

CONTINUOUS DISCLOSURE: WHAT'S NEW FOR 2010

Every year we are asked what has changed to the continuous disclosure requirements for Canadian public companies. The purpose of this Bulletin is to answer that question. We should, however, warn those officers of reporting issuers responsible for continuous disclosure matters that they should not just update last year's continuous disclosure documents. You should always refer to the source of the obligations to ensure that you are complying with all of the requirements. For example, changes to the circumstances of a reporting issuer could give rise to the obligation to respond to an item of required disclosure that was inapplicable last year.

The continuous disclosure rules for Canadian reporting issuers have not changed substantially for 2010 for reporting issuers whose last year end was on or after December 31, 2008. However, the Canadian Securities Administrators (the CSA) has reported on its reviews of certain continuous disclosure obligations and reporting issuers should keep these reports in mind. Furthermore, we expect that there will be increased scrutiny on several key areas this year, including:

- executive compensation;
- the transition to International Financial Reporting Standards;
- forward-looking information;
- certification of annual and interim filings; and
- corporate governance and environmental sustainability.

Executive Compensation

Most reporting issuers have made their initial filings under the expanded executive compensation disclosure requirements, introduced last year for financial years ended on or after December 31, 2008, and the balance will do so this year. The CSA provided guidance on the new requirements based on a targeted review of executive compensation disclosure made by 70 issuers in [CSA Staff Notice 51-331 Report on Staff's Review of Executive Compensation Disclosure](#), published

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on November 20, 2009. Overall, the CSA found that most companies reviewed generally met the requirements but that their disclosure could be improved.

The major focus of the CSA Staff Notice is on the compensation discussion and analysis requirement. The CSA noted several common deficiencies related to the disclosure of performance goals, disclosure and explanation of compensation benchmarking and the link between compensation and performance, including failing to:

- tie the discussion of performance goals to compensation as disclosed;
- distinguish between the relative importance of corporate-level goals and individual performance objectives in determining compensation;
- explain the use of discretion to modify the outcome of objective performance goals;
- quantify the objective performance measures used, such as earnings per share, EBITDA, net sales growth or operational targets;
- disclose historical objective performance measures through inappropriate reliance on the exemption from disclosing information that would seriously prejudice the interests of the company;
- explain the compensation benchmarking methodology used;
- disclose the identities of companies in the peer group used for benchmarking; and
- specifically compare the trend in executive compensation to the trend in cumulative total shareholder return.

The CSA also found common deficiencies in compliance with the summary compensation table requirements, including:

- failing to disclose the full fair value of share-based awards in the year of the grant irrespective of subsequent performance goals for payout;
- failing to reconcile grant date fair value with the accounting fair value for awards; and
- altering the format of the summary compensation table to de-emphasize total compensation.

Failing to disclose the annual lifetime benefit payable under pension plans at the end of the most recently completed financial year and failing to describe, explain and quantify estimated termination and change of control payments for named executive officers on an individual basis were also significant recurring comments.

The CSA indicated that it will continue to review executive compensation disclosure as part of its continuous disclosure review program.

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Transition to International Financial Reporting Standards (IFRS)

The Canadian Accounting Standards Board has set January 1, 2011 as the effective date for the change from Canadian generally accepted accounting principles to IFRS. Accordingly, for issuers with a calendar year-end, 2010 will become the comparative year for their first IFRS financial statements.

CSA Staff Notice 52-320 *Disclosure of Expected Changes in Accounting Policies Relating to Changeover to International Financial Reporting Standards*, published May 9, 2008, sets out CSA staff's views regarding the disclosure required under the existing rules regarding the change in accounting standards to IFRS. In particular, section 1.13(a) of the management's discussion and analysis (MD&A) form requires:

- a description of the new accounting standard;
- disclosure of methods of adoption permitted and the method the issuer expects to use;
- a discussion of expected effects of the issuer's financial statements; and
- disclosure of the potential effects on the issuer's business.

The Staff Notice suggests that, as an issuer moves closer to the date of changeover to IFRS, it should provide increasingly meaningful quantified information regarding the impact of the new accounting standard. In particular, discussion in the annual and interim MD&A of the key elements and the timing of the plan for the changeover was expected beginning three years prior to the change.

Key elements of the changeover plan that should be considered and discussed include:

- accounting policies, including options available under IFRS, and implementation decisions;
- internal controls over financial reporting;
- disclosure controls and procedures, including investor relations and external communications;
- financial reporting expertise, including training requirements; and
- business activities that may be influenced by GAAP measures, such as debt covenants and hedging arrangements.

For issuers with a calendar year-end, CSA staff expect additional disclosure in the annual MD&A for the year ended December 31, 2009 regarding the major identified differences between the issuer's current accounting policies and those expected to apply under IFRS. For the 2010 calendar year, updated discussion of the issuer's preparations is required. Furthermore, under IFRS it will be necessary to prepare quantified information about the impact of IFRS on each line item presented in the financial statements for the 2010 interim and annual periods. If an issuer has quantified information about the impact of IFRS on the key line items in its financial statements available when it prepares its interim and annual MD&A for the 2010 financial year, the issuer should include this information in its MD&A.

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Forward-Looking Information

CSA Staff Notice 51-330 Guidance Regarding the Application of Forward-Looking Information Requirements under National Instrument 51-102 Continuous Disclosure Obligations, published on November 20, 2009, discusses the results of the CSA's continuous disclosure review of compliance with the requirements for forward-looking information that came into effect on December 31, 2007.

Identification of forward-looking information

Reporting issuers are required to identify forward-looking information as such in their disclosure. There is no prescribed method for identifying forward-looking information. However, CSA staff expressed concern regarding the practices of using a cautionary paragraph to identify forward-looking information either: (i) by the reference to the types of words that would typically be found in a forward-looking statement; or (ii) by defining all disclosure relating to the future as forward-looking. The Staff Notice suggests that these approaches would not, without additional detailed disclosure, enable a reader to readily identify material forward-looking information contained in the document. Specifically identifying the nature of the material forward-looking information by its subject or in a table is suggested as a more effective means of identification.

Disclosure regarding material risk factors and material factors or assumptions

Issuers are required to disclose the material risk factors that could cause actual results to differ from any material forward-looking information provided, as well as the material factors or assumptions used to develop that forward-looking information. CSA staff observed various instances of issuers failing to discuss underlying factors and assumptions or merely stating that there were such factors and assumptions without identifying them.

Given the prevalence of forward-looking information that issuers are required to provide in order to satisfy their continuous disclosure obligations, particularly the requirements of MD&A, the obligation to identify material factors and assumptions underlying each material statement of forward-looking information is difficult to satisfy while providing readable plain language disclosure. The CSA suggests that issuers consider using tables to specifically link material forward-looking information to the material underlying factors and assumptions. This approach would require considerable judgment by the issuer as to the materiality of both the forward-looking information and the underlying factors and assumptions that are specifically disclosed. As issuers may wish to err on the side of caution, the tabular approach suggested would likely include all forward-looking statements. It does not appear that issuers typically provide this level of detailed disclosure. As a result, this may be an area that the CSA continues to focus on in its ongoing continuous disclosure reviews.

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The CSA suggests that the disclosure of underlying factors and assumptions may require additional consideration for forward-looking information that is incorporated by reference and cautions against the use of boilerplate or generic disclosure.

Updating forward-looking information

CSA staff suggest that general statements to the effect that an issuer assumes no obligation to update any forward-looking information contained in a document are not appropriate given the obligation under section 5.8(2) of National Instrument 51-102 to update previously disclosed forward-looking information.

Explanation of purpose of, and cautionary language related to, financial outlook or future-oriented financial information

The requirement to disclose the purpose of financial outlook or future-oriented financial information and to specifically caution readers that it may not be appropriate for other purposes is in addition the obligation to disclose material factors and underlying assumptions. CSA staff suggest that general disclosure at the beginning or the end of a document will not satisfy this obligation.

Disclosure regarding targets or goals

Targets or goals disclosed by an issuer could fall within the definition of forward-looking information, since issuers would generally only disclose targets or goals that are possible events, conditions or results of operations. CSA staff suggest that an issuer should consider disclosing the purpose of a target or goal if it determines that it does not constitute forward-looking information.

Impact of the transition to IFRS on future-oriented financial information or financial outlook

Any financial outlook or future-oriented financial information provided by an issuer is required to be based on the accounting standards that the issuer intends to use for its financial statements. Accordingly, any such information that relates to periods subsequent to January 1, 2011 should be based on accounting policies that are consistent with IFRS.

Certification of Interim and Annual Filings

The current version of National Instrument 52-109 *Certification of Issuer's Annual and Interim Filings* was adopted effective December 15, 2008. [CSA Staff Notice 52-325 Certification Compliance Review](#), published on September 11, 2009, indicates that 62% of the 198 non-venture issuers and 53 venture issuers reviewed by CSA staff had some level of non-compliance with the certification requirements. The common deficiencies identified in the Staff Notice include:

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- changes to the prescribed wording of the certificate forms;
- failing to include full disclosure in annual MD&A regarding the certifying officers' conclusions regarding the effectiveness of disclosure controls and procedures (DC&P) and internal controls over financial reporting (ICFR), including both the design and operation of DC&P and ICFR;
- qualifying conclusions about the effectiveness of DC&P or ICFR by discussion of limitations that are not described as a material weakness relating to ICFR or a weakness in DC&P;
- limiting the scope of design of DC&P and ICFR without including the required disclosure in the issuer's MD&A;
- failing to file certificates in connection with refiled financial statements, MD&A or annual information forms;
- inappropriately dating certificates;
- failing to file certificates concurrently with the later of the filing of the issuer's AIF (if required) or financial statements and MD&A; and
- venture issuers failing to include the required cautionary language in MD&A or the prescribed note to reader in certificates.

We understand that CSA staff are continuing to review compliance with the certification requirements and expect that certification will remain a significant focus for the CSA in 2010. Accordingly, issuers should be particularly mindful of these requirements in connection with their annual filings for 2009.

Corporate Governance and Environmental Sustainability

Although the CSA has decided not to proceed with proposed changes to the corporate governance regime published for comment on December 19, 2008, as set out in CSA Staff Notice 58-305 Status Report on the Proposed Changes to the Corporate Governance Regime, corporate governance continues to be a focal point for the debate on financial and securities regulation. New regulation in this area remains under active consideration and issuers' disclosure under the current regime will be monitored closely.

On December 18, 2009, the Ontario Securities Commission released OSC Notice 51-717 Corporate Governance and Environmental Disclosure as well as a Report to the Minister of Finance on the OSC corporate sustainability initiative, which was mandated by a resolution of the Ontario legislature. OSC staff conducted stakeholder consultations and received feedback that the current corporate governance disclosure requirements were adequate, but that compliance was poor. The OSC recommended maintaining the current corporate governance disclosure rules at this time and focusing on improving compliance through increased compliance reviews and education. In particular, the OSC recommended that the compliance reviews assess the disclosure filed by issuers in the spring of 2010.

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The OSC report also considered the adequacy of the current materiality-based environmental disclosure requirements. They recommended providing additional guidance to issuers by building on the guidance set out in OSC Staff Notice 51-716 *Environmental Reporting*, published on February 29, 2008, and propose to conduct further reviews. The OSC suggests that a further notice could be published in late 2010 to allow issuers time to incorporate the guidance into their annual filings for 2010. Accordingly, we expect that the reviews will be based on annual disclosures for 2009 filed in the spring of this year.

Please contact the authors or your usual lawyer in **BLG's Securities & Capital Markets Group** if you would like further information regarding these requirements.

Paul G. Findlay
(416) 367-6191
pfindlay@blgcanada.com

David R. Surat
(416) 367-6195
dsurat@blgcanada.com

BLG's Securities & Capital Markets Group Leaders are:

Paul A.D. Mingay	National Leader	(416) 367-6006	pmingay@blgcanada.com
Derrick Armstrong	Calgary Regional Leader	(403) 232-9430	darmstrong@blgcanada.com
Fred Enns	Montréal Regional Leader	(514) 954-2536	fenns@blgcanada.com
Jeremy S. Farr	Ottawa Regional Leader	(613) 787-3511	jfarr@blgcanada.com
Alfred L.J. Page	Toronto Regional Leader	(416) 367-6020	apage@blgcanada.com
Nigel P. Cave	Vancouver Regional Leader	(604) 640-4161	ncave@blgcanada.com

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Calgary

1000 Canterra Tower
400 Third Avenue S.W.
Calgary, Alberta, Canada
T2P 4H2
tel: 403 232-9500
fax: 403 266-1395

Montréal

1000 de La Gauchetière
Street West
Suite 900, Montréal,
Québec, Canada H3B 5H4
tel: 514 879-1212
fax: 514 954-1905

Ottawa

World Exchange Plaza
100 Queen St., Suite 1100
Ottawa, Ontario, Canada
K1P 1J9
tel: 613 237-5160
1-800-661-4237
legal fax: 613 230-8842
IP fax: 613 787-3558

Toronto

Scotia Plaza,
40 King Street West
Toronto, Ontario, Canada
M5H 3Y4
tel: 416 367-6000
fax: 416 367-6749

Vancouver

1200 Waterfront Centre
200 Burrard Street,
P.O. Box 48600
Vancouver, British Columbia,
Canada V7X 1T2
tel: 604 687-5744
fax: 604 687-1415

Waterloo Region

Waterloo City Centre
100 Regina Street South,
Suite 220
Waterloo Ontario N2J 4P9
tel: 519 579-5600
fax: 519 579-2725
IP fax: 519 741-9149