlining continuous disclosure requirements. For more information on this report, refer to our January 28, 2019 Update, *OSC Continues Ongoing Efforts to Reduce Regulatory Burden*.

6. On December 18, 2019, the OSC published Staff Notice 51-730 *Corporate Finance Branch 2019 Annual Report* (the "**OSC Annual Report**"), a resource to support issuers in meeting their disclosure obligations. The OSC Annual Report summarizes, among other things, key issues raised by the Corporate Finance Branch's annual continuous disclosure review program.

ISS/Glass Lewis

7. Proxy advisory firms ISS and Glass Lewis each published annual updates to their proxy voting guidelines for the upcoming 2020 proxy season: *2020 Americas Proxy Voting Guidelines Updates* and the *2020 Proxy Paper Guidelines Canada*, respectively. For further details on the Glass Lewis updates, refer to our November 26, 2019 Update, *Glass Lewis Releases 2020 Canadian Proxy Voting Guidelines*.

CCGG

8. The CCGG released its annual guide on 2019 Best Practices for Proxy Circular Disclosure (the "**CCGG Annual Guide**"). In December 2019, the CCGG also published a position paper on the *Use of Non-GAAP Measures in Executive Compensation* (the "**CCGG Non-GAAP Position Paper**").

Legislative Amendments

9. On May 1, 2018, Bill C-25 An Act to amend the Canada Business Corporations Act ("**CBCA**"), the Canada Cooperatives Act, the Canada Not-for-profit Corporations Act, and the Competition Act ("**Bill-C-25**") received royal assent. Bill C-25 includes certain amendments to the CBCA that came into force on June 13, 2019. For further details on the CBCA diversity disclosure amendments specifically, refer to our August 8, 2019 Update, *CBCA Diversity Disclosure Requirements Effective for 2020 Proxy Season*.

10. On June 21, 2019, 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**") received royal assent. Bill-97 contemplates certain amendments to the CBCA, some of which came into force on January 1, 2020.

2020 Proxy Season Themes

Diversity Disclosure

Issuers should expect continued scrutiny and review of their diversity disclosure in 2020.

Legislative Amendments

As of January 1, 2020, Bill C-97 requires all CBCA public companies to comply with new and broader diversity disclosure rules. The new regulations are similar to the "comply or explain" regime mandated by National Instrument 58-101 *Disclosure of Corporate Governance Practices* ("**NI 58-101**"), as discussed below. However, the 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. The new regulations will require this disclosure from "venture" issuers and "non-venture" issuers.

With respect to the "designated groups", the following topics will need to be disclosed or, if absent, explained, in the management information circulars of publicly-listed CBCA corporations:

1. *Term Limits.* Term limits for directors or other mechanisms of board renewal.
2. *Written Policies.* Written policy relating to the identification and nomination of directors from the designated groups and:
    a. a short summary of the policy's objectives and key provisions;
    b. a description of the measures taken to ensure effective implementation;
    c. a description of the annual and cumulative progress in achieving the objectives of the policy; and
    d. whether the effectiveness of the policy is measured and, if so, a description of how it is measured.
3. *Level of Representation.* Description of how the level of representation of the designated groups is considered when nominating individuals as directors and when appointing members of senior management.
4. *Targets.* Targets for representation on the board and among senior management for each of the designated groups and a description of the progress made in achieving the targets, and, for each group with a target, the annual and cumulative progress in achieving that target.
5. *Statistics.* The number and proportion (in percentage terms) of members from each of the designated groups on the board and in senior management.

All CBCA public companies must also send the foregoing disclosure to Corporations Canada, and may do so by submitting their circular through the Online Filing Centre for free.

CSA/OSC

The gender diversity disclosure requirements regarding women on boards and in executive officer positions are set out in NI 58-101 and have been in place since the end of 2014. Under these disclosure requirements, issuers must disclose, among other things:

1. the number and percentage of women on its board of directors and in executive officer positions;

2. whether the issuer has targets for the number or percentage of women in board and executive officer positions (and if not, why not);

3. whether the issuer has a written policy relating to the identification and nomination of female directors (and if not, why not); and

4. whether consideration is given to female representation in the director and executive officer recruitment process.

The CSA Diversity Notice reports the findings of the fifth annual review of disclosure regarding women on boards and in executive officer positions. The notice disclosed that 73% of issuers in the review sample had at least one woman on their board and the overall percentage of board seats occupied by women was 17%. The CSA will continue to monitor trends in this area.

Glass Lewis

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

Climate Change-Related Disclosure

CSA/OSC

Securities legislation in Canada requires reporting issuers to disclose the material risks affecting their business and, where practicable, the financial impacts of these risks. These disclosures inform investors about the sustainability of their business models and provide insights into how they are mitigating and adapting to these risks.

The CSA Climate Change Notice provides issuers, particularly smaller issuers, with guidance as to how they might prepare disclosures of material climate change-related risks. In particular, the guidance contained in the CSA Climate Change Notice is primarily focused on issuers' disclosure obligations as they relate to the Annual Information Form ("**AIF**") and Management Discussion and Analysis ("**MD&A**").

The CSA Climate Change Notice aims to assist directors and management of reporting issuers to identify and assess material climate change-related risks, by:

1. detailing the board's and management's responsibilities relating to risk identification and disclosure;

2. outlining relevant factors to consider in assessing the materiality of climate change-related risks;

3. providing examples of potential climate change-related risks issuers may be exposed to;

4. including questions boards and management should consider in the climate change context; and

5. providing an overview of the disclosure requirements specific to forward-looking climate change-related information.

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.

The CSA Climate Change Notice does not create any new legal requirements or modify existing ones. Rather, it is intended as an educational tool for issuers to support their compliance with their existing obligation to disclose material climate change-related risks.

Financial Interest Disclosure

Legislative Amendments

Under the CBCA, directors can fix their own remuneration, as well as that of officers and employees. Bill C-97 will create a new obligation on federally incorporated companies to develop an approach to the remuneration of directors and senior management, under which the remuneration of members of senior management would be put to an annual, non-binding shareholder vote also known as "say-on-pay" vote. The results of the say-on-pay vote would have to be disclosed publicly. Furthermore, CBCA corporations would have to disclose information about clawbacks of incentive benefits paid to members of senior management and information about the well-being of employees, retirees, and pensioners. These amendments to the CBCA received royal assent on June 21, 2019, but are not yet in force.

OSC

The OSC notes the cannabis industry has benefited from increasingly permissive legal frameworks and has grown significantly as an emerging public market sector. The OSC Annual Report highlights inadequate transparency relating to the cross-ownership of financial interests by cannabis reporting issuers (or their directors and officers) involved in mergers, acquisitions or other significant corporate transactions. The OSC emphasizes that cannabis issuers need to provide investors with transparent information about financial performance and risks and uncertainties to support informed investing decisions.

Director Election Matters

Legislative Amendments

Once certain amendments come into force, Bill C-25 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.

The CBCA will also be amended to require directors of CBCA corporations to be elected annually and on an individual basis (as opposed to "slate" voting). This requirement is already mandated by the TSX.

Director Attendance and Committee Meetings

In evaluating the performance of governance and audit committee members at TSX-listed companies, Glass Lewis will now consider director attendance and committee meeting disclosure. 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.

In 2019, ISS recommended to vote against or withhold from directors who do not meet certain attendance thresholds, which are generally 75% of board and committee meetings unless an acceptable reason is disclosed. For 2020, ISS clarified that this policy does not apply where a nominee has served only part of the fiscal year leading up to the annual general meeting.

Board Skills

In 2019, Glass Lewis codified its assessment of a board skills matrix to analyze the election of directors. In 2020, Glass Lewis clarifies its expectation for companies to disclose sufficient information to allow a meaningful assessment of a board's skills and competencies. Failure to provide adequate information could lead to negative voting recommendations on director elections.

Board Responsiveness

Glass Lewis will examine a board's responsiveness to low shareholder support on issues that may adversely affect shareholder value, including say-on-pay proposals at the previous annual meeting. If 20% or more of shareholders vote contrary to a management recommendation, Glass Lewis will evaluate whether the board responded appropriately to the negative vote by looking at publicly available disclosures. 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

Both ISS and Glass Lewis updated their policies regarding excessive non-audit fees.

Glass Lewis may recommend voting against all audit committee members in the second successive year of excess non-audit fees.

In calculating non-audit fees and determining whether they are excessive, ISS allows the exclusion of one-time capital structure events, such as initial public offerings, emergence from bankruptcies 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

ISS

To align with its definition of independence, ISS updated its voting policy for former executives serving on the audit and compensation committees. ISS recommends to 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. ISS deems such directors as non-independent.

CSA/OSC

With respect to the cannabis industry, the OSC Annual Report highlights inadequacies of reporting issuers identifying board members as being independent, without giving adequate consideration to potential conflicts of interest or other factors that may compromise their independence.

The CSA Cannabis Notice reminds issuers that independent directors cannot have (i) a direct or indirect material relationship with an issuer, or (ii) a personal or business relationship with other directors and executive officers of the issuer. The CSA recommend reviewing the impact of these relationships and whether disclosure is warranted in the circumstances. The CSA Cannabis Notice also reminds issuers that the chair of the board should be an independent director, or alternatively, an independent director should be appointed as a lead director. Finally, the CSA encourage issuers to adopt a written code of business conduct and ethics that incorporates guidance for dealing with conflicts of interest and related disclosure.

Overboarded Directors

ISS clarified its overboarding policy. ISS 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 the director is joining, even if the election has not yet taken place.

Executive Compensation

ISS/Glass Lewis

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

ISS introduced a new executive compensation performance metric for the 2020 proxy season, Economic Value Add ("EVA").

EVA = Net Operating Profit after Taxes – (Cost of Capital * 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. ISS' qualitative analysis remains the same, looking at the company's disclosure of performance metrics for short-term and long-term incentive plans, and the board's adherence to such plans in making decisions. When analyzing contractual payments and executive entitlements, 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. Glass Lewis expects that companies remedy such problematic provisions when renewing or revising employment agreements.

CCGG

The CCGG remains concerned about the extensive use of non-GAAP performance measures in issuers' incentive compensation programs. The CCGG Non-GAAP Position Paper notes boards often apply the highest weighting to these unaudited and adjusted measures. 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.

Notice-and-Access

To make the CBCA more consistent with securities laws related to notice-and-access, certain provisions of Bill C-25 amended the CBCA to permit CBCA corporations to use the notice-and-access procedures available under provincial securities legislation. Nonetheless, until new CBCA regulations are published, the use of notice-and-access by CBCA corporations still requires an application for exemption. However, Bill C-25 also broadened the scope of exemptions available under the CBCA to include the financial statement delivery requirement, allowing corporations to seek a complete exemption from the physical delivery requirements.

Regulatory Burden Reduction Mandate

In its 2019-2022 Business Plan, the CSA discuss their goal of streamlining disclosure requirements for public companies by reducing regulatory burdens while simultaneously improving the quality and utility of such disclosures. As part of this initiative, the CSA will also consider the frequency of reporting. This initiative, which began in 2017, aims to ensure regulatory requirements and associated compliance are proportional to the regulatory objectives sought to be realized, and that they reflect current market conditions, investor demographics, and the state of technological innovation and globalization. For more information, refer to our April 20, 2017 Update, *Canadian Securities Regulators Considering How To Reduce Regulatory Burden on Canadian Public Companies*, and our March 9, 2018 Update, *Canadian Securities Regulators Announce Upcoming Policy Projects Aimed to Reduce Regulatory Burden on Canadian Public Companies*. The CSA continue to pursue coordinated national changes with respect to reporting issuers.

On January 14, 2019, the OSC published OSC Staff Notice 11-784 – *Burden Reduction*, seeking input on ways to reduce unnecessary regulatory burden in Ontario's capital markets. The OSC held a roundtable discussion on March 27, 2019, allowing interested stakeholders an opportunity to discuss submissions made to the OSC.

Following the roundtable, the OSC published the Burden Reduction Report, outlining its plan to reform Ontario's securities regulatory regime. The OSC aims to implement the following reforms to streamline continuous disclosure requirements:

1. reduce the number of instances where financial statements are required in business acquisition reports and other disclosure with respect to significant acquisitions; and

2. amend the disclosure required in the AIF and MD&A to avoid duplicative or unnecessary disclosure.

These recommendations were part of the existing regulatory burden policy initiatives announced by the OSC in Fall 2018. The OSC intends to implement or take significant steps towards implementing these reforms within the next 24 months.

To discuss any of these developments in more detail, please contact any member of our Corporate Finance and Securities Group.

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