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Environment, Social & Governance (ESG) Considerationst



ESG considerations are becoming increasingly important and are central to any business strategy in Canada. Specific requirements under Canadian securities law are limited to Governance-related disclosure. No such disclosure is expressly required of Environmental and Social (E&S) factors. Instead, public companies are subject to a general rule that they must meaningfully disclose any material risk to their business. This materiality requirement applies to environmental, social and governance information as it would to any other information.

In addition to legislative requirements, disclosure of ESG statistics by Canadian public companies is becoming a norm expected by investors. For example, the lead proxy advisory firms have made recent updates to their Canadian voting guidelines placing greater emphasis on ESG considerations¹. Institutional investors in Canada and around the world also demand such disclosure: eight leading Canadian pension plan investment managers representing a combined roughly C\$1.6 tn (\$1.3 tn) of assets under management issued a joint statement calling on companies and investors to provide “consistent and complete” ESG information and stating that they will “allocate capital to investments best placed to deliver long-term sustainable value creation².”

Environment

Securities Disclosure

Mandatory Disclosure. To help Canadian issuers determine what environmental

information is material and must be disclosed, the Canadian Securities Administrators (CSA) has published guidance on reporting environmental risk generally³, and on climate change-related risk specifically⁴. There is no bright line in determining materiality, and thus the CSA provides guiding principles, based on recommendations of the international Taskforce on Climate-Related Financial Disclosures (TCFD), upon which a company should assess such risks. These principles include context, timing, probability and anticipated magnitude of an environmental or climate change-related risk on the business. Issuers are encouraged to err on the side of materiality and disclose the information. The CSA noted that these principles are not limited to environmental disclosure, and can also apply to social information as discussed in the following section.

Such disclosures might be required in an issuer’s management’s discussion and analysis (MD&A), where the issuer must disclose material information that may not be fully reflected in its financial statements, and trends and risks that are reasonably likely to affect the issuer’s future performance. Examples of environmental information that may require disclosure in a MD&A include trends relating to consumer preference, supply chain management, availability and price of carbon allowances or offsets.

In an annual information form (AIF) an issuer must describe, among other things, risk factors relating to the company and its business most likely to influence an investor’s decision to purchase securities of the company and what

¹ [2023 Policy Guidelines](#), Glass Lewis

² [Companies and investors must put sustainability and inclusive growth at the centre of economic recovery](#)

³ [Environmental Reporting Guidance](#), CSA/ACVM, October 27, 2010

⁴ [Reporting of Climate Change-related Risks](#), CSA/ACVM et [Climate-related Disclosure Update and CSA Notice of Consultation](#)

environmental policies have been implemented that are fundamental to its operations. Potential exposure to effects of extreme weather patterns, emissions-limiting regulations, and the transition to a low-carbon economy are examples of potential risks that may require disclosure if considered material.

If information is disclosed as forward-looking information, it must be identified as such in addition to providing a disclaimer and a description of factors and assumptions grounding its projection. Examples of forward-looking information may include a target to reduce GHG emissions or a scenario analysis of climate change-related business impacts.

Voluntary Disclosure. In addition to the guidance respecting mandatory disclosure, the CSA Guidance on environment and climate change risk recommends disclosing the role of the company's board and its management in overseeing, assessing and managing climate-related risks and opportunities. It also suggests that the actual and potential impacts of such risks and opportunities on the organization's businesses, strategy, and financial planning, as well as the processes for identifying and managing, and the metrics and targets for assessing and managing, climate risks and opportunities, are disclosed.

While this information is not presently required by law, the Ontario Capital Markets Modernization Taskforce has recommended mandating the disclosure of this information.

Furthermore, treating environmental information as a voluntary disclosure poses a risk to a company's leadership, as proxy advisory firms such as Glass Lewis have published guidelines discouraging shareholder support for boards of

directors that fail to disclose and assess, address and disclose environmental risk.

Financing

Creditors too are increasingly requiring climate change-related disclosures in their financing agreements. One example is the Government of Canada's large employer loans program in response to COVID-19⁵, which required recipients to publish annual climate disclosure consistent with the TCFD's recommendations.

Social

Economic Globalization has dominated the world economy post World War II. The failure to bring into existence, in the late 1940s, the Charter of the International Trade Organization (ITO), alongside the International Monetary Fund and the World Bank, left international business largely unregulated for the next half century or more. The ITO, among other things, housed the labour standards intended to accompany economic globalization.

Before the turn of the century, supranational organizations such as the World Trade Organization (established in 1995) recognized that a "social deficit" was embedded in globalization and in need of correction.

Efforts were under way to find a better balance between economic development and social progress so as to put globalization on a sustainable footing. In 1998, the International Labour Organization (ILO) passed the Declaration on Fundamental Principles and Rights at Work (the "Fundamental Declaration")⁶. In 2011, the UN Guiding Principles on Business and Human Rights (the "UNGP") came into existence.

⁵ [Prime Minister announces additional support for businesses to help save Canadian jobs](#)

For the last decade (2011-2022), numerous initiatives have been undertaken to “operationalize” the UNGP. Although attention has been paid to Pillar 1 and Pillar 3, close scrutiny has centered on Pillar 2 related to Business and Human Rights⁷ (BHR), which has become a significant part of the international discourse around the rectification of the social dimension of globalization.

The leading initiatives in the BHR space, include:

- The UN Treaty process to impose binding regulation on international business. The negotiation of a UN Treaty (i.e., the Legally Binding Instrument to Regulate, in International Human Rights Law, The Activities of Transnational Corporations and Other Business Enterprises) completed its eighth international session in October 2022⁸.
- The passage by national governments of: (1) National Action Plans (NAPs), under Pillar 1 of the UNGP, setting out the ways in which the jurisdiction will advance human rights; and (2) follow-on domestic legislation⁹.
- Recent judicial developments that are ~~shifting standards impacting business~~ from “soft” law guidelines, such as the UNGP, to “hard” law requirements. For

instance, recent Canadian case law confirms that customary international law is incorporated into the country’s common law¹⁰.

- Running parallel to the foregoing initiatives and developments in the BHR field is the emergence of Environmental, Social, and Governance (ESG) initiatives and ESG Investing. The Social in ESG is essentially BHR, with attention on how the corporation interacts with its various “people” constituencies, namely: investors and shareholders; employees, suppliers, contractors and workers in the Global Supply Chain (GSC); consumers; local communities; and civil society in general.

The efforts to recover from the socio-economic fallout from the pandemic has accelerated the debate between shareholder capitalism and stakeholder capitalism.

Under stakeholder capitalism, corporations are expected to engage in an ongoing process of “due diligence” in terms of the human rights footprint connected with the operations and activities of the corporations at home and abroad¹¹.

⁶Article 2 of the ILO’s Fundamental Declaration sets out the five core labour standards, namely, (a) freedom of association and the effective recognition of the right to collective bargaining; (b) the elimination of all forms of forced or compulsory labour; (c) the effective abolition of child labour; (d) the elimination of discrimination in respect of employment and occupation; and (e) the right to a safe and healthy working environment. See: [Article 2](#) of the ILO Declaration on Fundamental Principles and Rights at Work

⁷The three pillars of the UNGP are as follows: Pillar 1 – States’ duty to protect human rights; Pillar 2 – Business’ duty to respect human rights; and Pillar 3 – Access to effective remedy. See: the [UNGP](#)

⁸A [draft version of this treaty](#) dated August 17, 2021, which was discussed at the 8th session

⁹On November 24, 2021, An Act to enact the Fighting Against Forced Labour and Child Labour in Supply Chains Act and to amend the Customs Tariff (Bill S-211) was introduced in the Canadian Senate to respond to the use of forced labour within Canadian businesses’ supply chains. The Bill has advanced through multiple parliamentary stages. On November 30, 2022, the House of Commons finalized its consideration of [the bill](#) in committee. In addition to this legislative development, Canada has implemented regulatory strategies to prevent and prohibit forced labour and modern slavery in business supply chains. For example, the [Canadian Ombudsman for Responsible Enterprise](#) (CORE) was established to investigate complaints about potential human rights abuses by Canadian companies operating abroad in the garment, mining, and oil and gas industries. In accordance with obligations under the Canada-United States-Mexico Free Trade Agreement, Canada’s Customs Tariff also bans the importation of goods made in whole or in part with forced labour. The Canada Border Services Agency works with the federal Labour Program of Employment and Social Development Canada to identify and detain goods that are suspected of being produced by forced labour. In other jurisdictions, the [German Act on Corporate Due Diligence in Supply Chains](#) took effect in January 2023, while on February 23, 2022, the EU Commission adopted the proposal for the EU [Directive on Corporate Sustainability Due Diligence](#).

¹⁰ See, for example, [Nevsun Resources Ltd. v. Araya, 2020 SCC 5](#). At paragraphs 59 and 114, Abella J. rejects the Act of State Doctrine and accepts the application of customary international law: “The [Act of State] doctrine is not part of Canadian common law, and neither it nor its underlying principles as developed in Canadian jurisprudence are a bar to the Eritrean workers’ claims. [...] Ultimately, for the purposes of this appeal, it is enough to conclude that the breaches of customary international law, or jus cogens, relied on by the Eritrean workers may well apply to Nevsun. The only remaining question is whether there are any Canadian laws which conflict with their adoption as part of our common law. I could not, with respect, find any.”

Governance

Governance-related considerations emphasize robust governance structures, responsiveness and engagement with shareholders, and transparency. The following subjects are considered central, if not mandatory, to company practice and disclosure in Canada.

E&S-related Governance Considerations

As described above, the disclosure of material environmental and social risks is mandatory under Canadian securities laws. It is the responsibility of an issuer's board and senior management to complete a risk analysis of company operations, including those with environmental and social implications, and to institute and disclose these risks and related policies and practices.

Glass Lewis has published a Proxy Paper on ESG initiatives¹², in which it identifies the level and quality of oversight of environmental and social issues as critical in deciding to vote against a board, to support a shareholder resolution (or in some cases recommending voting against a company's accounts and reports and/or ratification of management and board acts), where the board fails to properly disclose, maintain oversight, or uphold related policies and practices.

Board Diversity

Publicly-traded corporations, including companies listed on the TSX venture exchange, governed by the *Canada Business Corporations Act* (CBCA) are required to disclose, on a comply or explain basis, information on company policies and practices related to diversity of the board of directors and in senior management¹³. This includes the number and percentage of members of the board and of senior management who are women, Indigenous Peoples, members of visible minorities and persons with disabilities. The company is also required to disclose whether or not they have adopted a target of representation in such positions, and if such a target has not been adopted, the reasons why they have not done so.

Board Compensation

All Canadian issuers are required to disclose a Statement of Executive Compensation with any information circular that is sent in connection with an annual general meeting, or a meeting in which directors will be elected or matters related to executive compensation will be voted upon¹⁴.

¹¹ The ingredients of corporate "due diligence" include a commitment to making respect for human rights a "core" part of the business and an ongoing process of "due diligence" as it pertains to the human rights footprint of the corporation. The due diligence process will include steps to assess risk to human rights; take action to mitigate such risk; track the progress of the measures aimed at mitigating the human rights risks; communicate, internally, and beyond the measures taken and the results achieved; and provide a remedy for those harmed by the corporation's human rights footprint. See the [UNGP Guiding Principles 18-21](#)

¹² [2023 Policy Guidelines](#), Glass Lewis

¹³ Section 172.1 Canadian Business Corporations Act and section 72.2 Canada Business Corporations Regulations, 2001.

¹⁴ Item 8, Form 51-102F5 Information Circular; Form 51-102F6 Statement of Executive Compensation.