



New Disclosure Rules and Guidance Related to the 2019 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, 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 provides an overview of the key themes that have emerged from the relevant disclosure rule updates and guidance for the upcoming 2019 proxy season, including with respect to environmental and social (E&S) responsibility, diversity, non-GAAP financial measures, forward-looking information, social media, director election matters, executive compensation, notice-and-access and shareholder meetings.

This Memorandum does not provide a comprehensive description of the documents referenced below. It is advisable to review each of these documents in connection with the preparation of this year’s annual proxy materials. Copies of these materials can be provided by any member of our Corporate Securities group upon request.

Summary of Relevant Updates and Guidance

The following briefly summarizes primary updates to, and guidance in respect of, the disclosure and proxy rules for the 2019 proxy season described in this Memorandum:

CSA/OSC

1. On April 5, 2018, the CSA published CSA Staff Notice 51-354 *Report on Climate change-related Disclosure Project* (the “**CSA Climate Change Report**”), which reports on its review of issuer disclosure regarding risks and financial impacts associated with climate change. In the CSA Climate Change Report, the CSA discusses, among other things: (i) the current disclosure requirements under securities legislation in Canada and previously issued guidance; (ii) the work it has completed in connection with its review; (iii) the key themes identified as a result of its review; and (iv) its plans for future work in this area. For further details, refer to our April 10, 2018 Update, *Canadian Securities Regulators Release Report on Climate Change-Related Disclosure Project*.
2. On July 19, 2018, the CSA published CSA Staff Notice 51-355 *Continuous Disclosure Review Program Activities for the fiscal years ended March 31, 2018 and March 31, 2017* (the “**CSA CD Review Program Notice**”), which discloses the results of its biennial Continuous Disclosure Review Program and highlights certain disclosure deficiencies and best practices. For further details, refer to our July 24, 2018 Update, *CSA Announces Results of Continuous Disclosure Review for Fiscal Years 2017 and 2018*.
3. On September 6, 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 and Proposed Non-GAAP Companion Policy were open for public comment until December 5, 2018. For further details, refer to our September 25, 2018 Update, *Canadian Securities Regulators Introduce New Rules for Disclosure of Non-GAAP Financial Measures*.

4. On September 27, 2018, the CSA published Multilateral Staff Notice 58-310 *Report on Fourth Staff Review of Disclosure regarding Women on Boards and in Executive Officer Positions* (the “**CSA Diversity Report**”), disclosing the results of its fourth consecutive annual review of compliance by 648 reporting issuers with respect to the gender diversity disclosure requirements set out in National Instrument 58-101 – *Disclosure of Corporate Governance Practices*. For further details, refer to our October 4, 2018 Update, *Canadian Securities Regulators Release Results of Fourth Gender Diversity Review*.
5. On October 4, 2018, the OSC published OSC Staff Notice 51-729 *Corporate Finance Branch 2017-2018 Annual Report* (the “**OSC Annual Report**”), which serves as a tool 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

6. Proxy advisory firms ISS and Glass Lewis published annual updates to their respective proxy voting guidelines for the upcoming 2019 proxy season: *2019 Americas Proxy Voting Guidelines Updates* and the *2019 Proxy Paper Guidelines Canada*, respectively. For further details, 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*.

CCGG

7. In May of 2018, the CCGG published *The Directors’ E&S Guidebook* (the “**CCGG E&S Guidebook**”), to provide recommendations for effective board oversight and company disclosure of E&S matters. The CCGG later released its annual guide on *2018 Best Practices for Proxy Circular Disclosure* (the “**CCGG Annual Guide**”), highlighting certain new best practices for the proxy season.

Legislative Amendments

8. 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 contemplates certain amendments to the *Canada Business Corporations Act* (CBCA).

2019 Proxy Season Themes

Environmental and Social Responsibility Disclosure

Issuers should expect increased scrutiny and review of their E&S disclosure in 2019.

CSA/OSC

Currently, securities legislation in Canada requires disclosure of certain climate change-related information in an issuer’s regulatory filings, if such information is material. The CSA, in the CSA Climate Change Report, notes there exists variations and room for improvement in issuers’ climate change-related disclosure practices. The CSA’s findings revealed that only 56% of issuers provided specific climate change-related disclosure in their managements’ discussion & analysis (MD&A) and/or annual information form (AIF), with the remaining issuers either providing boilerplate disclosure, or no disclosure at all. Of the climate change-related risks disclosed by issuers, regulatory risk was the most discussed. Most notably, few issuers disclosed their governance and risk management practices respecting climate change.

In the CSA CD Review Program Notice, the CSA remarks that many issuers across a wide range of industries could be materially impacted by climate change. However, 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. The CSA reminds issuers that the AIF must include disclosure of risk factors relating to the issuer and its business that would be likely to influence an investor's decision to purchase the issuer's securities. 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 AIF should also include a description of the environmental policies fundamental to the issuer's operations and the steps taken to implement them. When describing the policies, issuers should provide sufficient information necessary for an understanding of the impact the policies may have on their operations.

The OSC, in its OSC Annual Report, also notes that with respect to the MD&A, any commitments, events, risks or uncertainties that are reasonably believed to materially affect the future performance of the issuer, which includes those related to climate-change, should be discussed.

While no specific rule changes have been proposed by the CSA in this area at this time, the CSA will continue to monitor the quality of issuers' disclosure with respect to climate change-related matters to assess whether additional work needs to be done to ensure disclosure continues to develop and improve.

ISS/Glass Lewis

ISS and Glass Lewis have each published updates this year with respect to E&S risk oversight. For large-cap companies and in instances where Glass Lewis identifies material oversight issues concerning E&S risks, Glass Lewis will review a company's overall governance practices and identify which directors have oversight of E&S issues. If Glass Lewis determines an issuer has not properly managed E&S risks "to the detriment of shareholder value, or when such mismanagement has threatened shareholder value", it may consider recommending shareholders vote against the responsible board members. ISS codified certain factors already being considered in ISS' case-by-case analysis of E&S shareholder proposals, making it explicit that significant controversies, fines, penalties or litigation are considered by ISS.

CCGG

The new CCGG E&S Guidebook provides recommendations for effective board oversight and disclosure of E&S matters. The CCGG E&S Guidebook is a result of CCGG's review of existing literature on E&S oversight and the expertise of its committee members. CCGG acknowledges there is no "correct" approach to E&S governance, and each issuer's approach will be based on its own unique set of circumstances. The CCGG E&S Guidebook contains 29 principles-based recommendations covering eight key governance categories: (i) corporate culture; (ii) risk management; (iii); corporate strategy; (iv) board composition; (v) board structure; (vi) board practices; (vii) performance evaluation and incentives; and (viii) disclosure to shareholders.

The CCGG Annual Guide also highlights disclosure examples demonstrating an issuer's and its board's understanding of the importance of E&S considerations, including:

1. describing how the issuer's strategic priorities address potential environmental risks and opportunities;
2. providing a brief overview of key risks facing the issuer's business or risks closely monitored by its board and, if applicable, describing the issuer's efforts to integrate E&S matters within its risk management framework and its board's risk oversight responsibilities;

3. highlighting the issuer's commitment to managing and reporting E&S issues in the issuer's "letter from the board chair" portion of its proxy circular; and
4. noting any objectives or goals related to safety and the environment in an issuer's disclosure regarding executive compensation and corporate strategy.

Diversity

Issuers should expect continued scrutiny and review of their diversity disclosure in 2019.

CSA/OSC

The current gender diversity disclosure requirements regarding women on boards and in executive officer positions are set out in National Instrument *58-101 Disclosure of Corporate Governance Practices* ("**NI 58-101**") and have been in place since the end of 2014. These disclosure requirements consist of a "comply or explain" regime, under which 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.

In its fourth annual review of the gender diversity disclosure requirements, the CSA Diversity Report revealed a 5% improvement in the number of issuers with at least one woman on their board, compared to the results reported in the CSA's review published in 2017. The number of issuers having at least one female executive officer has improved from 62% in 2017 to 66% in 2018. While no changes to the current gender diversity disclosure requirements have been proposed by the CSA at this time, the CSA is considering whether changes to the disclosure requirements are warranted and, in particular, the introduction of new or supplemental guidelines regarding corporate governance practices in National Policy 58-201 *Corporate Governance Guidelines*.

Based on the OSC's issue-oriented reviews conducted in 2018, the OSC Annual Report notes deficiencies with respect to issuers' gender diversity disclosure in that the disclosure is often vague or boilerplate in nature or not provided at all. The OSC reminds issuers that such disclosure should provide a clear description of the corporate governance practices an issuer has adopted in relation to women on boards and in executive officer positions, or the reasons for not adopting such practices.

ISS/Glass Lewis

ISS introduced its board gender diversity policy for the 2018 proxy season for S&P/Toronto Stock Exchange (TSX) Composite Index companies. Beginning in the 2019 proxy season, the policy has expanded to apply to "widely-held" companies, which ISS characterizes as not only S&P/TSX Composite Index companies, but also other companies ISS designates as such based on the number of ISS clients holding securities of the company. ISS will generally recommend voting "withhold" for the nominating committee chair (or potentially the chair of another committee or of the board) where: (i) the company has not disclosed a formal written gender diversity policy; and (ii) there are more than four directors on the board, none of whom are female.

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. Unlike the ISS policy, the Glass Lewis policy has a single trigger.

Legislative Amendments

The CBCA Amendment Act includes certain provisions regarding diversity disclosure, which, once in force, will require all reporting issuers governed by the CBCA to comply with diversity disclosure rules similar to the “comply or explain” regime currently mandated by NI 58-101. However, the disclosure requirements in the CBCA Amendment Act will apply to all “designated groups”, which includes women, Aboriginal peoples, persons with disabilities and members of visible minorities. It is anticipated the CBCA diversity disclosure provisions will come into force once related regulations are enacted, which could occur as early as the end of 2019.

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 the CSA CD Review Program Notice, the CSA reminds issuers to ensure all adjustments made as part of the reconciliation to the most directly comparable GAAP measure are consistent with the purpose of the non-GAAP financial measure. The CSA notes issuers should ensure they identify non-GAAP pro-rata financial results as non-GAAP financial measures, and label them in a way that distinguishes them from the comparable GAAP financial statement line items, to not be misleading. Separately, the CSA remarks that issuers should ensure the narrative discussion in their MD&A is not solely focused on the non-GAAP results and that the GAAP discussion should be presented with equal or greater prominence. The CSA also observed that issuers continue to disclose non-GAAP financial measures in their corporate presentations, investor fact sheets, news releases, and on social media, and give excessive prominence to those non-GAAP financial measures.

The OSC also continues to be concerned by the prominence of disclosure given to non-GAAP financial measures, the lack of transparency about various adjustments and the appropriateness of the adjustments themselves, particularly in the mining, real estate and technology industries. The OSC Annual Report sets out the OSC's expectations regarding non-GAAP financial measures, including its expectations that issuers: (i) explicitly state the non-GAAP financial measure does not have a standardized meaning; (ii) present the most directly comparable measure along with a clear and quantitative reconciliation to such measure; and (iii) ensure the non-GAAP financial measure does not describe adjustments as non-recurring, infrequent or unusual when they are likely to occur or have occurred in a two-year period.

To avoid the potential to mislead investors when disclosing non-GAAP financial measures, the CSA and OSC suggest issuers refer to the guidance set forth in CSA Staff Notice 52-306 (Revised) *Non-GAAP Financial Measures* (“**SN 52-306**”) when preparing their disclosure documents.

In light of its continuing concerns regarding issuers' use of non-GAAP financial measures, the CSA published in late 2018 a notice and request for comment in respect of the Proposed Non-GAAP Instrument and Proposed Non-GAAP Companion Policy regarding disclosure requirements for non-GAAP financial measures and other financial measures. The Proposed Non-GAAP Instrument and Proposed Non-GAAP Companion Policy are intended to build upon and replace SN 52-306. The Proposed Non-GAAP Instrument would apply to all issuers (including private companies and investment funds) 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 such documents have been filed under securities legislation). This would include all written (including electronic) communications, such as news releases, MD&A, investor presentations, websites and social media posts.

Among other things, the Proposed Non-GAAP Instrument provides that financial disclosure presented or disclosed separate from financial statements are to be categorized as one of four financial measures: (i) non-GAAP financial measures; (ii) supplementary financial measures; (iii) segment measures; or (iv) capital management measures. The non-GAAP financial measures are subject to the most stringent requirements, including labelling requirements, restrictions on presenting such information with prominence, comparative period disclosure requirements and explanation and reconciliation requirements. The other categories of financial disclosure are subject to similar (though in most cases less stringent) requirements.

The Proposed Non-GAAP Instrument and Proposed Non-GAAP Companion Policy, as currently drafted, may be subject to further changes as a result of comment letters received during the comment period, which ended on December 8, 2018. If implemented, the Proposed Non-GAAP Instrument will have the force of law and provide the CSA with a much stronger tool to take regulatory action to enforce compliance where warranted.

Forward-Looking Information

Forward-looking information provides valuable insights about an issuer's business and how the issuer intends to attain its corporate objectives and targets. However, the CSA believes this type of disclosure is often deficient. In the CSA CD Review Program Notice, the CSA notes that, based on its review of continuous disclosure, some issuers disclose forward-looking information for a period beyond the issuer's next fiscal year end without providing reasonable and sufficient assumptions to support the forward-looking information. The CSA reminds issuers that they must not disclose a financial outlook unless the financial outlook is based on assumptions that are reasonable in the circumstances. The forward-looking information must be limited to a period for which the information in the financial outlook can be reasonably estimated. In many cases, that time period will not go beyond the end of the issuer's next fiscal year. Where forward-looking information is presented for multiple years and is not sufficiently supported by reasonable qualitative and quantitative assumptions, the CSA may ask issuers to limit the disclosure of forward-looking information to a shorter period (for example, one or two years), for which reasonable support exists.

The Proposed Non-GAAP Instrument in respect of disclosure of non-GAAP and other financial measures may also impact disclosure practices with respect to financial outlook once implemented. The Proposed Non-GAAP Instrument provides that if a non-GAAP financial measure is included in a document as a forward-looking "financial outlook" and the document discloses future orientated financial information (FOFI), the document must contain a quantitative reconciliation to the most directly comparable financial measure presented in the FOFI. If the document does not contain FOFI, the document must instead present the equivalent historical non-GAAP financial measure and describe: (i) each of the material differences (quantitative if possible) between the financial outlook and the most directly comparable financial outlook for which an equivalent historical financial measure is presented in the primary financial statements; or (ii) each of the significant components of the financial outlook used in its calculation (which may include quantification of the components and/or the process followed in preparing the financial outlook, including the material factors or assumptions relevant to the financial outlook). While generally consistent with the guidance in SN 52-306 and CSA comments provided in many of its issue-oriented reviews, these requirements (if implemented) would represent a departure from the current disclosure practices of many issuers.

Finally, the OSC Annual Report 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; (iii) provide reasonable qualitative and quantitative assumptions to support forward-looking information for multiple years; (iv) discuss the events and circumstances that occurred during the period and the impact on the original target; and (v) include a comparison of the actual results to FOFI or financial outlook originally disclosed.

Social Media

In its CSA CD Review Program Notice, the CSA observed some issuers provide material information on their social media sites before it is generally disclosed to all investors, which may constitute selective disclosure. In addition, the CSA found some issuers provide misleading or unbalanced information that may be inconsistent with information already posted on SEDAR or is exceedingly promotional. 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. The CSA also cautions issuers to be mindful of commonly observed pitfalls in social media disclosure, such as the disclosure of forward-looking information that is selectively disclosed on social media websites alone. In addition, where it is difficult to provide balanced disclosure on social media due to length restrictions, the CSA suggest issuers should provide a link to additional information.

The OSC, in its OSC Annual Report, reminds issuers that any changes made to their continuous disclosure record should be communicated in a transparent manner and refers issuers to OSC Staff Notice 51-711 (Revised) *Refilings and Corrections of Errors*, which clarifies and expands on expectations when amending a continuous disclosure record, including on the issuer's website and social media. Such expectations include making the corrective disclosure as soon as possible after determination, removing prior inaccurate social media disclosure and describing the nature and implications of any error and how the issuer is correcting the disclosure.

Director Election Matters

ISS/Glass Lewis

ISS has moved forward with its previously announced changes to its director overboarding policy. ISS will now define an overboarded director as: (i) a CEO of a public company who sits on more than two (previously one) outside public company boards in addition to the company of which he/she is a CEO; or (ii) a director who is not a CEO of a public company and sits on more than five (previously four) public company boards in total. ISS will no longer consider a director's meeting attendance in its director overboarding policy, effectively moving towards a single-trigger approach.

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. Glass Lewis believes companies should disclose sufficient information to allow meaningful assessment of a board's collective skills and competencies.

Legislative Amendments

Certain provisions of the CBCA Amendment Act, once in force, will implement majority voting of directors into the CBCA, requiring shareholders to vote "for" or "against" each director nominee (as opposed to the current "for" or "withhold" options) and each nominee director will be required 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). These amendments are already mandated by the TSX.

It is anticipated the above-noted amendments to the CBCA will come into force once related regulations are enacted, which could occur as early as the end of 2019.

Executive Compensation

ISS/Glass Lewis

Glass Lewis updated certain evaluation criteria that will apply in its reviews of executive compensation for the 2019 season:

1. *Contractual Payments and Arrangements.* When evaluating severance and sign-on arrangements for a recommendation regarding a say-on-pay proposal, Glass Lewis will consider the general Canadian market practice and the size and design of entitlements.
2. *Grant of Front-Loaded Awards.* Glass Lewis expressed concern with the risks associated with grants intended to serve as compensation for multiple years, often referred to as front-loaded awards, noting they effectively tie the hands of the compensation committee. Glass Lewis will take into account the quantum, design and company rationale in evaluating front-loaded awards.
3. *Clawback Provisions.* Glass Lewis indicated it is increasingly focusing its attention on the specific terms of “clawback” policies and while review of such policies will not directly affect voting recommendations on say-on-pay proposals, it will inform Glass Lewis’ assessment of a company’s compensation program.

CCGG

CCGG, in its CCGG Annual Guide, observed many issuers use adjusted financial performance measures to make executive compensation decisions. CCGG encouraged issuers to indicate in their proxy circulars the type of adjustments that may be made or have been made in the past to the most comparable GAAP financial measure to arrive at the adjusted financial performance measure used in the company’s executive compensation programs. CCGG also encourages issuers to describe their efforts taken by the board to scrutinize and validate material adjustments made to the most comparable GAAP figure to arrive at the adjusted financial performance used in the company’s executive compensation programs.

Notice-and-Access

In an effort to make the CBCA more consistent with securities laws related to notice-and-access, certain provisions of the CBCA Amendment Act will amend the CBCA to permit CBCA corporations to make use of the notice-and-access procedures available under provincial securities legislation. The CBCA Amendment Act will amend the CBCA by broadening the scope of exemptions available under the CBCA related to the requirement to deliver proxy-related materials to shareholders.

It is anticipated these amendments to the CBCA will come into force once related regulations are enacted, which could occur as early as the end of 2019.

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 shareholders

will be afforded the same rights and opportunities to participate in the meeting as they would have in person. Glass Lewis describes appropriate disclosure to include: (i) addressing the ability of shareholders to ask questions during the meeting, including time guidelines for shareholder questions, rules around what types of questions are allowed and how questions and comments will be recognized and disclosed to meeting participants; (ii) procedures, if any, for posting appropriate questions received during the meeting and the company's answers, on the investor page of the company's website as soon as is practical after the meeting; (iii) addressing technical and logistical issues related to accessing the virtual meeting platform; and (iv) procedures for accessing technical support should any difficulties accessing the virtual meeting arise.

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

Bay Adelaide Centre - West Tower
333 Bay Street, Suite 3400
Toronto, ON M5H 2S7

Tel: 416.979.2211
Fax: 416.979.1234

goodmans.ca

Goodmans^{LLP}