ESG disclosure requirements and implications for Canadian reporting issuers

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This is the first bulletin in a series addressing environmental, social and governance (ESG) implications for capital markets

On January 14, 2020, BlackRock CEO Larry Fink announced in his annual letter to CEOs of the world's largest companies that BlackRock would make environmental sustainability a key aspect of its investment decision-making process going forward. It also stated BlackRock will be "increasingly disposed" to vote against management and board directors that provide insufficient sustainability-related disclosure. This announcement represents a validation of the surging investor-led movement requiring issuers to provide enhanced disclosure regarding their environmental, social and governance (ESG) practices.

The Canadian Securities Administrators (CSA) have not met this growing investor enthusiasm for ESG disclosure with wholesale changes in disclosure requirements. Rather, they have published guidelines indicating how existing continuous disclosure requirements can reflect ESG issues.

This bulletin provides an overview of the relevant requirements and guidance from Canadian securities regulatory authorities and corporate laws relating to ESG disclosure by Canadian non-investment fund reporting issuers.

Environmental disclosure

Rather than separate, specific disclosure requirements regarding environmental matters, Canadian securities regulators have encouraged issuers to use existing forms of disclosure to show they have considered environmental risks, have fundamental environmental policies in place and are assigning responsibility for environmental risk management at the board of directors' level. Regulators have noted that issuers should denote material risks related to both physical risk (such as extreme weather events or rising sea levels), and material risk the business faces in the transition to a low-carbon economy (including reputational risk, policy risk, regulatory risk and market risk, among others). For more information on the disclosure of climate change-related risk, please see BLG's comments here.

As most industries are exposed to environmental and climate change risk, all Canadian issuers should consider whether they face any material environmental risks, and provide specific factual disclosure about these risks rather than giving general disclosure and using boilerplate language. In addition, the actual or expected impact of environmental protection requirements on its issuers, capital expenditures, earnings and competitive position must be disclosed in the issuer's AIF.

Social disclosure

Social matters are not given the level of attention environmental and governance matters receive with respect to ESG disclosure, but that does not mean that material social risks do not warrant disclosure.

Recent amendments to the CBCA have codified the decision of the Supreme Court of Canada in *BCE Inc. v. 1976 Debentureholders*, which broadened the scope of the directors' duty of loyalty (*i.e.* "to act honestly and in good faith with a view to the best interests of the corporation") to include consideration of the environment and the interests of stakeholders such as employees, retirees and pensioners, creditors, consumers, and governments in addition to the interests of shareholders. This likely will not require significant changes of Canadian issuers, to whom the expanded duty of loyalty in *BCE* already applies, but represents a reinforcement of *BCE* by the federal government.

Additionally, an amendment to the CBCA not yet in force will establish a requirement that issuers governed by the CBCA must make annual disclosure regarding the well-being of the issuer's employees, retirees and pensioners. The regulations setting out the required disclosure have not been published at this time, but any such disclosure would mean that the roles of employees, retirees and pensioners as stakeholders of a corporation would be heightened.

In 2018, Québec's Autorité des marchés financiers (AMF) published a notice highlighting how existing AIF and MD&A risk disclosure may be applied to disclose issues of modern slavery (including forced labour, debt bondage, human trafficking and child labour). Québec is currently the only Canadian jurisdiction to have made commentary on modern slavery disclosure. Legislation recently introduced in the Senate of Canada requires Canadian issuers to report the steps it has taken to prevent and reduce the risk that forced or child labour is used to make goods in Canada or elsewhere by the issuer or imported by the issuer to the Minister of Public Safety and Emergency Preparedness. In light of this proposed legislation, all Canadian issuers should consider whether they have exposure to modern slavery, including through supply chains or international operations, and determine whether there are any resulting material risks.

Governance disclosure

There has been a growing trend toward establishing "comply or explain" systems to address the representation of underrepresented groups on boards of directors and in C-suites, in addition to their use for disclosure of governance topics including the compensation of directors and officers and the director nomination process. Under CSA requirements, issuers must also make prescribed disclosure regarding the

representation of women in senior leadership positions and, in doing so, either demonstrate their compliance with CSA requirements or explain non-compliance. This includes whether or not an issuer considers the representation of women when considering potential nominees or appointments for director or officer positions.

Effective January 1, 2020, CBCA corporations are subject to new disclosure requirements relating to the diversity of boards of directors and senior management. In addition to the disclosure requirements for disclosing gender diversity on boards discussed above, the new CBCA requirements set out a "comply or explain" approach and extend the diversity requirements to members of visible minority groups, Indigenous persons and persons with disabilities. Distributing CBCA corporations must provide each shareholder with this disclosure at every annual meeting, either by sending it with the notice of meeting or by making it available with the information circular. Issuers governed by the CBCA should review their current practices for board and management diversity to ensure that they fully align with the new requirements.

Additionally, on a date not yet named, the federal government will amend the CBCA to provide shareholders of CBCA issuers with the right to vote on the approach with respect to compensation paid to directors and members of senior management of the corporation. The results of such a vote would not be binding on the corporation, but issuers may wish to consider how this requirement for a vote could affect their approach to compensation.

For more information

Please contact any of the authors of this bulletin, or your lawyer in BLG's Capital Markets Group for further information or to understand how these requirements may apply to you.

You may wish to review the following items discussed in this bulletin:

- CSA Staff Notice 51-333 *Environmental Reporting Guidance*
- CSA Staff Notice 51-358 *Reporting of Climate Change Risks*
- Form 52—102F1 *Management's Discussion and Analysis*
- Form 52-102F *Annual Information Form*
- *Canada Business Corporations Act* (in particular, see s. 122, s. 172.2 (not yet in force) and ss. 172.3-172.4 (not yet in force)).
- AMF"Notice relating to modern slavery disclosure requirements"
- Bill S-211 *An Act to enact the Modern Slavery Act and to amend the Customs Tariff*
- Form 58-101F1 *Corporate Governance Disclosure*
- Form 58-101F2 *Corporate Governance Disclosure (Venture Issuers)*

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