DENTONS

# Securities and Corporate Finance - 2023 Year in Review and Future Trends

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2023 saw continued volatility in the global capital markets, persistent inflation, central banks continuing to raise interest rates, the specter of a global recession, and geopolitical turbulence, including the ongoing conflicts in Ukraine and the Middle East. As a result, Canadian capital markets generally saw a year-over-year decline in market performance, although equity and debt underwriting activities picked up as compared to 2022. Private equity, mergers and acquisitions and venture capital financings were all muted in 2023. In terms of industry areas, technology, particularly generative AI, gained increasing focus. In addition, energy, mining and power sectors lead the way in new equity raises. Set against this context, we present our 2023 Year in Review and Future Trends publication, where we take a look back at key legal developments impacting the securities and corporate finance landscape in Canada and provide our outlook on anticipated trends for 2024.

# Contents

# No need to withhold your vote: The CSA exempts CBCA-incorporated reporting issuers from director election form of proxy requirement

Amendments to the *Canada Business Corporations Act* (CBCA) came into force in August 2022 (Amendments) which require public companies governed by the CBCA to provide security holders with options to vote "for" or "against" the election of directors. Subject to certain exceptions, the Amendments require that each director in an uncontested election (where the number of nominees equals the number of positions to be filled) must receive more votes "for" than "against" to be elected.

The Amendments created a potential inconsistency with National Instrument 51-102 – *Continuous Disclosure Obligations* (NI 51-102), which required that proxies provide security holders with the option to vote "for" or "withhold" for the election of each director, but did not provide a vote "against" as an option.

In response to the Amendments, Dentons previously commented that, in light of this potential inconsistency, CBCA companies should consider:

- Preparing proxies for the election of directors that comply with both regimes, by including either three options ("for," "against" and "withhold") or a hybrid approach with two options ("for" and "against/withhold"); and
- Adopting a majority voting policy that mirrors the requirements of the CBCA, but which specifies that a director is only elected if the number of "for" votes exceeds the aggregate of "against" and "withhold" votes.

On January 31, 2023, the Canadian Securities Administrators (CSA) published Blanket Order 51-930 – *Exemption From the Director Election Form of Proxy Requirement* (Order) which immediately came into effect. The Order exempts public companies governed by the CBCA from the requirement to include a "withhold" option on proxies when voting for directors if such election is conducted pursuant to the requirements of the CBCA.

As the Order clarified the potential inconsistency regarding voting options, public companies governed by the CBCA may now comfortably table proxies with only "for" and "against" options in an uncontested election of directors. Similarly, such companies will likely no longer require a standalone majority voting policy as the CBCA regime governs the requirements for director elections.

The Toronto Stock Exchange (TSX) mandates that TSX-listed companies adopt majority voting policies unless its majority voting requirement is otherwise satisfied by statute. The TSX has indicated that the Amendments satisfy its majority voting requirement, but has noted that a company should still include disclosure in its annual proxy circular specifying that the company abides by the requisite CBCA majority voting requirements.

The Order is only effective until the earlier of: (a) July 31, 2024, unless extended by the Canadian securities commissions; and (b) the effective date of an amendment to NI 51-102 that addresses substantially the same subject matter as the Order. We remain hopeful that the CSA will amend NI 51-102 before July 31, 2024, to codify the content of the Order.

# Dentons 2023 Proxy Season Guide

In February 2023, the Dentons Securities and Corporate Finance group published the 2023 proxy season guide, with reminders about continuing developments and future matters. The guide covered the following topics:

i. New developments

- Bill C-25: Amendments to the *Canada Business Corporations Act; and*
- Proxy advisory firm updates: Institutional Shareholder Services and Glass, Lewis & Co.

ii. Continuing developments

- Diversity developments;
- Environmental, social and governance (ESG) developments;
- Ontario's *Capital Markets Act;*
- New self-regulatory organization replaces the Mutual Fund Dealers Association of Canada and the Investment Industry Regulatory Organization of Canada; and
- Virtual shareholder meetings.

iii. Upcoming developments

- SEDAR+; and
- Changes to climate disclosure.

iv. Possible developments

- Recommendations from the Capital Markets Modernization Taskforce Final Report;
- Access equals delivery; and
- Changes to National Instrument 43-101 – *Standards of Disclosure for Mineral Projects* – Consultation exercise underway.

# Canadian securities regulators publish detailed data for 8th annual review of representation of women on boards in Canada

The CSA reported a modest uptick, as compared to its prior year's report, in the overall percentage of women on boards and in executive positions. However, in light of the ever-increasing focus on ESG factors, there appears to be an opportunity for more significant growth for issuers that actively plan to address this particular factor, as well as the potential for practical consequences for an issuer that fails to adequately address any lack of gender diversity on its board or within its management.

The CSA collected data based on a review sample of 625 issuers (out of the 792 issuers subject to the related disclosure requirements) with year-ends between December 31, 2021, and March 31, 2022, and who filed their information circulars or annual information forms by July 31, 2022. From the data collected by the CSA in this sample, it appeared that the total number of board seats occupied by women continued to increase year-over-year, from 11% in year one to 24% in year eight. In this year's report, CSA noted that 24% of board seats were held by women, an increase from 22% recorded in the last report and 7% of the chairs of boards were women, up from 6% in the prior year. Perhaps more notable is that 45% of the vacated board seats were filled by women, a significant improvement from 35% in the prior year. With respect to senior management positions, 19% of issuers had a woman CFO, up from 17% recorded in the last report, while 70% of issuers had at least one woman in an executive position, up from 67% in the prior year. The percentage of women CEOs remained unchanged at 5%.

The number of women on boards and in executive positions also varied by industry. Manufacturing, real estate and utilities industries had the highest percentage of issuers, with one or more women on their boards, while mining, oil and gas and biotech industries had the lowest percentage of women on boards. For women in executive positions, utilities, manufacturing and retail industries had the highest percentage of issuers with one or more women in executive positions, while mining, technology and oil and gas industries had the lowest percentage of issuers with one or more women in executive positions.

The CSA observed that issuers who set targets for the representation of women on their boards had a greater proportion of board seats held by women. On average, issuers that adopted board targets had 30% of their board seats held by women, compared to 20% for issuers without targets. However, only 39% of issuers adopted targets for the representation of women on their board, and only 4% of issuers adopted targets for the representation of women in executive officer positions.

The CSA noted that one of the key objectives of the disclosure requirement, for women on boards and in executive officer positions, is to "increase transparency for investors and other stakeholders regarding the representation of women on boards and in executive officer positions, and the approach that issuers take in respect of such representation." The CSA also noted that, although its review of the disclosure was completed primarily to identify key trends, rather than to perform a qualitative assessment of compliance with requirements, issuers generally provide their disclosure in different ways, and the format and content may vary from issuer to issuer.

# Everything you need to know about clawback policies

The US Securities and Exchange Commission (SEC) adopted new and amended rules, effective January 27, 2023, governing the recovery or clawback of certain awarded incentive-based compensation from current and former executive officers. Additionally, amendments have been proposed to the CBCA relating to the disclosure of clawback policies. As more companies adopt clawback policies, it is important to consider what a clawback policy is, the purpose of such policy, requirements to adopt a clawback policy, legal restrictions related to clawing back of compensation and best practices.

A clawback policy allows an employer to reclaim compensation previously paid to certain executives. Clawback policies typically relate to compensation paid under incentive-based plans and provide for recovery of compensation paid based on fraudulent or inaccurate financial measures. Generally, these policies are used by public companies as a risk mitigation tool to promote the integrity and accountability of their executives. The purpose of a clawback policy is typically to enable a company to recoup incentive-based compensation paid to an executive based on certain financial metrics, when it later turns out that the financial statements containing such metrics were flawed, resulting in an overpayment. We note that the new SEC rules require recovery (absent limited circumstances) in the event of a restatement of financial statements regardless of any misconduct. While issuers on US stock exchanges are required to have clawback policies for certain executives, there are currently no such requirements in Canada. Under Canadian securities legislation, issuers are required to disclose any policies and decisions related to recovery of compensation in their information circular. A similar requirement has been contemplated for companies governed by the CBCA. In June 2019, Federal Parliament adopted amendments to the CBCA, which will require a company to disclose prescribed information about the "recovery of incentive benefits or other benefits" paid to directors and employees who are "members of senior management." However, these amendments have not yet been proclaimed in force, nor have the regulations been published.

The Innovation, Science and Economic Development (ISED) department proposed that the prescribed information should follow a "disclose or explain" approach where companies indicate whether or not they have a clawback policy, and if not, the reasons why they have not adopted one. If the company does have a policy, it will be required to disclose the policy's objectives and key provisions. Although clawback policies are not currently required in Canada, they are supported by the proxy advisory firms Glass, Lewis & Co. and Institutional Shareholder Services.

Clawback policies are becoming more common among Canadian public companies and with clawback rules in effect in other jurisdictions, support for clawback policies from proxy advisory firms and proposed amendments to clawback disclosure requirements under the CBCA, the adoption of clawback policies in Canada may be further accelerated. Companies with clawback policies should consider all laws applicable to them and tailor their policies and practices accordingly to ensure requisite compliance while still maintaining good governance practices.

# Continued focus on diversity: What you need to know about the CSA's proposed amendments

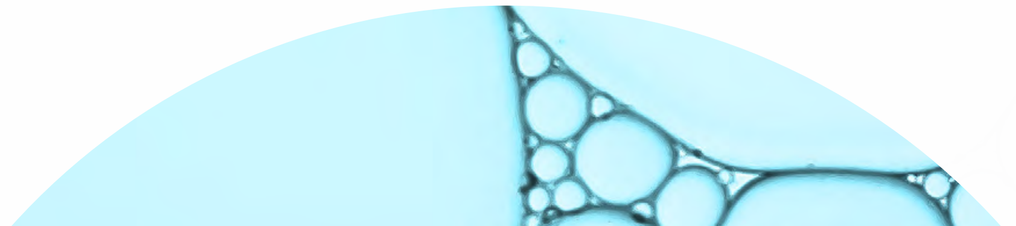
In April 2023, the CSA published a notice and request for comment on proposed amendments to Form 58–101 – *Corporate Governance Disclosure* (Form 58–101F1) and National Policy 58–201 – *Corporate Governance Guidelines* (NP 58–201) pertaining to diversity, board renewal and board nominations (Proposed Amendments). The comment period for the Proposed Amendments was originally scheduled to close in July 2023. In response to stakeholder feedback indicating that it would be beneficial to have additional time to review the proposals and prepare comments, the CSA extended the comment period to September 29, 2023, and extended it further in October 2023 with no published proposed date for the final format of the Proposed Amendments.

The primary objectives of the Proposed Amendments are to: (i) increase transparency concerning diversity, including diversity beyond women, on boards and in executive officer positions, (ii) provide enhanced, decision-useful information to investors to enable them to better understand how diversity connects to an issuer's strategic decisions and (iii) provide guidance to issuers on corporate governance practices related to board nominations, renewal and diversity. The Proposed Amendments are based on two different approaches towards diversity disclosure, "Form A" and "Form B." Generally, both forms are aligned with respect to disclosure requirements for board nominations and board renewal; however, they each reflect different approaches to disclosing diversity-related disclosure. While the CSA is considering adapting the Proposed Amendments for venture issuers, as of the date of this publication the forms would only to be applicable to non-venture issuers. The key difference between the two forms is that Form B mandates disclosure on historically underrepresented groups, whereas Form A mandates disclosure only on women's representation and is based on a view that securities regulators should not select categories of diversity; it instead defers to an issuer to determine what additional categories or aspects of diversity they wish to implement, based on the company's business strategy. Form B takes a similar approach to the CBCA by mandating disclosure on specific "historically underrepresented groups," while Form A follows a less prescriptive approach. At this time, securities regulatory authorities in British Columbia, Alberta, Saskatchewan and the Northwest Territories support Form A, while the Ontario Securities Commission supports Form B. The remaining securities regulatory authorities have not currently expressed a preference on the public record for either of the proposed alternatives.

The proposed changes to NP 58–201 would provide enhanced guidelines for all issuers related to board nominations and would introduce guidelines on board renewal and board diversity, which complement the diversity disclosure requirements contained in Form 58–101 F1. The proposed NP 58–201 would address the following:

- The responsibilities of the nominating committee;
- The adoption of a written policy respecting the director nomination process;
- The use of a composition matrix;
- Effective succession planning and the mechanisms of board renewal, including term limits;
- The adoption of a written diversity policy; and
- Setting targets for achieving diversity on the board and in executive officer positions.

Similar to the approach of two forms, the CSA has proposed two versions of NP 58–201 for comment, "Policy A" and "Policy B." The guidelines pertaining to board nominations and board renewal are harmonized in both Policy A and Policy B, but in regards to board diversity, the guidelines differ to match the corresponding versions of Form 58–101F1 for the diversity-related disclosure requirements.



# The Canadian Securities Administrators clarify the meaning of LIFE

On June 1, 2023, the CSA issued Staff Notice 45-330: *Frequently Asked Questions about the Listed Issuer Financing Exemption* (the Staff Notice). The Staff Notice provided clarity on certain questions from issuers and market participants with respect to the recently introduced listed issuer financing exemption under National Instrument 45-106 – *Prospectus Exemptions* (the Exemption). The Staff Notice addressed, among other things, the ambiguity surrounding qualification requirements for the Exemption, as well as the types of securities and permissible offering methods.

The Exemption permits established reporting issuers with equity securities listed on a Canadian stock exchange to issue free trading securities without filing a prospectus. Subject to certain limitations, the Exemption allows issuers to raise up to the greater of CA$5 million and 10% of its market capitalization (up to a maximum of CA$10 million) in a 12-month period.

The Staff Notice clarified that an issuer must be listed on a recognized Canadian stock exchange at the time of the distribution in order to qualify for the Exemption - it is not sufficient to be listed either concurrently with or following the proposed offering.

An issuer cannot be in default of any Canadian securities legislation requirements when relying on the Exemption. In particular, an issuer cannot qualify for the Exemption if it:

- Is on a list of defaulting issuers in Canada;
- Has been advised by staff at the securities regulators that the issuer must refile a non-compliant disclosure document as part of a prospectus or continuous disclosure review; or
- Has otherwise defaulted on its requirements under applicable Canadian securities laws.

The CSA also confirmed that subscription agreements are not required in connection with an offering completed under the Exemption.

To rely on the Exemption, an issuer must reasonably expect to possess the funds necessary to operate its business for the 12 months following the completion of the offering. Consequently, issuers are required to have a minimum offering amount that is sufficient for it to continue its operations and achieve its objectives for 12 months. In order to determine the funding requirements, an issuer must consider the costs of each business milestone, projected operating cash flow, offering costs, its working capital or deficiency and any committed sources of additional funding.

The Staff Notice confirmed an issuer can close an offering using the Exemption in multiple tranches, however, the amount raised by the issuer upon closing of the first tranche must be sufficient to meet its business objectives and liquidity requirements for 12 months. In addition, an issuer must complete the final tranche of the offering no later than 45 days after announcing the offering.

The issuance of flow-through shares is permissible under the Exemption (including the newly expanded “super flow-through” critical mineral exploration tax credits). Charitable flow-through shares are also permissible, provided all of the conditions of the Exemption are satisfied and the end purchaser is named in the report of the exempt distribution filed subsequent to the closing of the offering.

The Staff Notice confirmed that the Exemption does not apply to the distribution of broker’s warrants as they are not a listed equity security. Underwriters may continue to receive broker’s warrants but will need to do so under a separate exemption that may be subject to applicable hold periods.

The CSA is of the view that the Exemption does not apply to the distribution of securities to satisfy outstanding debt since one of the conditions of the Exemption is that the issuer cannot solicit an offer to purchase before issuing and filing a news release announcing the offering and the issuer will not be able to satisfy this condition if it already has bona fide debt outstanding with the intended "purchaser."

The Staff Notice clarified that, while the Exemption may be utilized for bought deal offerings, it raises potential concerns for securities regulators with respect to:

- Who the purchaser is and whether the purchaser receives all of the rights available under the Exemption;
- What happens when the underwriter has to purchase leftover securities; and
- Underwriters soliciting purchasers before the filing of a news release and prescribed offering document required under the Exemption.

In order to comply with the requirements of the Exemption, the CSA expects that the bought deal offering must be completed in such a way that the actual purchaser maintains all the rights contemplated under the Exemption and will be named in the exempt distribution report filed subsequent to closing of the offering. If the underwriter is required to purchase any leftover securities under the bought deal offering, then the CSA expects that such securities would be acquired by the underwriter under a separate prospectus exemption. Furthermore, the bought deal offering must be marketed in such a way that the offering complies with the requirements of the Exemption which prohibits any solicitation prior to the issuance of the news release and prescribed offering document.

The Staff Notice confirmed that an issuer may use the Exemption concurrently with other prospectus exemptions, such as the accredited investor exemption. However, the Exemption cannot be used in Québec concurrently with a prospectus offering in another province due to the potential of avoiding the translation requirements for the prospectus and continuous disclosure documents in Québec.

Under the Exemption, the offering, combined with all other distributions made by the issuer under this same exemption during the 12 months immediately before the date of the issuance of the news release announcing the offering, cannot result in an increase of more than 50% in the issuer's outstanding listed equity securities, as of the date that is 12 months before the date of the news release (not as of the date of the news release - this may limit the use of the Exemption for an issuer that recently completed a reverse takeover). The Staff Notice confirmed that any listed securities issuable on the exercise of warrants distributed in the offering are included when calculating this 50% limit. However, the exercise price of such warrants is not included in the maximum dollar amount calculation.

# Canadian securities regulators extended the comment period on proposed changes to corporate governance disclosure practices and guidelines

The proposed amendments to Form 58-101F1 *Corporate Governance Disclosure* of National Instrument 58-101 *Disclosure of Corporate Governance Practices* and proposed changes to National Policy 58-201 *Corporate Governance Guidelines* were published on April 13, 2023, and the comment period was originally scheduled to close on July 12, 2023. In response to stakeholder feedback indicating that it would be beneficial to have additional time to review the proposals and prepare comments, the CSA further extended the comment period to September 29, 2023.

However, on October 3, 2023, the CSA provided an update, delaying the proposed amendments' path to adoption (CSA Update). The CSA Update provided that the goals of the proposed amendments in streamlining disclosure requirements and reducing regulatory burden while maintaining strong investor protection will be "best achieved when combined with a model for electronic access to information." As a result of comments received on the access equals delivery model, the CSA "anticipates publishing a revised access model for continuous disclosure in due course" and advised that the proposed amendments will not be implemented until an access model is chosen.

The CSA Update did not specify whether the proposed amendments will be subjected to further revisions and publication for additional comments, nor when the proposed amendments are proposed to take effect. However, the CSA advised that they "will ensure reporting issuers are provided with sufficient time to transition to any new forms and requirements."

# A renewed focus on emerging trends and key drivers of change: Ontario Securities Commission's 2023 – 2024 Statement of Priorities

The Ontario Securities Commission (OSC) published its Statement of Priorities (Statement) for the fiscal year ending March 31, 2024. The Statement set out four strategic goals the OSC is intending to focus on, above and beyond its fundamental core regulatory operations, providing stability, transparency and continuity in the regulation of Ontario's capital markets.

Promoting confidence in Ontario's capital markets among market participants and investors is a core mandate of the OSC, and it is committed to carrying this mandate through a balanced policy framework, access to information to make informed investment decisions, exercising effective compliance oversight and pursuing timely and vigorous enforcement. The initiatives that the OSC indicated it will prioritize in 2023-2024 include:

- Advance work on ESG disclosures for reporting issuers;
- Consider broader diversity on boards and in executive roles for reporting issuers;
- Incorporate Indigenous Peoples' issues and perspectives into CSA policy work;
- Complete the development of the over-the-counter derivatives regulatory framework; and
- Strengthen investor safeguards.

The OSC continues to modernize its regulatory framework to respond to developing trends and changing business models and practices and anticipate changing market conditions and investor needs. The OSC stated it plans to balance investor protection while reducing undue barriers to innovation and capital formation through some of the following initiatives:

- Additional oversight and enforcement in the crypto asset sector;
- Streamline periodic disclosure requirements for corporate finance and investment fund reporting issuers;
- Complete the transition to SEDAR+; and
- Enable the OSC to deliver effective regulation.

# Canadian Securities Administrators provide a statement on proposed climate-related disclosure requirements

The CSA welcomed the publication on June 26, 2023, of the International Sustainability Standards Board (ISSB)'s first two sustainability disclosure standards: IFRS S1 *General Requirements for Disclosure of Sustainability-related Financial Information* and IFRS S2 *Climate-related Disclosures* (together, the ISSB Standards). In their statement, the CSA commended the ISSB "for developing a global framework for investor-focused disclosure that is responsive to market demand for more consistent and comparable disclosures." The CSA stated they are encouraged by the ISSB's proposed capacity building efforts to support adoption of the ISSB Standards. The CSA also highlighted the June announcement by the Canadian Sustainability Standards Board (CSSB) that it is now operational, having appointed a quorum of members. The CSA stated that it "looks forward to engaging and collaborating with the CSSB with respect to the ISSB Standards."

CSA members are responsible for developing climate-related disclosure requirements for reporting issuers in Canada. CSA staff noted that they intend to conduct further consultations to adopt disclosure standards based on ISSB Standards, with modifications considered necessary and appropriate in the Canadian context. A further market update from the CSA will follow in the coming months ahead.

The ISSB Standards are intended to provide a global baseline for sustainability disclosures. The ISSB Standards are voluntary but are expected to have a significant impact on the development of mandatory sustainability and climate disclosure regimes in Canada and abroad. We note that the CSA have indicated they are supportive of a global baseline for sustainability disclosures, while advocating that the standards should phase in and scale disclosure requirements to accommodate smaller issuers. See our Insight on 10 key aspects of the standards at: https://www.dentons.com/en/insights/articles/2023/july/5/international-sustainability-standards-board

# Five things you need to know when a Canadian securities commission requests information in connection with an investigation

For publicly listed companies in Canada, there may come a day when you receive a request for information from a provincial securities commission in connection with a securities investigation. Below are five important considerations to keep in mind as you navigate and respond to any information request from your securities commission.

i. What is the nature of the request?

ii. What action needs to be taken immediately?

iii. What is the extent of the required disclosure?

iv. Will the disclosure be used in other proceedings?

v. What can I learn from the investigation?

While responding to a securities investigation can be stressful and disruptive, it also provides companies with an opportunity to assess their operations and identify any areas for improvement or further examination. Parties should review not only the issues that are the subject of the investigation, but also ancillary or underlying processes, procedures and controls that might have contributed to those issues. Proactive steps to thoroughly review the circumstances that resulted in the investigation will almost certainly result in a stronger organization emerging at the conclusion of the investigation.

# SEDAR+ goes live

The System for Electronic Data Analysis and Retrieval + (SEDAR+) launched on July 25, 2023, replacing the previous filing system known as the System for Electronic Data Analysis and Retrieval (SEDAR). There was an approximate five-day period (the Transition Period) in which SEDAR was closed for filing and SEDAR+ came online, beginning at 11 p.m. ET on July 20, 2023, and ending at 7 a.m. ET on July 25, 2023.

As the result of the Transition Period, the CSA issued a blanket order to exempt a person or company from filing or delivering certain documents through SEDAR+ (the SEDAR+ Exemption) during the Transition Period. The SEDAR+ Exemption issued by the CSA stipulated that persons or companies may delay the filing or delivery of documents no later than two days after the earlier of the launch of the date on which SEDAR+ becomes available for filing, or July 28, 2023. The CSA's view is that SEDAR+ became available for filing on July 25 despite reported technical issues. Through to July 31, 2023, the CSA removed late filing fee charges.

# Ontario Court of Appeal clarifies the meaning of “material change” and discussed disclosure obligations in context of securities class actions

In recent decisions in *Markowich v. Lundin Mining Corporation* (Markowich) and *Peters v. SNC-Lavalin Group Inc.* (Peters), the Court of Appeal for Ontario provided guidance on the requirement to disclose a “material change” under Canadian securities legislation in the context of motions for leave to proceed with proposed securities class actions.

Under section 1(1) of the *Securities Act* (Ontario), a “material change” is “a change in the business, operations or capital of the issuer that would reasonably be expected to have a significant effect on the market price or value of any securities of the issuer.” In contrast, a “material fact” is “a fact that would reasonably be expected to have a significant effect on the market price or value of the securities.” Pursuant to section 75 of the *Securities Act* (Ontario), a material change must be disclosed as soon as practicable, but a material fact does not need to be disclosed forthwith.

The Court of Appeal explained that the distinction between “material fact” and “material change” does not relate to the magnitude of the change but, rather, depends on whether the change was external to the company as opposed to whether the change was in the business, operations or capital of the company. The Court of Appeal held that changes in the business, operations or capital of a company do not include external factors outside of the company’s control or changes in quarterly results on their own. Further, a “material change” does not need to rise to the level of effecting a company’s ability to conduct its business, as the motion judge erroneously held. Rather, losing the ability to conduct operations is a circumstance, among other potential circumstances, that constitutes a change in the operations of an issuer.

The expansive definition of “change” adopted by the Court of Appeal has the potential to increase liability for a failure to disclose “material changes” pursuant to the *Securities Act* (Ontario). A change does not need to rise to the level of physical impairment of operations before it must be disclosed. Rather, reporting issuers should consider whether any change to a company’s business, operations or capital that is not external or outside of the company’s control should be disclosed immediately to protect against potential shareholder claims. *Markowich* illustrates that even if there is an external influence upon the company’s business, operations or capital, if it affects production and results in an internal decision to adjust operations, such a decision may fall within the definition of change and if material, the information must be disclosed. In contrast, *Peters* illustrates that while a change in risk may constitute a change within the meaning of the *Securities Act* (Ontario), if a reporting issuer’s risk has not changed after an event has occurred, it may not fall within the definition of change and thus, will not need to be disclosed forthwith. Nonetheless, it is prudent to consider the expansive and generous approach to the meaning of change when considering whether to make disclosure.

# Are you in conflict?

The CSA along with the Canadian Investment Regulatory Organization (CIRO) introduced Client Focused Reforms (CFR) in October 2019, which came into force in December 2021, with the goal of improving the client-registrant relationship. The CFR amendments were introduced to help align the interests of security advisers, dealers and representatives (registrants) with the interests of their clients, improve outcomes for clients and clarify the nature and characteristics of the client-registrant relationship.

The main areas of focus of the CFR include:

- Conflict of interest - Registrants must address material conflicts of interest in the best interest of the client. This includes identifying existing and reasonably foreseeable conflicts and having policies to address them.
- Know Your Client (KYC) - Enhancements to KYC obligations ensure that registrants gather complete and current information about their clients. This includes understanding the client's investment needs, financial circumstances, risk tolerance, time horizon, and investment objectives.
- Know Your Product (KYP) - Registrants must understand the securities they recommend.
- Suitability - Registrants must ensure that any investment action taken on behalf of a client is suitable for the client, based on KYC and KYP principles.
- Relationship disclosure - Clients must be provided with easy to understand and complete information about fees, charges, and other key aspects of their relationship with the registrant.
- Restrictions on referral arrangements - There are new requirements and restrictions related to referral arrangements to ensure that they are in the best interest of the client.
- Enhanced training - The reforms require that registrants have sufficient training to understand and comply with their new regulatory obligations.

In July 2023, the CSA and the CIRO published joint Staff Notice 31-363 *Client Focused Reforms: Review of Registrants' Conflicts of Interest Practices and Additional Guidance* (31-363 Notice).

The 31-363 Notice summarized the findings of the CSA and CIRO's review of conflicts of interest practices at 172 firms across various registration categories. It provided additional staff guidance to registrants including suggested practices to comply with the conflicts of interest requirements under the CFR.

Deficiencies noted in the review included failure to identify one or more material conflicts of interest, inadequate controls to address certain material conflicts of interest and inadequate or outdated written policies and procedures relating to conflicts of interest.

The CSA and CIRO advised that they will conduct additional reviews through the remainder of 2023 to assess registrants' compliance with other obligations under the CFR, including the KYC, KYP and suitability requirements.

# Well-known and here to stay: The CSA proposes a permanent WKSI regime in Canada

The CSA proposed amendments to National Instrument 44-102 – *Shelf Distributions*, Companion Policy 44-102CP and National Policy 11-202 – *Process for Prospectus Reviews in Multiple Jurisdictions* (WKSI Proposed Amendments) which, if implemented, would provide an expedited shelf prospectus regime to well-known seasoned issuers (WKSIs).

A WKSI is an issuer that, among other criteria, has either (1) outstanding listed equity securities that have qualifying public equity of CA$500 million or (2) at least CA$1 billion aggregate amount of non-convertible securities, other than equity securities, distributed under a prospectus in primary offerings for cash, not exchange, in the last three years. Under the regime, WKSIs that satisfy the qualification criteria and conditions are exempt from certain base shelf prospectus filing requirements, including the requirement to file a preliminary base shelf prospectus and having such prospectus undergo a regulatory review (WKSI Framework). WKSIs are also permitted to omit certain disclosure from the base shelf prospectus (e.g., aggregate dollar amount of securities that may be raised under the prospectus) and under the WKSI Proposed Amendments, will benefit from an automatic prospectus receipt effective for a period of 37 months after its deemed issuance, subject to an annual confirmation. The WKSI Proposed Amendments will enhance, and make permanent, the temporary local blanket orders (the WKSI Temporary Orders) adopted by the Canadian provinces and territories on January 4, 2022.

As of December 15, 2023, 47 issuers have utilized the WKSI Framework. This relatively low adoption rate may be due to the state of the Canadian capital markets since the adoption of the WKSI Temporary Orders and is not necessarily indicative of issuers' appetite for using the WKSI regime. We expect that the improvements to the WKSI Framework under the WKSI Proposed Amendments will be particularly attractive for dual-listed issuers and ultimately increase the use of the framework.

The WKSI Proposed Amendments enhance the WKSI Framework by providing transaction certainty for issuers – because prospectus receipts are deemed to be automatically issued. This change reduces the regulatory burden for WKSIs as well as certain transaction risks associated with the traditional base shelf prospectus, enabling WKSIs to respond quickly to changing market conditions. For high market-cap companies, this means taking advantage of favourable market conditions or narrow market openings.

The lengthening of the seasoning period for issuers to qualify as a WKSI from 12 to 36 months may reduce the number of eligible issuers. This more stringent qualification adds further protection for the public by providing investors with a lengthier period of disclosure documentation and in turn may justify the greater period that a base shelf prospective may stay active (from 25 to 37 months). The WKSI Proposed Amendments also contain an annual confirmation requirement, but this does not appear to be an onerous undertaking for any WKSI if simply incorporated to an issuer's annual information form.

The WKSI Proposed Amendments are currently subject to a 90-day comment period and stakeholders were invited to provide comments in writing on or before December 20, 2023.

# The Ontario Securities Commission reviews use and regulation of artificial intelligence in capital markets

The Ontario Securities Commission (OSC) published Artificial Intelligence in Capital Markets: Exploring Use Cases in Ontario (the Report), which explores the use of artificial intelligence (AI) in Ontario's capital markets. The Report was jointly developed by the OSC and Ernst & Young LLP and highlights current AI use cases, benefits and challenges, and aims to raise awareness of both the opportunities and risks associated with the use of AI in capital markets.

# Overview of SEDAR+ since July launch

Since the initial launch of SEDAR+ in late July, the CSA, issuers and other stakeholders have been adapting to the transition from SEDAR.

In the first months after launch, users encountered a number of performance issues, technical difficulties and search function challenges. The number of transition related inquiries to the CSA service desk were very high. Extended maintenance periods were initially disruptive. However, with constructive feedback provided by users, continued system maintenance and expanded service hours, enhancements have been made to the initial functionality of the SEDAR+ system.

Currently SEDAR+ is stable and since early August has been operating 24 hours a day, seven days a week with limited planned maintenance windows. The CSA has advised that quarterly updates, enhancements to existing functionality and the addition of new features will further improve the user experience for capital market participants.

# 2024 securities and corporate finance trends ahead

## Generative AI and technology advances in 2024

The rapidly evolving application and development of generative AI will continue to affect business in many areas. The adoption and advancements of this technology are accelerating significantly. Focus on governance and regulatory guardrails alongside the rapid growth of this technology is expected to continue in 2024. We anticipate that new and expanded technology offerings will continue to attract significant investment in the capital markets and will be a key factor affecting businesses and the securities and corporate finance industry.

## Down-rounds in private equity

Although the venture capital market has been one of the more resilient areas in 2023, raising capital in the current market conditions has generally proven challenging. Increased borrowing costs and continued rising interest rates have resulted in down-round equity financings. We anticipate that as high interest rate conditions persist, the down-round trend will continue as a necessary means for venture capital financing.

## Higher for longer funding costs and financial distress in the broader market

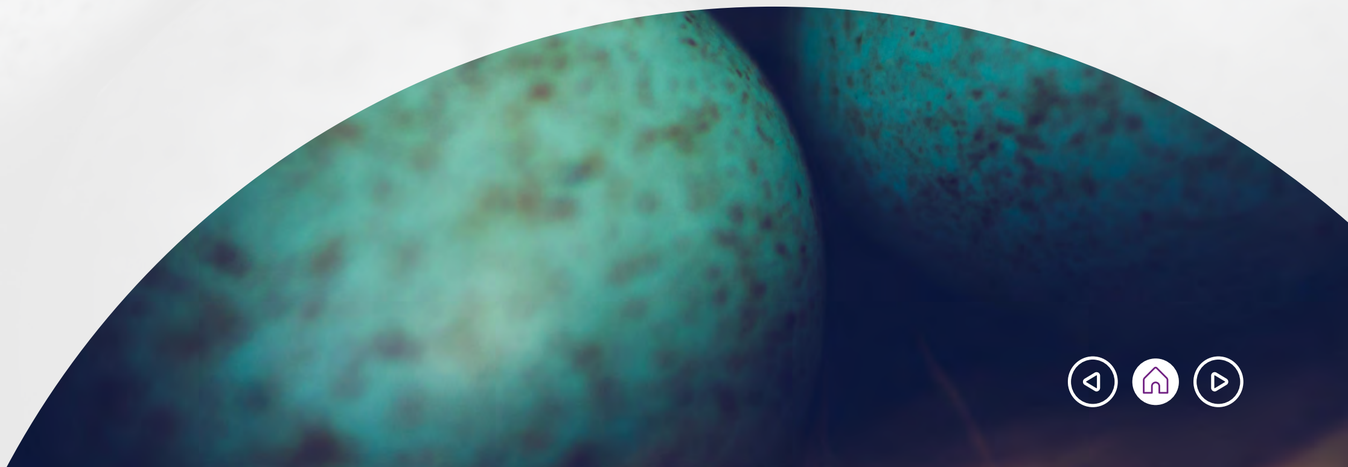
Updated predictions from economists in Canada continue to see weaknesses in the country's economy through 2024. Further interest rate hikes may occur, although many predict interest rates will stabilize in 2024. That said, market experts expect inflation to stubbornly persist throughout 2024. We anticipate that the effects of the higher interest rate environment will continue to affect deal structures and strategies in 2024.

## ESG

ESG factors will continue to represent a variety of risks and opportunities for Canadian companies in 2024. We anticipate ongoing and expanding focus on each of the aspects comprising ESG for public company disclosure, governance and compliance. One key piece of legislation that [took effect January 1, 2024] is the *Act to enact the Fighting Against Forced Labour and Child Labour in Supply Chains Act and to amend the Customs Tariff* (the Modern Slavery Act). The first set of reports are due May 31, 2024. In addition to ESG considerations on supply chains and human rights, legal obligations surrounding supply chain and human rights appear to be here to stay and will play an increasing role in compliance requirements for Canadian companies alongside existing ESG considerations outlined by the CSA and stock exchanges.

## Shareholder activism

Shareholder activism has become a reality of the modern corporate landscape. Corporate activists now include hedge funds, which often combine efforts in a coordinated manner, social action groups, institutional investors and sometimes competitors or adversaries in litigation. We anticipate ongoing activist measures - including board seat battles, say-on-pay proposals and opposition to proposed transactions – will continue to be a feature of the capital markets in 2024. In addition, activist swarming has become increasingly evident, with multiple activists making uncoordinated but public demands on boards or company leadership to affect various changes, a phenomenon we expect to continue in 2024.



## Climate-related disclosure

Development of the CSA's proposed climate disclosure regulation, National Instrument 51-107 *Disclosure of Climate-related Matters* (NI 51-107) (the Climate Disclosure Proposals) has been paused since 2022. The Climate Disclosure Proposals 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 will require issuers to make disclosure in the following areas:

- 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;
- 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;
- Risk management: Describe its processes for identifying, assessing and managing climate-related risks and how these processes are integrated into overall risk management; and
- Metrics and targets: Describe its metrics used to assess climate-related risks and opportunities and targets used to manage these risks and opportunities.

As with ESG, Dentons anticipates that continued and increased focus will be placed on climate disclosure and compliance with the evolving standards.

## Diversity disclosure

As noted above, regulatory amendments have been proposed by the CSA to address diversity disclosure. Companies should prepare for the changes ahead with respect to the proposed amendments, in whatever form they may ultimately be, Form A or Form B (for non-venture issuers), or Policy A or Policy B (for all issuers). While issuers have started to address diversity, there is an opportunity for significant changes, as well as the potential for consequences to issuers who fail to adequately address any lack of diversity on their boards or within their management.

## Continued rise of private markets

We expect private capital (including private equity, venture capital, private wealth and crowdfunding) will continue to play a more significant role in the Canadian capital markets in 2024. As more companies will seek to exit the public markets and the number of IPOs decrease during ongoing economic uncertainty, we believe that private capital will be a strong source of viable financing alternatives.

## Strategic buyers and restructurings

While companies with strong financials and proven track records will attract capital investment, we anticipate that the increasingly difficult market conditions, coupled with investment focus on generative AI technology, will ultimately result in restructuring and insolvency for certain companies. We anticipate that strategic buyers will be able to take advantage of these challenging conditions in 2024.

## Regulation of crypto assets and trading will continue to be in the spotlight

Cryptocurrency regulation has been an area of increased focus. The CSA initially published a basic framework for the regulation of crypto assets in Canada in 2023, and we believe that regulation and legislative focus on crypto assets and trading will continue in 2024.

## Cybersecurity risks and regulations on incident reporting

The Securities and Exchange Commission (SEC) published new cybersecurity breach reporting regulations in 2023 for SEC listed issuers. The SEC final rules are intended to enhance and standardize disclosure regarding cybersecurity risk management, strategy, governance and incident reporting by public companies that are subject to the reporting requirements of the Securities Exchange Act of 1934 (including foreign private issuers). Specifically, the SEC's amendments require current reporting of material cybersecurity incidents and annual reporting of company processes for identifying, assessing and managing material risks from cybersecurity threats; management's role in assessing and managing the company's material cybersecurity risks; and the board's oversight of cybersecurity risks. We anticipate that the SEC regulations may provide a roadmap for reporting regulations for the CSA. Currently, Canadian-listed issuers must provide timely reporting of any material changes by issuing a press release. Given the significant increase in regulator and investor scrutiny of timely and decision-useful information about cybersecurity incidents, we believe that Canadian issuers should take proactive steps to help ensure that they are meeting applicable legal requirements and the expectations of capital markets participants.

## Critical minerals

Demand for minerals and metals continues to grow and we anticipate that there will be increased focus on what are referred to as "critical minerals," those which are essential components in industries such as aerospace, defence, telecommunications, computing and an array of clean technologies such as solar panels and electric car batteries. More than just rare earth elements, critical minerals encompass several minerals and metals critical new technology, including cobalt, copper, precious metals, nickel, uranium, lithium, magnesium and many others. Canadian mining companies will continue to play a key role in the development and extraction of such critical minerals.

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