Dentons 2022 Proxy Season Guide

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This guide sets out legislative, regulatory and advisory developments in respect to corporate governance and annual disclosure matters. These developments will impact Canadian public companies with respect to their proxy-related materials and other annual disclosure. The focus is on the 12 months to February 2022, with some reminders about continuing developments and future matters.

Contents

New developments

1. Adoption of new non-GAAP financial disclosure requirements

On May 27, 2021, the Canadian Securities Administrators (CSA) published new disclosure requirements for non-GAAP financial measures, non-GAAP ratios, and other financial measures in National Instrument 52-112 – *Non-GAAP and Other Financial Measures Disclosure* (NI 52-112) and its related Companion Policy 52-112CP. NI 52-112 replaces a previous 2016 CSA Staff Notice on non-GAAP financial measures disclosure and raises the standard of regulation for voluntary disclosure of non-GAAP and other financial measures, which generally lack standardized meanings, to improve the quality of information provided to investors.

NI 52-112 came into effect on August 25, 2021 and applies to all reporting issuers (except investment funds, SEC foreign issuers and designated foreign issuers) in relation to any document that is intended to be, or reasonably likely to be, made available to the public. For reporting issuers, For reporting issuers, NI 52-112 applies to disclosures for a financial year ending on or after October 15, 2021. NI 52-112 also applies to documents filed after December 31, 2021 by a non-reporting issuers in connection with a distribution made in reliance on the offering memorandum exemption under National Instrument 45-106 - Prospectus Exemptions, such as offering memorandums and related marketing materials.

For further information on the requirements and exemptions to disclosure under NI 52-112, please visit our previous insight.

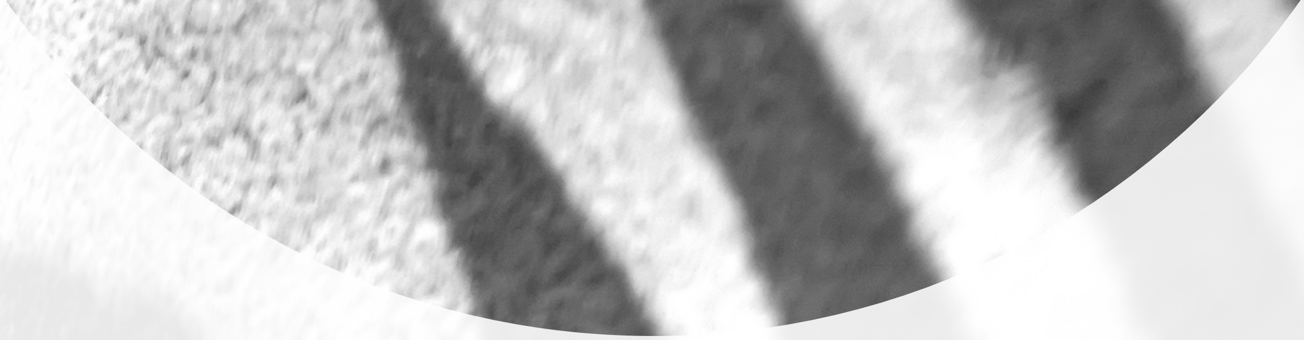
2. Bill C-25 – proposed amendments to the *Canada Business Corporations Act*

Certain proposed amendments to the *Canada Business Corporations Act* (CBCA) under Bill C-25, *An Act to amend the Canada Business Corporations Act, the Canada Cooperatives Act, the Canada Not-for-profit Corporations Act and the Competition Act* (Bill C-25), including proposed changes to the director election process, which were expected to come into force on July 1, 2021, have been delayed. While a new implementation date for these amendments has not been announced, Corporations Canada anticipates this new implementation date will be outside of this proxy season to minimize any disruption to the election of directors at annual shareholders' meetings of CBCA incorporated companies.

In a previous insight, we summarized the proposed amendments to the CBCA under Bill C-25 that have not yet come into force. The proposed amendments reform the director election process to align with the rules adopted by the Toronto Stock Exchange (TSX), which are mandatory for TSX-listed companies. The key changes to director elections for CBCA incorporated companies under Bill C-25 include the following:

a. **Mandatory annual election of directors** – all public companies will be required to hold annual elections for the entire board of directors, such that the term limit will become one year for the directors of a public company, but remain three years for the directors of a private company.

b. **Mandatory individual director voting** – all public companies will be required to elect their directors by individual voting, rather than slate voting, such that shareholders will vote for each nominee separately.



c. **Majority voting** – all public companies will be subject to mandatory majority voting, rather than plurality voting, involving an amended form of proxy allowing shareholders to vote "for" or "against" a director rather than "withholding" a vote. With certain exceptions (to fulfill Canadian residency or non-officer/non-employee director requirements), a candidate who fails to receive more votes "for" than "against" will not be elected to the board.

d. **Appointment of additional directors between annual meetings** – the default rule for the appointment of directors between annual meetings will become "opt-out" instead of "opt-in", such that directors will have the power to appoint one or more additional directors for a term ending no later than the next annual meeting, unless the articles of the company provide otherwise.

Certain aspects of Bill C-25 have already come into force, including provisions relating to diversity disclosure, which came into force on January 1, 2020 and were summarized in our 2020 proxy season guide. These provisions require a public CBCA company to disclose, in its proxy circular or elsewhere, the number and percentage of board seats and senior management positions occupied by "designated groups" (which include women, Aboriginal peoples, persons with disabilities and members of visible minority groups).

As discussed in our 2021 proxy season guide, on February 3, 2021, Corporations Canada set out further non-binding guidelines on diversity disclosure (Diversity Guidelines), which were further updated and enhanced on February 7, 2022 to ensure the clear and consistent disclosure of diversity information. The enhancements include additional guidelines on disclosing written policies relating to the identification and nomination of directors from designated groups and disclosing board and management consideration of the level of representation of designated groups.

The Diversity Guidelines also encourage, among other things, consistently disclosing diversity information in a common format, clearly indicating the date of disclosure and presenting diversity information, including term limits and targets, in a table format.

3. Advisory updates: ISS and Glass Lewis

A. Board gender diversity

Beginning in 2022, ISS and Glass Lewis will apply gender diversity policies for boards announced back in 2021 with additional requirements for the next year.

The two significant changes to Glass Lewis' gender diversity policies for boards of TSX-listed companies are that Glass Lewis will generally recommend voting against (1) the chair of the nominating committee of a board with fewer than two gender diverse directors, or (2) the entire nominating committee of a board with no gender diverse directors. The term "gender diverse directors" is an expansion from Glass Lewis' concept of gender diversion to include not only women, but also directors that identify with another gender other than male or female.

For companies not listed on the TSX, and for all boards with six or less directors, a minimum of one gender diverse director is required. Glass Lewis' voting recommendations will be based on a careful review of a company's disclosure of diversity considerations. Glass Lewis may refrain from recommending that shareholders vote against directors of companies when boards have provided a sufficient rationale or plan to address the lack of diversity on the board.

ISS will recommend voting "withhold" for the chair of the nominating committee (or chair of the board, if no nominating committee has been identified or no chair of such committee has been identified) for all TSX-listed issuers where the issuer:

a. Does not have a formal written gender diversity policy; and

b. Has no women on its board of directors.

This recommendation has been expanded from being applicable only to “widely held” TSX-listed issuers to all TSX-listed issuers.

For TSX issuers that form part of the S&P/TSX Composite Index (S&P/TSX-listed issuers), ISS has imposed a higher standard and will recommend voting “withhold” for the chair of a nominating committee (or chair of the board if no nominating committee has been identified or no chair of such committee has been identified) where:

a. Women comprise less than 30% of the board; and

b. The issuer has not provided a clear commitment to achieve this target prior to the next annual general meeting (AGM).

This change was announced last year with a one-year grace period and has been further amended by requiring an issuer to commit to achieving the 30% target by its next AGM as opposed to “within a reasonable timeframe”. Exemptions will continue to be available for newly listed TSX issuers and those transitioning from the TSX Venture Exchange within the prior or current fiscal year. In addition, this gender diversity policy will not apply to non-S&P/TSX-listed issuers that have four or fewer directors.

B. Additional updates from Glass Lewis and ISS

Glass Lewis has further updated its Canadian proxy voting guidelines for 2022 to incorporate the following key recommendations:

a. **Environmental and social risk oversight** – as previously discussed in our 2021 proxy season guide, as of 2022, Glass Lewis will recommend voting against the governance committee chair of a S&P/TSX-listed issuer that fails to provide explicit disclosure in its information circular concerning the board’s role in overseeing environmental and social issues.

b. **Multi-class share structures with unequal voting rights** – beginning in 2022, for issuers with a multi-class share structure and unequal voting rights, Glass Lewis will recommend voting against the chair of the governance committee if the issuer does not provide for a “reasonable sunset of the multi-class share structure” (generally seven years or less).

c. **Size of key committees** – for all issuers on Canadian stock exchanges, Glass Lewis recommends voting against the compensation, nominating or governance committee chair if the committee consists of fewer than two members for the majority of the fiscal year.

ISS will, moving forward, evaluate the board’s responsiveness where a shareholder vote on executive compensation does not receive a 80% positive response. This threshold has been increased from 70% to 80%, based on Canadian market expectations and a comparison to other major ISS markets such as the United Kingdom, Continental European and Australian markets, which all have thresholds above 70%. Board responsiveness generally includes disclosure of engagement efforts regarding the issues contributed to the low level of support, specified actions undertaken by the board and an analysis of the basis of the compensation practices in question.

4. Adoption of Bill 213, *Better for People, Smarter for Business Act, 2020*

On July 5, 2021, *Bill 213, Better for People, Smarter for Business Act, 2020* (Bill 213) came into force. The amendments in Bill 213 eliminated the director residency requirement under section 118(3) of the *Business Corporations Act* (Ontario) (OBCA), which previously required 25% of the directors of a corporation governed by the OBCA to be resident Canadians (or at least one director to be a resident Canadian for corporations with less than four directors). For further information on the amendments in Bill 213, please visit our previous insight.

Continuing developments

1. Diversity

Starting January 1, 2023, Glass Lewis will implement a percentage-based approach instead of a numerical requirement and will generally recommend voting against the nominating committee chair of a board of a TSX-listed company that is not at least 30% gender diverse. ISS will have a 30% requirement in 2022, but only for S&P/TSX-listed issuers, and will generally not recommend a negative vote provided that the company has a formal written gender diversity policy as contemplated by National Instrument 58-101 – *Disclosure of Corporate Governance Practices* and includes a commitment to include at least 30% of women on the board by the next AGM.

With increasing attention being paid to diversity in corporate leadership, on May 19, 2021, the CSA announced upcoming consultations with issuers, investors and other industry stakeholders on broader diversity on boards and in executive officer positions. Following this announcement, the Ontario Securities Commission (OSC) convened a panel on October 13, 2021 to discuss broader diversity (beyond just gender diversity) with a focus on targets, term limits and diversity data. The CSA intends to use the results of the consultations to make recommendations on changes to the current diversity disclosure framework.

In 2021, both Corporations Canada and the CSA released the results of annual reviews conducted on diversity on corporate boards and among senior management. On April 7, 2021, Corporations Canada published a 2020 Annual Report – *Diversity of Board of Directors and Senior Management of Federal Distributing Corporations*, the first report published since the new diversity disclosure requirements were instituted in 2020. The findings in the 2020 Annual Report showed a disparity in the representation of designated groups on corporate boards and among senior management. The review revealed that out of all board seats, 17% were held by women; 4% by members of visible minorities; 0.3% by persons with disabilities; and 0.3% by Indigenous peoples. The review revealed that out of all senior management positions: 25% were held by women, 9% by members of visible minorities, 0.6% by persons with disabilities; and 0.2% by Indigenous peoples.

On November 4, 2021, staff of the CSA published Multilateral Staff Notice 58-313 – *Review of Disclosure Regarding Women on Boards and in Executive Officer Positions* (MI 58-313), the seventh annual review by the CSA of disclosure regarding women on boards and in executive officer positions. Among the findings set out in MI 58-313 was that the percentage of women in these roles has increased in recent years. As of 2021, 22% of board seats were occupied by women; 79% of issuers had at least one woman on their board; 65% of issuers had at least one woman in an executive officer position; 6% of issuers had a woman as chair of the board; and 5% of issuers had a woman as Chief Executive Officer. The CSA noted a correlation between issuers adopting diversity measures and the proportion of women on boards. Issuers who set targets for the representation of women on their boards had a greater proportion of board seats held by women, as did issuers that adopted a written policy relating to the representation of women on their board.

Upcoming developments

1. Amendments to National Instrument 51-102 – *Continuous Disclosure Obligations*

On May 20, 2021, the CSA proposed substantial changes to National Instrument 51-102 – *Continuous Disclosure Obligations* (NI 51-102). The proposed changes will apply to reporting issuers other than investment funds, and are intended to streamline and clarify disclosure requirements while also addressing current gaps in disclosure. The proposed changes are currently expected to come into effect on December 15, 2023.

Public companies are currently required to prepare and file annual and interim financial statements, and annual and interim management's discussion and analysis (MD&A) in prescribed form. In addition, non-venture public companies are required to file annual information forms (AIF) in prescribed form. The proposed changes to NI 51-102, when enacted, will:

a. Consolidate the annual financial statements, annual MD&A and, if applicable, the AIF into a single reporting document called the "Annual Disclosure Statement"; and

b. Consolidate the interim financial statements and interim MD&A (or for certain venture issuers, the quarterly highlights) into a single reporting document called the "Interim Disclosure Statement".

A reporting issuer will be required to deliver the Annual Disclosure Statement to its investors. However, the CSA proposes that granting electronic access to an Annual Disclosure Statement and publishing a related notice that the Annual Disclosure Statement is available would constitute delivery.

Some other noteworthy proposed changes include removing materiality qualifiers (such as "material", "significant", "critical", "major" and "fundamental") from existing provisions of the prescribed forms of the MD&A and AIF, and instead, having all disclosure requirements subject to the qualification on material information as set out in general instructions to Form 51-102F1 and Form 51-102F2. However, materiality qualifiers will be retained where they are part of a defined term (such as "significant acquisition") or a term that is reflected in the CSA's prospectus rules.

Under the proposed changes, any reporting issuer that is exempt from preparing, filing or delivering an annual or interim filing will also be exempted from preparing, filing or delivering an Annual Disclosure Statement or an Interim Disclosure Statement, as applicable.

2. Changes to climate disclosure

The CSA are proposing mandatory climate disclosure requirements for reporting issuers. On October 18, 2021, the CSA published CSA Notice and Request for Comment (Notice) on proposed National Instrument 51-107 – *Disclosure of Climate-related Matters* (NI 51-107) and its proposed Companion Policy 51-107CP (the Climate Disclosure Proposals). The comment period closed on February 16, 2022.

The Climate Disclosure Proposals would require disclosure based on recommendations of the Task Force on Climate Related Financial Disclosures (TCFD), which was established by the Financial Stability Board of the G20 group of countries to improve the effectiveness of climate disclosures. The Climate Disclosure Proposals would require issuers to make disclosure in the following areas:

a. **Governance** – describe the board's oversight of climate-related risks and opportunities, and management's role in assessing and managing climate-related risks and opportunities.

b. **Strategy** – describe any climate-related risks and opportunities identified over the short, medium and long term and describe the impact of these risks and opportunities on its business, strategy and financial planning.

c. **Risk management** – describe its processes for identifying, assessing and managing climate-related risks and how these processes are integrated into overall risk management.

d. **Metrics and targets** – describe its metrics used to assess climate-related risks and opportunities and targets used to manage these risks and opportunities.

Notably, an issuer is required to "comply-or-explain" with greenhouse gas (GHG) emissions disclosure by disclosing Scope 1, Scope 2 and Scope 3 GHG emissions or providing an explanation if they do not. Additionally, issuers are expected to lay out their approach to managing climate-related risks, their approach to risk management and their process for identifying climate-related risks.

While it is currently not anticipated that NI 51-107 will come into force before December 31, 2022, the key areas of climate-related disclosure that would be mandated under NI 51-107 (including disclosure regarding climate-related governance, strategy, risk management, metrics and targets, and GHG emissions) should inform issuers' preparation of MD&As and AIFs. As such, as we previously suggested in our 2021 proxy season guide, it is important for issuers to integrate climate risk policies into board mandates and officer position descriptions to proactively align existing governance structures with anticipated climate-related disclosure requirements. Once implemented, NI 51-107 is expected to be phased in over a one-year period for non-venture issuers and a three-year period for venture issuers.

Please see our summary report and previously published insights for further information.

3. Ontario's *Capital Markets Act*

In October 2021, the Ontario government announced that it would publish the draft *Capital Markets Act* (CMA) for stakeholder consultation. The CMA is intended to replace the *Securities Act* and the *Commodity Futures Act* (CFA) in Ontario, if it comes into force. The CMA sets out the regulatory framework for capital markets participants, the regulatory and enforcement powers of the Ontario Securities Commission (OSC), including the authority to make rules, and the Capital Markets Tribunal's (Tribunal) adjudicative powers.

The CMA would provide more general and broader rule-making authority than current legislation by adopting a "platform approach" to capital markets capitalization and would leave the more detailed requirements to regulations. The CMA would also replace the CFA, meaning that all commodity future contracts and options that are currently regulated under the CFA would be regulated as derivatives under the CMA. The CMA proposes to close regulatory gaps in the current *Securities Act* by providing more civil liability recourse to investors such as holding directors, promoters, experts and other influential persons liable instead of just the issuer.

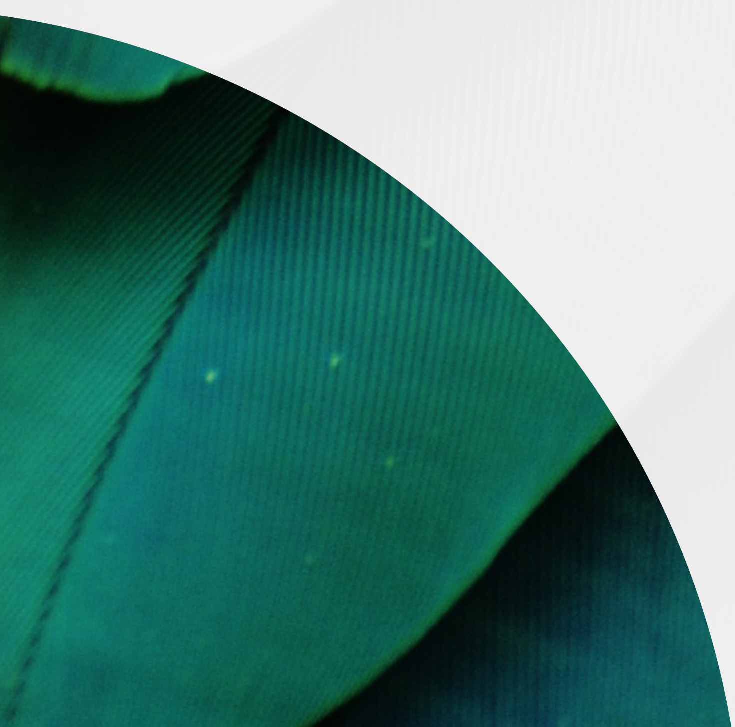
Significantly, the CMA recognizes the emergence of crypto-assets and provides the chief regulator of the OSC the power to determine if certain crypto-assets are securities or derivatives. The chief regulator is also granted greater authority to determine the requirements for quickly evolving new platforms and assets.

4. New self-regulatory organization to replace MFDA and IIROC

In 2019, the CSA examined the current framework for the Investment Industry Regulatory Organization of Canada (IIROC) and the Mutual Fund Dealers Association of Canada (MFDA). The examination resulted in the announcement in 2021 that a new self-regulatory organization (SRO) will be created that consolidates the current functions of IIROC and MFDA into a single regulatory body. The CSA, IIROC and MFDA have created a special joint committee to recruit and recommend a board of directors and chief executive officer for the new SRO. The recommendations and election are expected in the second quarter of 2022 and the new SRO is expected to launch later this year.

The consolidation of the MFDA's and IIROC's current rules and framework into a new harmonized set of rules is expected to take place soon after the creation of the new SRO and be subject to public comment and consultation periods.

The CSA has also announced the intention to create a new investor protection fund which will combine the existing Canadian Investor Protection Fund and the MFDA Investor Protection Corporation. The new investor protection fund is also expected to launch by the end of 2022.



Possible developments

1. Recommendations from the Capital Markets Modernization Taskforce Final Report

In its Final Report dated January 2021, Ontario's Capital Markets Modernization Taskforce (Taskforce) released 74 recommendations to modernize Ontario's capital markets regulation. Recommendations previously noted in our 2021 proxy season guide include moving to an "access equals delivery" model, implementing board and management diversity targets, regulating proxy advisors such as ISS and Glass Lewis, setting board tenure limits, introducing mandatory non-binding say-on-pay, and allowing issuers to access beneficial ownership information by removing "OBO" and "NOBO" status.

The Taskforce provided several recommendations in its Final Report concerning corporate board diversity, which could impact future proxy seasons as these issues continue to gain widespread attention. The Taskforce's recommendations to improve corporate board diversity include the following:

a. **Board diversity targets and timelines** – as discussed in our 2021 proxy season guide, the Taskforce recommends diversity targets (aggregated across the board and executive management) of 50% for women, completed within five years, and 30% for other diversity groups (BIPOC, persons with disabilities and LGBTQ+), completed within seven years.

b. **Written policy for director nomination process** – the Taskforce recommends adopting a written policy for the director nomination process that addresses the identification of candidates who self-identify as women, BIPOC, LGBTQ+ or persons with disabilities.

c. **Maximum board tenure limits** – as discussed in our 2 2021 proxy season guide, the Taskforce recommends adopting a 12-year maximum term limit for directors and a 15-year maximum tenure limit for the chair of the board, with certain exceptions.

The Taskforce made several recommendations concerning the enhanced disclosure of environmental, social and governance (ESG) information, including mandatory climate-related disclosure, GHG emissions disclosure on a comply-or-explain basis, and a transition phase to comply with new disclosure requirements, which will be implemented by the CSA, with some modifications, through NI 51-107.

While the Taskforce also recommended that an "access equals delivery" model be implemented in Ontario within six months following the publication of the Final Report, such implementation did not take place in 2021. The CSA has yet to follow up on its consultation on an "access equals delivery" model, but did note in the CSA Notice dated May 20, 2021 that the changes to delivery requirements under NI 51-102 were proposed in light of the "access equals delivery" model currently under consideration.

2. Conclusion of consultations on corporate governance amendments to the CBCA

The public consultation process for certain corporate governance amendments to the CBCA under Bill C-97, *An Act to implement certain provisions of the budget tabled in Parliament on March 19, 2019 and other measures* (Bill C-97) was completed in 2021 but the amendments are not yet in force. We previously described the CBCA amendments enacted under Bill C-97 in *our* 2020 proxy season guide. The key changes to the CBCA on the horizon following the conclusion of the consultation process include the following requirements proposed to apply to public companies:

a. **Mandatory say-on-pay** – companies would be required to hold an annual non-binding shareholder vote on executive compensation, the results of which would be required to be disclosed to shareholders.

b. **Compensation claw-backs** – companies would be required to report on the recovery of certain incentive-based compensation paid to directors and senior management on an annual basis. A corporation would be required to indicate whether the corporation has adopted a written claw-back policy and either describe the policy or explain the reasons why a corporation has not adopted a claw-back policy.

c. **Disclosure on well-being** – companies would be required to disclose information relating to the well-being of employees, retirees and pensioners on an annual basis. A corporation would be required to indicate whether the corporation has adopted a written well-being policy and either describe the policy or explain the reasons why a corporation has not adopted a well-being policy.

The public consultation period to provide feedback on these amendments under Bill C-97 closed on March 31, 2021, but no timeline has been suggested for the implementation of the regulations.

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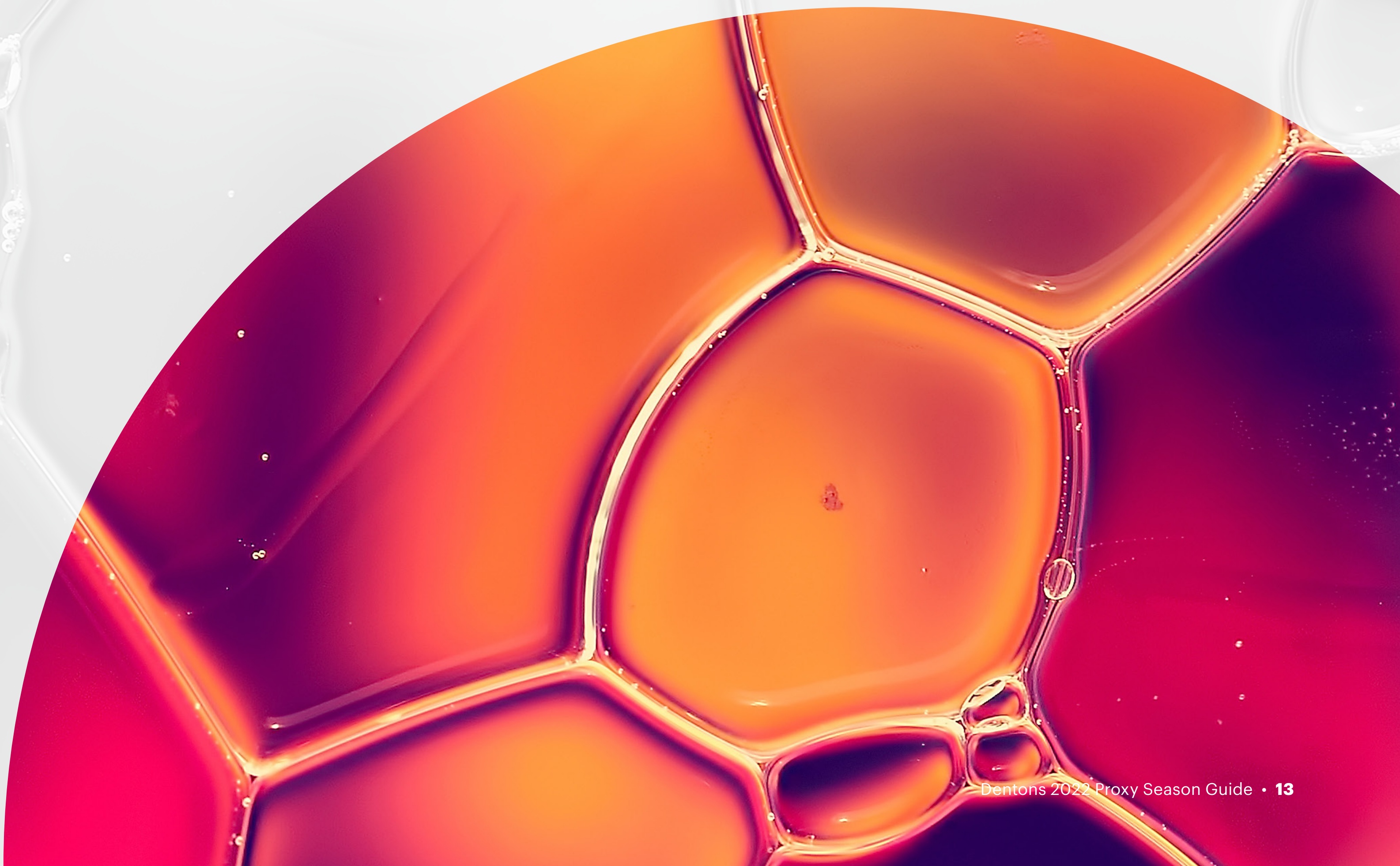

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