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Outlook for 2024 Proxy Season

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With proxy season on the horizon, many public companies are once again preparing their annual disclosure documents and shareholder materials for their annual general meetings. In preparing for the 2024 proxy season, clients should be aware of some of the regulatory developments and institutional investor guidance that are likely to impact disclosure to, and interactions with, shareholders this year.

This update highlights what is new for the 2024 proxy season and other developments in relevant securities regulation.

What's new in institutional investor commentary?

Glass Lewis & Co. (“Glass Lewis”) and Institutional Shareholder Services (“ISS”), two companies that provide guidance to institutional investors on how to vote at shareholders’ meetings of publicly-traded companies, have each released updates to their Canadian guidelines for the 2024 proxy season.

Both sets of guidelines focus on several key areas including board diversity as well as compensation plans and proposals. This year, Glass Lewis is also expanding its policies relating to board accountability for climate-related issues and cyber risk oversight. Companies, especially those with a significant percentage of their shares held by institutional shareholders, should review and consider these updates as they plan for their upcoming annual general meetings.

Board Diversity

Starting February 1, 2024, for S&P/TSX Composite Index companies, ISS will generally recommend that votes be withheld or voted against the chair of a nominating committee if a company’s board has no apparent racially or ethnically-diverse members unless the company has provided a formal, publicly-disclosed written commitment to add at least one racially or ethnically-diverse director at or prior to its next annual general meeting.

Under these new guidelines, racial and/or ethnic diversity is defined as: Aboriginal peoples (meaning persons who are Indigenous, Inuit or Métis) and members of visible minorities (meaning persons, other than Aboriginal peoples, who are non-Caucasian in race or non-white in colour).

ISS and Glass Lewis both continue to recommend that votes be withheld from the chair of the nominating committee at companies where gender representation is deemed too low.

ISS will recommend withholding votes for S&P/TSX Composite Index companies where the board is not comprised of at least 30% women, subject to limited exceptions. These exceptions include companies who have publicly disclosed a written commitment to achieve 30% representation of women on the board at or prior to the subsequent annual general meeting and (i) have recently joined the S&P/TSX Composite Index and have not previously been subject to a 30% representation requirement, or (ii) have fallen below the 30% threshold due to an extraordinary circumstance after previously satisfying the threshold at the preceding annual general meeting. For companies that are TSX-listed but not on the S&P/TSX Composite Index, ISS will recommend withholding votes from the chair of the nominating committee if there are no women on the board.

Glass Lewis will recommend that votes be withheld for the chair of the nominating committee of a TSX-listed company if the board is not comprised of at least 30% gender diverse directors and will recommend that votes be withheld for the entire nominating committee if the board has no gender diverse individuals. Glass Lewis will require companies listed outside of the TSX to have at least one gender diverse director before it recommends supporting the chair of the nominating committee. The term “gender diverse” refers to women and individuals who do not identify as exclusively male or female.

Environmental and Cyber Risk Oversight

Glass Lewis expanded its policy on board accountability for climate-related issues for 2024 to include TSX 60 companies operating in industries where the Sustainability Accounting Standards Board has determined that greenhouse gas emissions represent a financially material risk. This policy requires that such companies provide clear and comprehensive disclosure of their climate risks (including how they are being mitigated and overseen) and have explicit and clearly defined oversight responsibilities for climate-related issues. Glass Lewis may recommend voting against responsible directors if either of these disclosures are absent or significantly lacking.

ISS has a more lenient approach to its environmental, social, and governance disclosure policy. However, if there are material deficiencies in overseeing these issues, ISS may recommend withholding votes for individual directors or the entire board under its Egregious Actions Policy. Adverse legal judgments or settlements, as well as substantial fines or sanctions from regulatory bodies may be regarded as deficiencies.

New this year, Glass Lewis has modified its policy on cyber risk oversight to include increased disclosure requirements. Where a company has been materially impacted by a cyber-attack, Glass Lewis believes shareholders should be able to reasonably expect periodic updates communicating ongoing resolution and remedial processes. Such updates should include details such as what resources are being provided for affected stakeholders, progress updates

on the restoration of its information systems, confirmation of when the company has returned to normal operations, and any other relevant information until the impact of the cyber-attack has been fully remediated. Glass Lewis may recommend against appropriate directors where the board's oversight, response or disclosures concerning cybersecurity-related issues are found to be insufficient. No tangible guidance has been provided as to what constitutes "sufficient" disclosure in this regard.

ISS has not yet codified its approach to cyber security disclosure.

Equity-Based Compensation Proposals

ISS has revised its guidance for TSX-listed companies by removing the legacy percentage limit for non-employee directors ("NEDs") with respect to individual equity grants and equity compensation plan proposals to reflect current market practices. The previously acceptable limit was one percent. ISS will generally recommend voting against an individual equity grant if voting against the underlying equity compensation plan, and similarly for compensation plan proposals, where the equity plan document doesn't specify an annual individual NED grant limit with a maximum value of (i) \$100,000 worth of stock options, or (ii) \$150,000 worth of shares.

For venture companies, ISS has expanded its policy on share-based compensation plans to include circumstances where companies have adopted an equity plan without seeking shareholder approval. ISS will now recommend withholding votes for the continuing compensation committee members or board chair where a share-based compensation plan has been adopted without seeking shareholder approval, or the company maintains a rolling equity plan (also referred as an "evergreen" plan) and has not sought shareholder approval in the past two years and does not seek approval at the meeting. This requirement is in line with the current TSX rules for rolling equity plans.

This year, Glass Lewis broadened its discussion on proposals for grants of front-loaded awards. Its guidelines now provide that in instances where a large shareholder is also the recipient of a proposed grant, the proposal will be viewed more favourably if it includes a provision requiring disinterested shareholder approval (excluding the votes of the recipient shareholder). Glass Lewis believes these provisions help to address potential conflict of interest issues and power imbalances, especially when including the vote of the recipient shareholder could materially influence the outcome of the vote. Glass Lewis expects any front-loaded award to include a firm commitment not to grant additional awards for a defined period. If a company breaks its commitment not to grant further awards, Glass Lewis may recommend voting against its say-on-pay proposal unless a convincing rationale is provided.

Executive Ownership Guidelines

Recognizing the importance of maintaining an alignment between the interests of shareholders and executives, Glass Lewis formally outlined its approach to executive ownership guidelines in a new section this year. The discussion provides that companies should adopt and maintain minimum executive share ownership requirements for its named executive officers. Companies should also be sure to clearly disclose the executive ownership requirements in their Compensation Discussion and Analysis section of their management information circulars. The disclosure should include how various types of outstanding equity awards are counted or excluded from the ownership level calculation. Although Glass Lewis deems it unnecessary to count unearned performance-based full value awards and/or unvested/unexercised stock options, a cogent rationale for their inclusion should be provided if they are.

Audit Financial Expert Designation

Glass Lewis has revised its criteria for designating a director as an “audit financial expert” for the purposes of audit committee membership. Generally, Glass Lewis will expect at least one member of the audit committee to be an “audit financial expert”, meaning that such director has experience as one or more of the following: (a), (i) a chartered accountant; (ii) a certified public accountant; (iii) a former or current CFO of a public company or corporate controller of similar experience; (iv) or a current or former partner of an audit company; or (b) similar demonstrably meaningful audit experience.

Going forward, Glass Lewis will now consider the “audit financial expert” designation distinctly from the financial literacy skill in its skills matrix, which encompasses more generalized financial professional experience beyond accounting or audit experience.

Other securities regulatory changes

Amalgamation of IIROC and MFDA

On January 1, 2023, following a successful vote by members of IIROC and the MFDA, along with approval from the CSA, IIROC and the MFDA amalgamated to become the New Self-Regulatory Organization of Canada (New SRO). Canada’s provincial and territorial securities regulators recognized the New SRO and approved the Canadian Investor Protection Fund (CIPF), effective January 1, 2023. CIPF is the amalgamated entity, independent of CIRO, combining the former Canadian Investor Protection Fund and the MFDA Investor Protection Corporation.

As of June 1, 2023, New SRO officially changed its name to the Canadian Investment Regulatory Organization (CIRO).

New Anti-Forced Labour Legislation

The *Fighting Against Forced Labour and Child Labour in Supply Chains Act*, commonly referred to as Canada's 'Modern Slavery Act', came into force on January 1, 2024. This legislation implements Canada's international commitment to reduce the use of forced labour and child labour in the foreign and domestic supply chains of certain businesses that operate in or from Canada by imposing public reporting obligations intended to increase the transparency of those business' supply chains.

The legislation applies to companies listed on a stock exchange in Canada and requires companies to prepare and submit annual reports if they are:

- a) producing (including manufacturing, growing, extracting, and processing), selling, or distributing goods in Canada or elsewhere;
- b) importing into Canada goods that are produced outside of Canada; or
- c) controlling an entity engaged in any activity described in (a) or (b).

Stewart McKelvey will be monitoring and providing further updates summarizing the implementation of this legislation.

What's on the horizon for securities regulation?

Introduction of expedited shelf prospectus regime for well-known seasoned issuers

In September, 2023, the CSA announced that it is seeking public comment on amendments to National Instrument 44-102 *Shelf Distributions* to establish a permanent expedited shelf prospectus regime for well-known seasoned issuers ("WKSIs"). This framework has existed under temporary blanket orders for some time, and creates a more efficient process for WKSIs to raise capital by reducing the regulatory burden for issuers with a strong market following and established public reporting records. The amendments, if approved, will codify the WKSI framework permanently.

The comment period for this proposal ended December 20, 2023.

The foregoing is a summary only intended for general information. If you are interested in any of these topics, a more complete analysis will be required. If you have any questions, comments or concerns respecting the upcoming proxy season please contact one of the members of our [securities group](#).

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