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Outlook for 2023 Proxy Season

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With proxy season once again approaching, many public companies are in the midst of preparing their annual disclosure documents and shareholder materials for their annual general meetings. In preparing these documents, public companies 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 2023 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 2023 proxy season.

Both sets of guidelines focus on several key areas including board gender diversity and environmental, social and governance ("ESG") disclosures and related matters. This year, Glass Lewis is also expanding its policies relating to cyber security and long-term incentive awards. 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 Gender Diversity

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

ISS remains focused on, but has not changed its recommendations from 2022, namely: for S&P/TSX Composite Index companies, ISS will recommend withholding votes where the board is not comprised of at least 30% women, subject to limited exceptions. These exceptions are only available if the company has disclosed a formal gender diversity policy and a commitment to achieve at least 30% women on the board prior to the next 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 references the more expansive term "gender diverse" directors in its gender policy, being women and people that identify with a gender other than male or female. Beginning this year, 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.

ESG and Cyber Security Oversight

Recognizing the direct legal, financial, regulatory and reputational risks associated with environmental and social aspects of a company's business, Glass Lewis will begin identifying material oversight concerns through a review of a company's overall governance practices. Glass Lewis will generally recommend voting against the governance committee chair of a company in the S&P/TSX Composite Index which fails to provide explicit disclosure concerning the board's role in overseeing these issues.

Furthermore, Glass Lewis has expanded its ESG policy this year to specifically contemplate the board's oversight of climate-related disclosures. This new metric applies to all companies, but is more important for those whose greenhouse gas emissions represent a financially material risk. Under this expanded policy, all companies should include disclosures in their shareholder materials, including risk factors, that consider and evaluate their operational resilience under lower-carbon scenarios. These disclosures should be in line with the recommendations of the Task Force on Climate-Related Financial Disclosures, if applicable. Glass Lewis may recommend voting against the chair of the committee charged with oversight of climate-related issues if it determines disclosure in this area is lacking.

ISS's ESG disclosure policy is more lenient, but material deficiencies in the oversight of ESG issues may result in ISS recommending that votes be withheld for individual directors or the whole board under its Egregious Actions policy. These deficiencies may be evidenced by adverse legal judgments or settlements, large or serial fines or sanctions from regulatory bodies.

New this year, Glass Lewis has expressed the view that due to increased regulatory scrutiny, it will be considering cyber security disclosure as material for all companies. At this time, Glass Lewis will generally not make voting recommendations on the basis of a company's oversight or disclosure concerning cyber-related issues. However, it will more closely evaluate and comment on a company's disclosure where cyber-attacks have caused significant harm to shareholders and reserves the right to recommend against certain directors should it deem such disclosure or oversight to be insufficient.

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

Long-Term Incentive Plans

Glass Lewis has revised its Long-Term Incentive ("LTI") policy this year to recommend that at least 50% of the LTI equity awards granted to executives going forward should be performance-based awards. While Glass Lewis will raise concerns with programs that do not meet this criterion, it will generally refrain from a negative recommendation in the absence of other significant issues

with the LTI program. However, it warns that if performance-based awards are rolled back or eliminated from a company's LTI plan, it will likely issue a recommendation against the proposal. Finally, Glass Lewis clarified in this year's guide that it expects fulsome disclosure surrounding the factors influencing discretionary bonus/compensation awards.

ISS lists "mix of fixed versus variable and performance versus non-performance-based pay" in its list of its primary evaluation factors for executive pay proposals (say-on-pay votes), but does not quantify a minimum acceptable balance in the same way as Glass Lewis.

What's new from securities commissions?

Common Continuous Disclosure Deficiencies Identified by CSA

In November 2022, the Canadian Securities Administrators (the "CSA") released CSA Staff Notice 51-364 – *Continuous Disclosure Review Program Activities for the fiscal years ended March 31, 2022 and March 31, 2021* (the "Review Notice"), which highlighted common issues and mistakes made by companies in preparing their continuous disclosure documents. The most common issues identified by the CSA by document included:

- **Financial Statements**: compliance with the recognition, measurement, presentation, classification and disclosure requirements in IFRS including revenue recognition, disclosure of expected credit losses, disclosure of business combinations and disclosure of reportable segments.
- **MD&A**: compliance with Form 51-102F1, including forward-looking information, discussion of operations specific to development and/or early-stage issuers, and non-GAAP and other financial measures.
- **Other**: compliance with other regulatory matters including overly promotional disclosure pertaining to ESG matters, audit committee requirements, inconsistencies throughout continuous disclosure documents, required disclosures in a reverse takeover transaction and mineral project disclosure.

The CSA cautioned companies against "greenwashing" their ESG disclosure, noting an increase of potentially misleading, unsubstantiated or otherwise incomplete claims about business operations or the sustainability of a product or service being offered. Greenwashed disclosures convey a false impression that a company or product are more environmentally-friendly than they actually are.

The CSA also identified a number of issues with non-GAAP financial disclosures. Non-GAAP financial disclosures are governed by National Instrument 52-112 – *Non-GAAP and Other Financial Measures Disclosure*, which came into effect in August of 2021. The CSA observed that a material number of companies were non-compliant with this new rule by reason of:

(i) failing to include the required quantitative reconciliation to the most closely-related GAAP financial measure for each non-GAAP financial measure used,

(ii) referencing non-GAAP financial measures more prominently than GAAP financial measures,

(iii) failing to describe significant differences between equivalent forward-looking and historical non-GAAP financial measures,

(iv) not identifying a "total of segments" measure as a non-GAAP financial measure,

(v) using confusing labels when naming their non-GAAP financial measures,

(vi) failing to provide required comparative information for all comparative periods, or

(vii) failing to disclose each non-GAAP financial measure that is used as a component of a non-GAAP ratio.

Following the CSA's review, regulators required 23% 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 Review Notice includes specific examples of acceptable and unacceptable disclosures and can be found in its entirety here.

New Prospectus Exemption: The Listed Issuer Financing Exemption

In November 2022, the Listed Issuer Financing Exemption (the "LIFE Exemption") was created in an amendment to National Instrument 45-106 – *Prospectus Exemptions*. The LIFE Exemption introduces a new form of offering disclosure document entitled the "Listed Issuer Financing Document" (the "Offering Document").

The LIFE Exemption relies on a company's continuous disclosure record and Offering Document to provide protection for investors. It is intended to reduce the costs incurred by smaller companies engaging in capital raises through public markets by replacing a prospectus that is reviewed and cleared by a securities regulator with an Offering Document not reviewed by a securities regulator. In most cases, the securities distributed pursuant to the LIFE Exemption will be immediately freely-tradeable for investors who are not insiders or control persons of the company, resulting in reduced discounts compared to hold period trades.

Because this is an exempt offering, it can be sold through full securities dealers, exempt market dealers (EMDs), or by a company directly without any dealer.

Eligibility & Requirements

Companies are eligible to raise up to the greater of the following amounts over a rolling twelve-month period under the LIFE Exemption: (i) $5 million, or (ii) 10% of the company's market capitalization, up to a maximum amount of $10 million. In order to rely on the LIFE Exemption, a company must meet all of the following criteria:

- be a reporting issuer in a Canadian jurisdiction for a of minimum twelve months prior to the offering;
- have a listed equity security on a recognized Canadian stock exchange;
- have an operational business that had not ceased operations, or had cash, cash equivalents or its exchange listing as its principal asset during the preceding twelve months;
- not be an investment fund; and
- have previously filed all continuous disclosure documents, as required under applicable securities laws.

New Form of Offering Document

To rely on the LIFE Exemption, a company must file an Offering Document compliant with the new Form 45-106F19 *Listed Issuer Financing Document*. Among other things, the Offering Document will require detailed summaries of the offering and the business of the company.

The Offering Document and the company's continuous disclosure record incorporated by reference therein will be subject to liability for misrepresentations. For this reason, the level of disclosure in the Offering Document may approach that in a prospectus. This is particularly so if a dealer is involved in the offering. A dealer will also want to conduct due diligence which could be similar to a prospectus offering, and which could include auditor involvement.

What's on the horizon for securities regulation?

CSA Upgrade to SEDAR+

In June of this year, the CSA will be upgrading the System for Electronic Document Analysis and Retrieval ("SEDAR") to a cloud-based platform called SEDAR+. The onboarding and transition period for this upgrade has begun and Stewart McKelvey will contact affected clients to aid in the transition and renew filing permissions over the coming months.

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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