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Corporate Bulletin

2010 ANNUAL PUBLIC COMPANY FILINGS - NEW DEVELOPMENTS

This Bulletin outlines recent changes in securities laws or guidance that public companies should be aware of as they prepare their 2010 annual filings.

- *new executive compensation guidance (pg 1)*
- *new forward looking information guidance (pg 3)*
- *new CEO/CFO certification guidance (pg 4)*
- *corporate governance and environmental disclosure review (pg 6)*
- *IFRS transition guidance (pg 6)*

EXECUTIVE COMPENSATION REVIEW

In November of 2009, the Canadian Securities Administrators (CSA) published the results of their first review of compliance with the new executive compensation disclosure requirements that came into effect last year (*CSA Staff Notice 51-331*). The CSA identified the following areas for improvement that public companies should consider in preparing their executive compensation disclosure in 2010:

1. Performance Goals

Public companies are required to disclose in their compensation discussion and analysis any performance goals used to determine executive compensation. The CSA found the most significant disclosure issues in this area:

- *Tie to other executive compensation disclosure* – The CSA expects the discussion about performance goals to be tied to the compensation reported in the summary compensation table. For example, if the summary compensation table disclosed a bonus was actually earned by an officer, the compensation discussion and analysis should also describe the actual performance goals achieved in explaining why the bonus was paid.
- *Corporate goals versus individual performance* – The CSA is of the view public companies should clarify the relative importance between corporate level performance goals and individual performance goals in determining an officer's reported compensation.
- *Use of discretion* – Where discretion can be used to either increase or decrease compensation following the initial setting of objective performance goals, the CSA expects public companies to clarify that such goals are only intended to be guidelines and to explain the importance of board discretion in determining the actual bonus paid.

- *Objective measures* – The requirement to quantify objective measures, such as earnings per share, EBITDA, growth in net sales, and operational targets, applies regardless of whether the objective measures are guidelines or hard targets.
- *“Seriously prejudice” exemption* – Public companies are permitted to not disclose specific performance goals if that disclosure would seriously prejudice its interests. However, the CSA is generally of the view that the disclosure of broad corporate level financial performance measures like earnings per share, revenue growth and EBITDA could not seriously prejudice a company’s interests.
- *Undisclosed performance goals* – Where a specific performance goal is not disclosed, the percentage of total compensation relating to the undisclosed performance goal and the difficulty in achieving that goal must be disclosed. In describing the likelihood of achieving a performance goal, the CSA suggests disclosing whether the undisclosed performance goal was achieved in the past or, if the undisclosed performance goal is incrementally more difficult to achieve based on prior year results, then disclosure could emphasize that it is a “stretch” target and is intended to promote enhanced performance year over year.

2. Benchmarking

Any benchmarks used in determining executive compensation are required to be disclosed, and their components explained, in the compensation discussion and analysis. The CSA found a significant number of disclosure issues in this area:

- *Explanation of methodology* – The CSA is of the view that it is insufficient to simply disclose that the compensation practices of a peer group were reviewed and to list components of that group, if there is not also an explanation of how that information was used in decisions about executive compensation. Also, if a company uses different peer groups for different components of compensation or for different officers (for example, a company may use a U.S. peer group to benchmark for U.S. based executives and a Canadian peer group to benchmark for Canadian executives), the company should clearly describe which peer group it used for each component or particular officer.
- *Benchmark group* – The CSA is of the view that a statement that compensation is based in part on the “market practices of companies in similar industries” or “companies of similar size and revenues” is inadequate, if it does not also identify the specific peer companies. The composition of the benchmark group should be disclosed, even if the list is extensive.

3. Performance Graph

Public companies are required to discuss how the trend in the performance graph (that shows the cumulative total shareholder return over the five most recently completed financial years) compares to the trend in the company’s compensation to executive officers over the same period.

The CSA is of the view that it is not appropriate to merely state that there is no specific relationship between executive compensation and the cumulative total shareholder return without any further disclosure. Rather, a public company should specifically describe the trend in executive compensation and describe how that trend compares to the trend in cumulative total shareholder return before indicating that the two trends were not related. The CSA also cautions that the comparison must be over the five-year period of the performance graph (and not limited to the last three years required for the summary compensation table).

The CSA found that the voluntarily practice by some public companies of providing an additional line in the performance graph showing the trend in total compensation was an effective way of comparing compensation trends with total shareholder performance, when combined with a narrative discussion.

4. Summary Compensation Table

Grant date fair value of multi-year awards – Public companies are required to disclose the grant date fair value of share-based awards and option-based awards in the summary compensation table. The CSA cautions that the grant date fair value of these awards must be reported in the year of grant irrespective of whether part or all of the award relates to multiple financial years and payout is subject to performance goals and similar conditions, including vesting, to be applied in future financial years.

Reconciliation to “accounting fair value” – Public companies are required to reconcile any difference between the grant date fair value reported

in the summary compensation table and the accounting fair value of share-based and option-based awards. In doing so, the CSA is of the view that the difference must be stated and explained, including a description of the methodology used to calculate the grant date fair value, a description of the key assumptions and estimates used for each calculation, and an explanation of why that methodology was chosen.

5. Pension plan benefits

For defined benefit plans, the annual lifetime benefit payable at the end of the most recently completed financial year based on years of credited service and actual pensionable earnings must be disclosed. For purposes of quantifying this, the CSA is of the view that public companies should assume at year end that the officer is eligible to receive pension benefits.

6. Termination and change in control benefits

Public companies are required to describe and, where appropriate, quantify the estimated incremental payments and benefits that are triggered by a termination, resignation, change in control of the company or change in an officer's responsibilities. The CSA is of the view it is not sufficient to state that, for example, the CEO would be entitled to a payment equal to three years salary and bonus under an employment contract if terminated. Rather, the actual amount must also be quantified. While not required, the CSA found that a tabular presentation of potential post employment payments was an effective way of disclosing this information.

NEW GUIDANCE ON FORWARD LOOKING INFORMATION REQUIREMENTS

In November of 2009, the CSA published new guidance on forward looking information requirements (*CSA Staff Notice 51-330*). "Forward looking information" refers to statements made about current expectations and views of future events. This guidance is based upon a compliance review conducted by the CSA. Public companies should consider the following in preparing their MD&A, annual information forms, information circulars and any related press releases for 2010:

1. Identification of forward looking information

All material forward looking information must be identified as such. When material forward looking information is identified through a cautionary paragraph at the beginning or end of a disclosure document (in contrast to identifying it throughout the document as it is used or consolidating it in a particular section), the CSA is of the view that readers should be given an indication of the nature of such information so that it can more readily be identified when encountered. The CSA is of the view that identifying forward looking information by merely referring to the words that would typically be found in such information, or by simply stating it is all disclosure relating to the future, will generally be inadequate. Rather, additional more specific information must be provided, e.g.:

"Forward-looking statements included or incorporated by reference in this document include statements with respect to:

- *the Company's acquisition strategy, including acquisition criteria and acquisition benefits;*
- *the Company's goal to sustain or grow production and reserves through prudent management and acquisitions ..."*

The CSA cautions that public companies should avoid including statements that a document contains forward looking information when that is not the case.

2. Disclosure regarding material risk factors and material factors or assumptions

Public companies that disclose material forward looking information are also required to include disclosure that identifies material risk factors that could cause actual results to differ materially. The disclosure must also include material factors or assumptions used to develop the material forward looking information. The CSA provides the following guidance on complying with this requirement:

- either neglecting to discuss the underlying factors or assumptions or simply stating that there were factors or assumptions without identifying them is inadequate;

- while incorporating by reference material risk factors and material factors or assumptions contained in another document is not precluded, public companies should consider whether incorporation by reference, in any particular circumstances, enables a reader to readily inform himself or herself of such factors and assumptions;
- specific material risk factors and material factors and assumptions that are relevant to the particular forward looking information should be disclosed (“boilerplate” disclosure should be avoided); and
- the use of tables and other methods of presentation that clearly link specific material risk factors and material factors and assumptions to the particular forward looking information is encouraged.

3. Updating practices

Public companies are required to discuss in their MD&A events and circumstances that occurred during the MD&A period that are reasonably likely to cause actual results to differ materially from previously disclosed material forward looking information for a period which is not yet complete, as well as discussing the expected differences. Consequently, the CSA cautions that it is inappropriate for a public company to state that it does not assume any obligation to update forward looking information if management’s beliefs, expectations or opinions should change.

4. Explanation of purpose of financial outlook or future oriented financial information

Public companies that disclose future oriented financial information or a financial outlook are required to disclose the purpose of the information and caution readers that it may not be appropriate for other purposes. The CSA cautions that this is in addition to the requirement that material risk factors and material factors or assumptions also be disclosed. The CSA also warns that, for purposes of future oriented financial information or financial outlooks, the use of a cautionary paragraph at the beginning or end of a document will generally not satisfy this requirement.

5. Disclosure regarding goals or targets

The CSA is of the view that a target or goal that may possibly be achieved can constitute material forward looking information and any document containing such goals or targets should contain disclosure that complies with the forward looking information requirements.

6. Impact of the transition to International Financial Reporting Standards

Future oriented financial information and financial outlooks are required to be based on the accounting policies that are expected to be used to prepare historical financial statements for the period covered by the future oriented financial information or the financial outlook. Consequently, public companies should ensure that future oriented financial information or financial outlooks that cover their 2011 fiscal year are based on International Financial Reporting Standards.

CEO AND CFO CERTIFICATION REVIEW

In September of 2009, the CSA published the results of their review of compliance with the CEO and CFO certification requirements (*CSA Staff Notice 52-325*). Public companies should, in preparing their 2010 CEO and CFO certifications and MD&A, consider the following concerns raised by the CSA:

1. Qualifying conclusions about effectiveness

Except for certain limited exceptions (i.e. for proportionally consolidated or variable interest entities or a business acquired less than 365 days before the end of a financial period), certifying officers are not permitted to qualify their assessment in the MD&A that disclosure controls and procedures and internal controls over financial reporting are effective.

The CSA observed that while some public companies concluded that disclosure controls and procedures and internal controls over financial reporting were effective, they also disclosed a “weakness”, “design challenge” or “deficiency”, such as a lack of segregation of duties or a lack of knowledgeable accounting staff in technically complex areas. The CSA is of the view that this type of disclosure is potentially confusing

because it is difficult to discern if such a description constitutes a material weakness relating to internal controls over financial reporting or a weakness in disclosure controls and procedures that is significant. If a limitation is discussed in the annual MD&A, the discussion should avoid any ambiguity about the nature of the limitation by clearly disclosing if the limitation constitutes a material weakness relating to internal controls over financial reporting or a weakness in disclosure controls and procedures that is significant.

The CSA noted that some public companies concluded their disclosure controls and procedures and internal controls over financial reporting were effective because they had procedures for addressing a limitation. In some cases, the discussion did not clarify if a material weakness relating to internal controls over financial reporting or a weakness in disclosure controls and procedures that is significant existed after implementing such procedures. A reader could infer that although there was a material weakness relating to internal controls over financial reporting or a weakness in disclosure controls and procedures that was significant, it was fully addressed at the reporting date due to the implementation of the procedures. If the control deficiencies were fully addressed, the CSA is of the view that the limitation would not exist at the financial reporting date and so need not be described.

The CSA observed that several public companies confused the concepts of “mitigating procedures” and “compensating controls”. A “mitigating procedure” may help to reduce, but does not eliminate, the financial reporting risk that the deficient internal control over financial reporting component failed to address. The CSA is of the view that certifying officers and public companies should not imply that a mitigating procedure eliminates a material weakness and should not conclude that internal controls over financial reporting and disclosure controls and procedures are effective. In contrast to a mitigating procedure, a “compensating control” fully addresses a material weakness and allows certifying officers to conclude that internal controls over financial reporting and disclosure controls and procedures are effective. In the case of a compensating control, the material weakness relating to internal controls over financial reporting or the weakness in disclosure controls and procedures that is significant is fully addressed and there is no associated reporting obligation.

The CSA notes that a lack of segregation of duties is a significant challenge for internal controls over financial reporting. A public company may address this challenge through additional involvement by its audit committee or board of directors. This involvement could represent either a mitigating procedure or a compensating control, depending on the nature or procedures performed by the directors, the volume of transactions and the complexity of the business. The CSA believes that the threshold is high for the additional involvement of the audit committee or board of directors to constitute a compensatory control rather than a mitigating procedure. If a public company has implemented only a mitigating procedure, it should identify the lack of segregation of duties as a material weakness and conclude that internal controls over financial reporting are not effective. The CSA notes that if the certifying officers identify a material weakness in the internal controls over financial reporting, this will almost always represent a weakness that is significant in the disclosure controls and procedures.

2. Amendments to wording on forms

No amendments to the prescribed wording of the CEO and CFO certifications is permitted.

3. Certificate date

CEO and CFO certificates must be dated the same date that the certificates are filed.

4. Venture issuer disclosure

“Venture issuers” (i.e. a public company whose securities are not listed on the TSX, a US exchange or an exchange outside Canada and the US other than London’s AIM market) and their certifying officers can file “basic certificates” that do not include representations relating to internal controls over financial reporting or disclosure controls and procedures. However, if a venture issuer chooses to discuss the design or operation of such controls or procedures in its MD&A or other regulatory filings, the CSA is of the view that it should consider disclosing in the same document that:

- it is not required to certify the design and evaluation of its disclosure controls and procedures and internal controls over financial reporting and has not completed such an evaluation; and
- inherent limitations on the ability of the certifying officers to design and implement on a cost-effective basis disclosure controls and procedures and internal control over financial reporting for it may result in additional risks to the quality, reliability, transparency and timeliness of interim and annual filings and other reports provided under securities legislation.

CORPORATE GOVERNANCE AND ENVIRONMENTAL DISCLOSURE REVIEW

In December of 2009, the Ontario Securities Commission announced that they will be conducting a review of corporate governance disclosure in information circulars (or annual information forms of annual MD&A if applicable) filed by public companies in spring 2010. The Ontario Securities Commission also indicated they will be providing guidance on existing environmental disclosure requirements by December 2010. Public companies should pay particular attention in preparing their corporate governance and environmental disclosure for 2010 annual filings.

TRANSITION TO INTERNATIONAL FINANCIAL REPORTING STANDARDS

The CSA has published guidance on the disclosure they expect in MD&A in connection with International Financial Reporting Standards (IFRS) replacing current Canadian accounting standards for public companies on January 1, 2011 (*CSA Staff Notice 52-320*). As a public company moves closer to the date of changeover to IFRS, the CSA expects that more meaningful quantified information on the impact of the changeover be provided.

A public company should have discussed in earlier MD&A the timing and key elements of its changeover plan, including:

- choice of policies permitted under IFRS;
- changes to technology and data systems;
- changes to internal and disclosure controls;
- financial reporting expertise and training;
- changes to business activities, such as hedging activities; and
- changes to other matters influenced by GAAP measures, like debt covenants and compensation arrangements.

For the financial year ended December 31, 2009, a public company should provide in its MD&A an update on its changeover plan as discussed in earlier MD&A. In addition, the major identified differences between the public company's current accounting policies and those it is required or expects to apply in preparing IFRS financial statements should be discussed. While such information may be narrative only at this stage, it should enable an investor to understand the key elements of the financial statements that will be affected by the changeover. In identifying the accounting policies that are required or expected to apply under IFRS, a public company should consider IFRS as they exist at the date of the MD&A.

For the interim and annual periods for the financial year ended December 31, 2010, public companies will be expected to continue to provide updates on their changeover plans, describe in more detail key decisions and changes made, and provide quantified information about the impact of the changeover if available.

This summary is necessarily of a general nature and should not be construed as the giving of legal advice. You are urged to seek legal advice on areas of specific interest or concern.

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