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Outlook for 2025 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 2025 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 2025 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 2025 proxy season.

Both sets of guidelines focus on several key areas including pay-for-performance evaluations and shareholder meeting formats. This year, Glass Lewis introduced a new policy focused on the governance and oversight of artificial intelligence. Meanwhile, ISS finalized its board gender diversity policy and its board racial and ethnic diversity policy. Both parties now include certain conditional exemptions for S&P/TSX Composite Index companies. These policies are described in more detail below.

Companies, especially those with a significant percentage of their shares held by institutional shareholders, should review and consider these updates as they prepare disclosures for their upcoming annual general meetings.

Pay-for-Performance Evaluations

ISS updated its pay-for-performance evaluation policy for all S&P/TSX Composite Index Companies and for all Management Say-on-Pay ("MSOP") resolutions. The policy update provides that in exceptional circumstances, ISS may elect to use a non-CEO named executive officer (e.g., an executive chair or a former CEO) in its pay-for-performance evaluation if doing so would provide a more appropriate assessment of pay-for-performance alignment. For example, this may be the case where the compensation of a particular named executive officer ("NEO") is regularly significantly higher than that of the CEO.

ISS continues to recommend voting against MSOP proposals and/or vote withhold for compensation committee members, and/or against an equity-based incentive plan proposal, if there is significant, long-term misalignment between CEO (or NEO, in exceptional circumstances) pay and company performance.

Glass Lewis clarified its executive compensation and say-on-pay evaluation policy to emphasize that it takes a holistic approach, with pay programs reviewed on a case-by-case basis. Rather than using a pre-determined scorecard, Glass Lewis will consider the individual features of a plan against their rationale, overall structure and disclosure quality, along with the program's overall ability to align executive pay with performance.

Shareholder Meeting Formats: Virtual-only Meetings

Both ISS and Glass Lewis have provided additional guidance on shareholder meeting formats in response to concerns raised by shareholders and shareholders rights advocates, including the Council of Institutional Investors, that virtual-only shareholder meetings may hinder meaningful interactions, reduce accountability, and potentially undermine shareholder rights by limiting engagement.

ISS will now recommend voting against proposals to adopt or amend articles or by-laws that provide the board with the discretion to hold shareholders' meetings in a virtual-only format without a compelling rationale.

Glass Lewis does not currently have a benchmark voting policy based solely on shareholder meeting format. However, Glass Lewis will generally recommend voting against the chair of the governance committee if the board intends to hold a virtual-only shareholder meeting and the company either fails to provide effective disclosure or offers unclear disclosure.

Examples of effective disclosure include addressing the following matters:

- The ability of shareholders to ask questions during the meeting, including time guidelines and rules for what types of questions are allowed;
- The procedures, if any, for posting appropriate questions received during the meeting and the company's answers on the company's website;
- The procedures for participating in the meeting and accessing the virtual meeting platform; and,
- The procedures for accessing technical support.

Board Oversight of Artificial Intelligence

New this year, Glass Lewis introduced a voting policy on board oversight of artificial intelligence ("AI"). Companies that use or develop AI technologies should adopt strong internal frameworks that include ethical considerations to ensure effective oversight of AI and clearly disclose this information to shareholders.

In instances where there is evidence that insufficient management of AI technologies has resulted in material harm to shareholders, the benchmark policy may recommend that shareholders vote against the re-election of accountable directors.

Absent any material incidents related to a company's use or management of AI-related issues, the benchmark policy will generally not make voting recommendations on the basis of a company's oversight of, or disclosure concerning, AI-related issues.

ISS has not yet codified its approach to AI governance.

Board Gender Diversity

ISS continues to recommend withholding votes for S&P/TSX Composite Index companies where women comprise less than 30% of the board of directors. This policy contains an exemption for companies that have fallen below 30% representation of women on the board after achieving such level of representation at the preceding annual general meeting.

Previously, companies were required to disclose an "extraordinary circumstance" in order to qualify for this exemption. In its updated policy, ISS has removed this requirement. Now, companies can avoid a negative recommendation after falling below the 30% threshold as long as there is a diversity policy in place and a commitment to meet the diversity guideline by its next annual general meeting.

Glass Lewis continues to 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. The term "gender diverse" refers to women and individuals who do not identify as exclusively male or female.

Board Racial and Ethnic Diversity

ISS introduced its first racial and ethnic diversity policy in 2024. This year, ISS finalized their policy by removing its transitionary language and adding certain exemptions. ISS now

recommends 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.

"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).

In its update, ISS added two exemptions to this requirement for companies with a publicly disclosed written commitment to add at least one racially or ethnically diverse director on the board at or prior to the subsequent AGM that either:

- Joined the S&P/TSX Composite Index and have not previously been subject to the racial/ethnic board requirement as an S&P/TSX Composite Index constituent since their previous AGM, or
- Have fallen below the minimum racial or ethnic representation on the board after achieving such level of representation at the preceding AGM.

ISS will continue to evaluate voting recommendations on a case-by-case basis for additional directors at companies that fail to meet the policy over two years or more.

Glass Lewis has not yet codified its approach to board racial and ethnic diversity.

<u>Former CEO on the Audit/Compensation Committee</u>

ISS updated its policy related to non-independence of former CEOs (including former interim CEOs) to remove the five-year cooling-off period, after which a former CEO used to be considered independent. Now, former CEOs will continue to be deemed non-independent indefinitely. ISS will only reassess a former CEO's classification in exceptional circumstances after a minimum of five years.

In connection with this amendment, ISS will continue to recommend against non-independent former CEOs as members of the audit and/or compensation committees. The general recommendation is to vote withhold for any director who has served as a former CEO of the company or its affiliates, or of an acquired company and is a member of the audit or compensation committee. This policy does not apply if a former CEO has been classified as independent by ISS.

<u>Disclosure of Professional Skills and Experience</u>

Glass Lewis has updated its guidance to highlight the importance of companies providing detailed disclosure regarding the experience and expertise of board nominees. As part of their

analysis of director elections, Glass Lewis will evaluate board skills matrices to assess a board's competencies and identify any potential skills gaps.

Glass Lewis may recommend voting against the chair of the nominating committee (or equivalent) if a company's disclosure fails to provide enough information to assess the key skills and experience of current directors and nominees.

What's new from the Canadian Securities Administrators?

Continuous Disclosure Review Report

In November 2024, the Canadian Securities Administrators (the "CSA") released CSA Staff Notice 51-365 – *Continuous Disclosure Review Program Activities for the fiscal years ended March 31, 2024 and March 31, 2023* (the "Continuous Disclosure Review Notice"), which highlighted common issues and mistakes made by companies in preparing their continuous disclosure documents.

The CSA cautioned companies against overly promotional disclosure, particularly with respect to greenwashing and "AI washing", a fairly new term used to describe when an issuer makes false, misleading or exaggerated claims about its use of AI systems in its products or services, to capitalize on the growing use of and investor interest in AI systems.

Following the CSA's review, regulators required 58% (up from 23% in 2022) of the companies reviewed to re-file documents, and an additional 10% were referred to enforcement, cease-traded, or added to the default list. The Continuous Disclosure Review Notice includes specific examples of acceptable and unacceptable disclosures and can be found in its entirety here.

The most common issues identified by the CSA by document included:

- **Financial Statements:** compliance with the recognition, measurement, presentation, classification and disclosure requirements in accordance with International Financial Reporting Standards including those pertaining to impairment of assets, business combinations, expected credit losses and disaggregation of revenue.
- **MD&A:** compliance with disclosure requirements including forward-looking information, discussion of operations relating to liquidity and capital resources and discussion of operations relating to business performance.
- **Other Regulatory Requirements:** compliance with other regulatory matters including material contracts and material change reports.
- **General Disclosure:** compliance with general disclosure requirements regarding overly promotional disclosure pertaining to AI and environmental, social and governance (ESG) matters.

- **Mineral Project Disclosure:** compliance with National Instrument 43-101 – *Standards of Disclosure for Mineral Projects*.

Consultation on the Use of AI in Capital Markets

In December 2024, the CSA released CSA Staff Notice and Consultation 11-348 – *Applicability of Canadian Securities Laws and the use of Artificial Intelligence Systems in Capital Markets* (the "AI Notice") to provide clarity and guidance on how securities legislation applies to the use of AI systems by market participants. The AI Notice also outlines selected requirements under securities law that market participants should consider during an AI system's lifecycle.

The guidance provided in the AI Notice advises market participants to carefully assess and manage the risks associated with AI systems, ensuring they operate within the framework of existing securities laws. Companies are encouraged to implement robust risk management practices to prevent issues like market manipulation, systemic risk, and biased outcomes. The CSA also cautioned that market participants whose business activities are regulated under securities law are responsible for the decisions that their AI systems make and for understanding the systems they use. Additionally, market participants are urged to monitor AI systems regularly for compliance, make necessary adjustments to mitigate risks, and take steps to avoid discriminatory or unfair practices.

Included in the AI Notice is a set of consultation questions from the CSA seeking feedback from stakeholders on the use of AI systems in capital markets. The comment period will be open until March 31, 2025. For a complete list of guidance and consultation questions, the AI Notice can be accessed here.

Review of Disclosure Regarding Women on Boards and in Executive Officer Positions

In October 2024, the CSA issued CSA Multilateral Staff Notice 58-317 – *Review of Disclosure Regarding Women on Boards and in Executive Officer Positions* (the "Multilateral Review Notice"). The Multilateral Review Notice outlines key findings from a recent review of public disclosure required by Form 58-101F1 *Corporate Governance Disclosure* of National Instrument 58-101 *Disclosure of Corporate Governance Practices* ("NI 58-101") regarding women on boards and in executive officer positions.

The data summarized in the Multilateral Review Notice is based on a review sample of 574 issuers that had year-ends between December 31, 2023 and March 31, 2024. Key highlights include:

- 29% of board seats were held by women;
- 37% of vacated board seats were filled by women;

- 5% of issuers had a woman CEO;
- 72% of issuers had at least one woman in an executive officer position; and
- 64% of issuers adopted a policy relating to the representation of women on their board.

After ten years, it is expected that this will be the final year that the CSA conducts this review. The CSA is working towards a harmonized national disclosure framework in light of changing diversity-related disclosure requirements. The full Multilateral Review Report can be found here.

Other securities regulatory changes

Public Company Supply Chain Transparency Update

Public Safety Canada ("PSC") has issued material updates to its guidance on the *Fighting Against Forced Labour and Child Labour in Supply Chains Act* (the "Act") in advance of the upcoming May 31st, 2025 reporting deadline. While all companies listed on Canadian stock exchanges are deemed to be subject to the Act, the updated guidance may affect whether a public company is ultimately required to file a report. Most significantly, the updated guidance:

- reduces the scope of reportable activities by deeming certain activities listed in the Act to be exempt from reporting and enforcement by PSC;
- limits the types of goods that create reporting obligations if produced or imported; and
- narrows the classes of assets included when determining whether private companies have a nexus to Canada or meet the entity size threshold.

Reporting entities incorporated under the *Canada Business Corporations Act* must provide their report to their shareholders with their annual financial statements. While the updated guidance clarifies that this requirement can be satisfied using an entity's standard means of delivery, it remains unclear if a public company shareholder that opts out of receiving financial statements is exempt from this requirement. Although reports are due by May 31st, securities filing deadlines, board meeting dates, and AGM preparations may require public companies to finalize their reports months in advance of the May 31st deadline.

The updated guidance also discusses best practices for reporting jointly with parent or subsidiary entities, assessing import activity if the reporting entity is not the direct importer, and whether the Temporary Foreign Worker Program carries a risk of forced labour.

For our detailed summary and analysis of how PSC's updates may impact reporting obligations for reporting entities, please see our recent Thought Leadership Article. The full text of PSC's guidance can be accessed here. PSC has indicated that they intend to issue a further round of guidance updates in February 2025. Stewart McKelvey will be monitoring and providing further updates.

What's on the horizon for securities regulation?

Climate Related Disclosure

The Canadian Sustainability Standards Board published its final Canadian Sustainability Disclosure Standard 1 – *General Requirements for Disclosure of Sustainability-related Financial Information* and Canadian Sustainability Disclosure Standard 2 – *Climate-related Disclosures* (collectively, the "CSSB Standards").

The CSSB Standards are voluntary until mandated by provincial and territorial regulators. The CSA noted that they continue to work towards a revised climate-related disclosure rule that will consider the CSSB Standards and may include modifications considered appropriate for the Canadian capital markets. The CSA will publish a revised rule for public comment and will encourage interested and affected parties to provide feedback.

In the meantime, issuers should continue to prepare their climate related disclosures in accordance with the existing guidance found in CSA Staff Notice 51-333 and CSA Staff Notice 51-358.

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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