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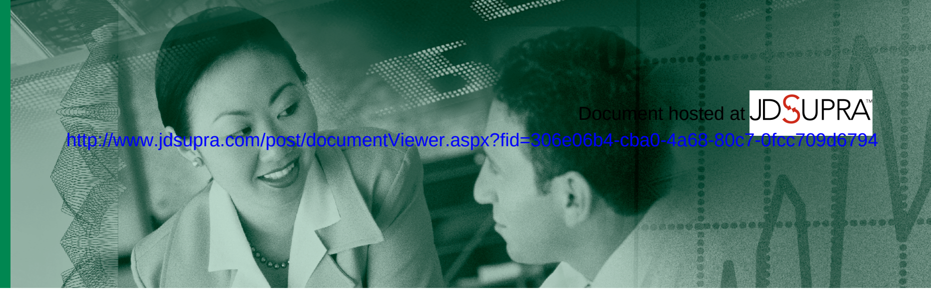

SecuritiesBrief

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In This Issue

In this issue Paul Collins and Stephen White introduce the new executive compensation disclosure rules coming into effect at the end of the year. Christos Gazeas has contributed three separate articles that discuss management cease trade orders, filing material contracts and a policy relating to the defence for misrepresentations in forward looking information. Daniel Dex and Tom Hakemi look at the recent SEC ban on naked short selling. John Conway tackles changes to financial reporting. Karim Lalani discusses recent SEC amendments for foreign private issuers. Barbara Collins introduces new TSX rules relating to special purpose acquisition companies.

We also introduce you to five new members of our securities team and bring you up-to-date on some of our activities.

Six Things You Need to Know About the New Executive Compensation Disclosure Rules

Paul Collins

Stephen White

The Canadian Securities Administrators recently announced that amendments to rules governing disclosure of executive compensation will become effective and apply to fiscal years ending on or after December 31, 2008. The new *Form 51-102F6 – Statement of Executive Compensation* (the **New Rule**) makes extensive changes to the existing disclosure requirements. Here are six things to consider as you begin to prepare your 2009 management proxy circular:

1. Determination of the Highest Paid Executive Officers

An issuer must continue to disclose all compensation paid to its CEO, CFO and its three other highest paid executive officers (collectively referred to as "named executive officers" or **NEO**s). The current rule determines the highest paid NEOs based solely on annual salary and bonus. Under the New Rule, all compensation, including the value of awards of shares, options and grants under other incentive plans, as well as the value of certain perquisites, must be added to salary and bonus to determine total compensation and therefore the highest paid executive officers. Perquisites, including property or other personal benefits which are not made available generally to all employees and which in aggregate total either $50,000 or 10% of a particular executive officer's salary, will be included in the calculation and must be disclosed. The calculation will exclude pension plan benefits, cost-of-living payments for foreign assignments and amounts paid or payable as a result of the termination of employment. The current $150,000 minimum income threshold has been maintained for determining whether any of the highest paid officers may be excluded from the disclosure but will be applied to total compensation (and not be limited to salary and bonus as under the existing rule).

2. No Restatement of Prior Compensation Disclosure

The New Rule will not require NEO compensation disclosure for financial years ended before December 31, 2008. Accordingly, summary compensation disclosure from prior years need not be restated under the New Rule nor repeated in the form previously reported under the existing rule. In each subsequent year, an additional year of disclosure will be added to the NEO Summary Compensation Table such that, following completion of financial years ending on or after December 31, 2010, three-year comparative information will again be included in the Summary Compensation Table.

3. Compensation Discussion and Analysis

Each issuer must include compensation discussion and analysis (**CD&A**) in its proxy circular. While the concept of CD&A is similar to that underlying the existing rule's Report on Executive Compensation, the level of explanation in the CD&A must be significantly more detailed and specific than what has generally been the practice in the past. In the manner that management discussion and analysis is intended to explain the disclosure included in financial statements, CD&A is intended to explain the executive compensation disclosure which appears elsewhere in the proxy circular. CD&A must describe and explain all significant elements of compensation awarded, earned, paid or payable to NEOs. This will include a discussion of the compensation program's objectives, what the program is designed to reward, a description of each element of compensation and why the issuer chooses to pay each element, how the amount of each element of compensation is determined (including any formula used), and how the decisions made fit within the issuer's overall compensation objectives. Benchmarks used, including other companies used in the benchmark group and the selection criteria, must be identified. Where targets are based on objective criteria (such as, for example, share price or earnings per share), the targets must be disclosed. However, disclosure of specific quantitative or qualitative performance-related factors need not be disclosed where public disclosure of the criteria has not already occurred and where such disclosure would, in the view of a reasonable person, seriously prejudice the issuer's interests. The perceived likelihood of achieving any undisclosed goals must be disclosed. Disclosure that describes only the process of determining compensation without explaining the specifics of that actually paid or payable will not be adequate.

As in the past, an issuer must include a performance graph reflecting its cumulative shareholder total return for the previous five years as compared to a broad equity market index. In addition, an issuer must now include in the CD&A a discussion of how the trend shown by the performance graph compares to the trend in the level of executive compensation paid over the same period.

Certain issuers need not prepare the performance graph, including those listed only on the TSX Venture Exchange, those who have issued only debt securities or non-convertible, non-participating preferred shares, and those who have been reporting issuers in Canada for less than 12 months before the end of their most recently completed fiscal year.

Under the New Rule, all compensation, including the value of awards of shares, options and grants under other incentive plans, as well as the value of certain perquisites, must be added to salary and bonus to determine total compensation and therefore the highest paid executive officers.

4. Grant Date Valuation of Share and Option Awards

The New Rule will require disclosure of the dollar value of share-based and option-based awards to NEOs. The dollar value given must be based on the grant date fair value of the award. This value frequently may be different from the accounting fair value used for financial statement purposes, since the accounting fair value amount is amortized over the service period and adjusted at year end as required. The amount of, and the reason for, any difference in the fair values must also be disclosed. Issuers must also disclose the methodology (for example, the Black-Scholes-Merton or the binomial lattice model), assumptions and estimates used in the calculation and the reasons for selecting the particular methodology.

5. Enhanced Disclosure of Termination and Change of Control Payments and Benefits

Enhanced disclosure will be required for any contracts, plans or arrangements which provide for the possibility of an NEO receiving a payment or other benefit upon the termination of employment, retirement or change of control. The New Rule will require disclosure of the circumstances which could trigger a payment obligation, together with an estimate of the amount of incremental payments and benefits resulting from each of the triggering circumstances. For purposes of estimating uncertain amounts, an issuer must assume that the triggering event occurred on the last day of its most recently completed financial year. Disclosure of any conditions in favour of the issuer, such as non-competition, non-solicitation and confidentiality obligations of the recipient, must also be provided.

6. Director Compensation Disclosure to be Individualized and Expanded

The New Rule will require detailed disclosure of all compensation received by each director, other than those directors who are also NEOs and whose compensation is included in the NEO compensation disclosure. The disclosure must be included in a table similar to the NEO Summary Compensation Table and must include the amount of all fees earned, the value of awards of shares, options and grants under non-equity incentive plans, pension benefit values and the amount and nature of all other compensation earned by the director in any capacity, including as a consultant to, or as an employee of, the issuer or any subsidiary.

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How to Mitigate the Damage From a Looming Continuous Disclosure Default

Christos Gazeas

Imagine that you are the chief executive officer (**CEO**), chief financial officer (**CFO**) or a director of a reporting issuer. Now imagine that you have just realized that your company will fail to meet its periodic continuous disclosure obligations. You can be certain that this default will result in a general cease trade order (**CTO**) being issued, effectively halting all trading in the securities of the issuer and bringing with it a large group of disgruntled investors and damage to the issuer's reputation.

What can you do if you anticipate the issuer will fail to meet a periodic continuous disclosure deadline? You can limit the damage of a default by applying for a management cease trade order (**MCTO**) in accordance with National Policy *12-203 Cease Trade Orders for Continuous Disclosure Defaults* (the **Policy**), which was introduced on September 1, 2008. The MCTO will prohibit management and specific insiders from trading in the issuer's securities but not affect other security holders.

Scope of the Policy

The Policy effectively replaces CSA Staff Notices 57-301 and 57-303 and Ontario Securities Commission Policy 57-603. Generally, the Policy outlines the criteria that the CSA will utilize in deciding if a default or deficiency merits the issuance of a CTO or MCTO. The Policy applies to defaults or deficiencies with respect to the following periodic continuous disclosure obligations (**Specified Requirements**):

- annual or interim financial statements, management's discussion and analysis, and management reports of fund performance;
- annual information forms; and
- certification of filings under Multilateral Instrument 52-109 *Certification of Disclosure in Issuers' Annual and Interim Filings*.

Non-periodic disclosure obligations, such as a material change reports, information circulars or technical disclosure required for mineral projects, are not governed by this Policy; however, issuers should be aware that, in certain circumstances, a regulator may choose to use the Policy as guidance.

When will default result in a CTO or MCTO?

The Specified Requirements help protect investors by ensuring they are provided with essential information that assists them in making informed decisions about the securities of a reporting issuer. The disclosure ensures that confidence is maintained in the integrity and fairness of capital markets. While the Canadian Securities Administrators (**CSA**) recognize that an issuer's failure to comply with the filing deadlines may be due to circumstances outside of its control, the overall concern with investor protection justifies, in the CSA's view, the threat or issuance of a CTO (as it provides a strong incentive to issuers to prevent a default or diligently rectify it). In the absence of an application for an MCTO, the principal regulator, usually the regulator where the issuer's head office is located, will generally issue a CTO for a Specified Requirement default.

There are key differences between a CTO and MCTO. A CTO will generally be issued where the issuer is not likely to rectify the default within a short period of time and where the circumstances leading to default are likely to continue, such as may be the case with issuers that no longer have an active business, are insolvent, or have lost a majority of their board members. A CTO will generally provide that no person or company may trade in or acquire the securities of the defaulting issuer. This can have dramatic consequences for an issuer, including the loss of the ability to access capital, deterioration of the issuer's goodwill, and investors who are angry because they are unable to sell their securities.

On the other hand, an issuer is eligible to apply for an MCTO if it demonstrates that it has a history of complying with continuous disclosure obligations, that the default will be rectified quickly (usually two months) and is not likely to be recurring. In addition the issuer must:

- be generating revenue or, if it is in the developmental stage, actively seeking business opportunities;
- have a significant number of directors, and the financial and human resources to rectify the default in a timely fashion;
- be listed on a Canadian Stock Exchange and not be thinly traded; and
- not be a defaulting issuer for any reason other than the default at issue.

Essentially, the MCTO is part of a 'voluntary' process where only management and specific insiders will be subject to the cease trade order. Unlike a CTO, an MCTO offers the significant advantages of allowing non-management and non-insider investors to continue to trade in the securities of an issuer and continued access for the issuer to financing. This can limit the damage a continuous disclosure default may have on an issuer's reputation. The principal regulator, if it considers an MCTO appropriate, retains the discretion to subject members of the board or other persons or companies to the MCTO.

Applying for an MCTO

An application to the principal regulator should be made two weeks in advance of the default, or if this deadline is missed despite the use of reasonable diligence, the application should be accompanied by an explanation for the delay. The application for the MCTO should include:

- a description of how the issuer satisfies the eligibility criteria;
- the identification of the default, the reasons for the default, and the anticipated duration of the default;
- a detailed remediation plan to remedy the default, along with a realistic timetable for doing so;
- consent of the parties subject to the MCTO;
- an undertaking of the issuer to refrain from acquiring securities from, or issuing securities to, insiders or employees, except if legally obligated; and
- a description of the issuer's blackout policies and other policies and procedures relating to insider trading.

An MCTO will not be issued until a default announcement is filed by the issuer, which the CSA expects to occur at least two weeks prior to default. As soon as an issuer determines that it will not meet the Specified Requirement deadline, it must determine whether the default or the events leading to the default constitute a material change. If so, a news release and material change report must be filed. If the material change report contains all the information required in a default announcement, the issuer need not issue a separate default announcement.

Once an MCTO is issued, the issuer must also file default status reports every two weeks providing updates on matters such as the progress in rectification of default or failure to meet the rectification plan. Failure to file the default status reports will result in a CTO being issued. An issuer may omit confidential information from the default announcement or default status report if the issuer reasonably considers the disclosure to be unduly detrimental to the interests of the issuer.

Once an MCTO is issued, the issuer must also file default status reports every two weeks providing updates on matters such as the progress in rectification of default or failure to meet the rectification plan. Failure to file the default status reports will result in a CTO being issued.

Consequences of a CTO or MCTO

A CTO or MCTO can not only damage the reputation of a reporting issuer, it can also sully the reputation of promoters, directors, CEOs or CFOs of issuers for 10 years after such an order. These individuals are required to disclose in certain public filings whether, at any time in the past 10 years, they were a director, CEO or CFO of any company that was subject of an MCTO or CTO that was in effect for at least 30 consecutive days while they held their office, or which MCTO/CTO resulted from an event that occurred while they held their office. This disclosure is required even if the director, CEO or CFO was not named in the MCTO. A CTO and MCTO must be disclosed by:

- directors or executive officers in annual information forms and long form prospectuses;
- proposed directors in an information circular relating to the election of directors; and
- promoters in a short form prospectus.

In 2007 the Ontario Securities Commission issued 104 CTOs for failing to comply with continuous disclosure filing requirements, with the majority being issued for failing to file financial statements and management discussion and analysis on time. Approximately 75% of all cease trade orders resulted from the failure to file annual filings, and 25% resulted from failure to file interim filings. The disproportionate amount of CTOs issued for annual filings is likely a reflection of the additional preparation required and difficulties that reporting issuers encounter in obtaining auditor approval of their financial statements within the applicable filing deadlines.

Implications

The possibility of having any type of CTO issued against a reporting issuer underscores the importance of meeting the Specified Requirements. While management is involved in the 'hands on' day-to-day activities of an issuer, the reality for many directors reflects more of a 'hands-off' approach. Nonetheless, directors must make it a priority to ensure they are apprised of the issuer's progress towards meeting the Specified Requirement filing deadlines by implementing a tickler system or equivalent. Failure to implement these processes puts promoters, CEOs, CFOs and directors at risk of being stigmatized and embarassed over disclosing a past default in public filings.

Should a default occur, issuers should monitor trading by management and other insiders and remind them of blackout periods and other related insider trading procedures and policies because of the increased risk that they may have access to material undisclosed information that would have been available to the public, if not for the default or deficiency.

This article provides a general summary of the key elements and consequences of the Policy. Please contact us should you wish to receive further details regarding the Policy, assistance with the preparation of an MCTO application, default announcement or default status report, or have further questions regarding the consequences of MCTOs.

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Special Purpose Acquisition Corporations

Barbara Collins

TSX introduces new listing rules

The Toronto Stock Exchange (**TSX**) recently proposed new rules to allow the listing of special purpose acquisition corporations (**SPAC**) —publicly traded shell companies that raise funds to be used to acquire an undetermined business. At the time of its formation and initial public offering, the SPAC has no business. SPACs have been used in the United States (listing on the NYSE, NASDAQ and AMEX) and in Europe (listing on the Euronext and the London Stock Exchange's AIM market).

Fundamentals

Formation and Initial Public Offering

A SPAC is formed by founders, generally executives and sophisticated investors, who form the management of the SPAC. The founders provide the initial funding for the SPAC by taking up at least a 10% equity interest in the SPAC. Although there is no maximum on the founders' initial investment, the TSX has stated that more than 20% may be excessive. Shares held by founders are subject to restrictions on transfer prior to the acquisition of a business (**Required Acquisition**) by the SPAC. The TSX may impose escrow on founders' shares after the Required Acquisition.

The SPAC must complete an initial public offering (IPO) that raises a minimum of $30 million at a price of at least $5 per security. The IPO securities can be common shares or units consisting of common shares and warrants. Any warrants issued will not be exercisable before the Required Acquisition and will expire if no business is acquired.

IPO Proceeds and Conversion Feature

At least 90% of the IPO gross proceeds must be held in trust pending completion of the Required Acquisition. The trust funds may be invested only in certain permitted investments. This ensures sufficient capital is available to make the Required Acquisition. In addition, 50% of the underwriters' commission must be held in the trust, to be released after the Required Acquisition. If no business is acquired or the conversion feature (discussed below) is exercised, the portion of the underwriters' commission held in trust will be released to the securityholders.

Shares issued to non-founders will have a conversion feature that allows a holder who votes against a proposed Required Acquisition to convert his or her shares into a pro rata portion of the IPO proceeds that are held in trust.

Operation of SPAC between IPO and Required Acquisition

A SPAC may pay expenses incurred in operations and in seeking out businesses from the funds raised from the founders, the non-trust portion of IPO proceeds and any interest earned on the IPO proceeds in trust.

A SPAC may raise additional capital by way of a rights offering (90% of the additional funds must be held in trust). A SPAC is not permitted to undertake any debt financing prior to the completion of a Required Acquisition.

SPACs will be reporting issuers and thus are subject to continuous and timely disclosure requirements and corporate governance standards.

A SPAC may not have a stock compensation plan prior to the Required Acquisition. Any plan instituted will be subject to shareholder approval.

Required Acquisition

A SPAC has up to three years to complete a Required Acquisition. The value of the business acquired must be equivalent to at least 80% of the funds held in trust. A SPAC may acquire multiple businesses in order to meet this 80% requirement and to meet additional TSX requirements. Multiple acquisitions must close concurrently.

Shareholders, other than founders, will have the right to vote on each proposed Required Acquisition. The SPAC must provide shareholders with an information circular containing prospectus level disclosure about the business or businesses being acquired. The information circular is vetted by the TSX and the securities regulatory authorities prior to mailing. A SPAC must also file a "non-offering" prospectus with the securities regulatory authorities describing the resulting issuer. This prospectus must be cleared by the regulatory authorities prior to mailing the information circular to ensure consistent disclosure.

The Required Acquisition must be approved by a majority of votes cast at the shareholder meeting. If the Required Acquisition is approved, any shareholder who voted against the resolution may elect to exercise the conversion rights. Since shareholders who exercise conversion rights will be paid out of the trust funds (which would otherwise be applied to the purchase price of a Required Acquisition) a SPAC may need to raise additional funds by way of debt or equity financing in order to close a Required Acquisition which meets the TSX original listing requirements. Such a financing must be completed contemporaneously with or immediately following the closing of a Required Acquisition. A SPAC may provide that a Required Acquisition can be abandoned if more than a specified number of shares are converted, provided that this limitation is disclosed in the information circular and prospectus.

The company resulting from the Required Acquisition must meet the minimum TSX original listing requirements and obtain TSX approval of the listing of the resulting company prior to the completion of the Required Acquisition.

Liquidation and Delisting

If a SPAC does not complete a Required Acquisition within the three year time period, the SPAC must liquidate the funds held in trust. This liquidation must occur within 30 days after the three-year deadline. The funds are distributed to the shareholders, other than the founders, on a pro rata basis. The portion of the underwriters' commission held in trust is forfeited and distributed to the shareholders. Warrants do not entitle the holder thereof to any proceeds from the liquidation. Upon liquidation of the trust, the SPAC is delisted.

Difference from Capital Pool Companies

Canadian investors are already familiar with capital pool companies (CPCs) that trade on the TSX Venture Exchange. CPCs are permitted to raise a relatively small amount of capital (less than $2 million) and do not have shareholder protection mechanisms, such as the conversion and liquidation features. In addition CPC shareholders are entitled to vote on only certain types of acquisitions.

The Future of SPACs

The amendments to the TSX rules to permit SPACs are not yet in effect. The TSX solicited comments on the proposal (the deadline for comments has expired). It is likely that the SPAC rules will be finalized by November 2008.

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Amended SEC Rules for Foreign Private Issuers

Karim Lalani

On September 23, 2008, the United States Securities and Exchange Commission (**SEC**) amended its reporting rules applicable to foreign private issuers (**FPI**). Among other things, the amendments, which are intended to enhance information available to investors:

- allow foreign issuers to assess their eligibility for FPI status annually, rather than continuously;
- accelerate the deadline for filing annual reports on Form 20-F (**Form 20-F Reports**) to four months after year end;
- revise the annual report and registration forms available to FPIs to require disclosure of: (a) changes of, and disagreements with, certifying accountants, and (b) significant differences in corporate governance practices compared to U.S. domestic companies listed on the same exchange; and
- require that financial statements be prepared under Item 18 of Form 20-F (containing all of the information required by U.S. GAAP) in certain circumstances.

Annual Test for Foreign Private Issuer Status

Currently, to utilize the FPI rules and forms, a foreign issuer must assess its eligibility for FPI status at the end of each fiscal quarter and upon completion of certain transactions. The SEC stated that this can result in uncertainty and confusion among investors, for example if the issuer must switch between FPI and domestic reporting forms in the same fiscal year. Accordingly, the amendments require that foreign issuers assess their FPI status annually on the last business day of their second fiscal quarter.

FPIs that determine that they no longer qualify as FPIs must begin using forms prescribed for U.S. domestic companies commencing on the first day of their next fiscal year. These issuers will therefore have six months lead time to transition to domestic forms and applicable reporting requirements.

Conversely, reporting companies that determine that they qualify as FPIs may avail themselves of the FPI reporting regime (such as filing reports on Form 6-K and Form 20-F Reports) immediately upon such determination.

The amendments also require MJDS issuers (Canadian issuers that file registration statements and reports using the multi-jurisdictional disclosure system, or **MJDS**) to assess their eligibility for FPI status as of the last business day of their second fiscal quarter. Currently, MJDS issuers that are eligible to file an annual report on Form 40-F at the end of a fiscal year are presumed to remain eligible to use Forms 40-F and 6-K until the end of their next fiscal year. The amendments now require a Canadian issuer that plans to use MJDS to assess its eligibility for FPI status earlier in the year (i.e. at the end of its second fiscal quarter) and the issuer is required to continue to assess its eligibility to file Form 40-F based on all of the other requirements of that form (such as public float) at the end of its fiscal year.

The amendments now require a Canadian issuer that plans to use MJDS to assess its eligibility for FPI status earlier in the year (i.e. at the end of its second fiscal quarter) and the issuer is required to continue to assess its eligibility to file Form 40-F based on all of the other requirements of that form (such as public float) at the end of its fiscal year.

Canadian issuers are currently required to assess their eligibility to use MJDS registration statement forms at the time of filing. Under the amendments, MJDS issuers that do not qualify as FPIs at the end of their second fiscal quarter would immediately lose the ability to use MJDS registration forms, and would be required to use other FPI registration statement forms.

Acceleration of Reporting Deadline for Form 20-F

Currently, FPIs are required to file Form 20-F Reports within six months after their year end. The amendments will require that FPIs file their Form 20-F Reports within four months after their fiscal year end, regardless of their size.

The SEC believes that a delayed filing deadline for these reports is no longer necessary since technological advances permit companies to process and disseminate information quickly, and investors also evaluate and react to, and expect to receive, information more quickly. In addition, many FPIs are expected to file annual reports with their home jurisdiction securities regulators on a faster time table. The SEC intends to continue to monitor market developments with a view to determining whether to further accelerate the due date for Form 20-F Reports.

Elimination of U.S. GAAP Reconciliation in Financial Statements

Currently, FPIs that list a class of securities on a national securities exchange or register a class of securities under Section 12(g) of the United States Securities Exchange Act of 1934, as amended, without conducting a public offering of those securities (**Non-Offering FPIs**), may provide financial statements in accordance with Item 17 of Form 20-F. In addition, FPIs may provide financial statements in accordance with Item 17 in their Form 20-F Reports.

Item 17 permits the preparation of financial statements and schedules on the basis of accounting principles other than U.S. GAAP, so long as a reconciliation of the financial statements to U.S. GAAP is provided. In contrast, financial statements under Item 18 of Form 20-F must include all of the information required by Item 17 and all other information required by U.S. GAAP and Regulation S-X.

Item 17 permits the preparation of financial statements and schedules on the basis of accounting principles other than U.S. GAAP, so long as a reconciliation of the financial statements to U.S. GAAP is provided. In contrast, financial statements under Item 18 of Form 20-F must include all of the information required by Item 17 and all other information required by U.S. GAAP and Regulation S-X.

Under the amendments, Non-Offering FPIs (in their registration statements) and FPIs filing a Form 20-F Report will be required to provide financial statements under Item 18 of Form 20-F. MJDS issuers, however, may continue to provide financial information on the basis of Item 17 of Form 20-F. Financial statements of non-registrants that are required to be included in a foreign issuer's registration statement or annual report may be presented on the basis of Item 17 as well.

Amendments Relating to Certifying Accountants

Currently, unlike US domestic issuers, FPIs are not required to report changes of, or disagreements with, their certifying accountants in their Form 20-F Reports. Under the amendments, FPIs will be required to disclose in their Form 20-F Reports certain information relating to changes of independent auditors within the issuers' two most recent fiscal years or any subsequent interim period, and information relating to any disagreements with their former independent auditors on any matter of accounting principles or practices, financial statement disclosure or auditing scope or procedure. This information will also be required in FPI registration statements.

Disclosure of Corporate Governance Practices

The amendments will require listed FPIs to disclose in their Form 20-F Reports (or alternatively on their websites) any significant differences in their corporate governance practices from those followed by U.S. domestic companies listed on the same stock exchange. The SEC expects that the enhanced disclosure will benefit investors by facilitating their ability to monitor and assess FPIs' corporate governance practices.

Compliance Dates

The compliance dates relating to the amendments are:

- provision of corporate governance disclosure in Form 20-F Reports – for the first fiscal year ending on or after December 15, 2008;
- disclosure of a change of, or disagreements with, a certified accountant – for the first fiscal year ending on or after December 15, 2009;
- filing of a Form 20-F Report within four months after year end – for the first fiscal year ending on or after December 15, 2011, and
- inclusion of financial statements prepared in accordance with Item 18 of Form 20-F in a Form 20-F Report – for the first fiscal year ending on or after December 15, 2011.

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Are you in Compliance With the Current Material Contract Filing Obligations?

Christos Gazeas

Effective March 17, 2008, amendments to National Instrument 51-102 *Continuous Disclosure Obligations* (**NI 51-102**) and its related Companion Policy changed the disclosure and SEDAR filing requirements related to material contracts entered into by reporting issuers. The amendments limit the use of the "ordinary course of business" filing exemption and restrict the permitted redactions that can be made to a material contract before it is filed on SEDAR. The changes apply not only to all new material contracts, but also to material contracts entered into after January 1, 2002, which are still in effect and were not previously filed.

Key Changes to the Filing Requirements

Prior to March 17, 2008, reporting issuers were not required to file a material contract that was entered into in the "ordinary course of business". Now under NI 51-102, the following six types of material contracts do not qualify for the "ordinary course of business" filing exemption and must be disclosed:

1. a contract to which directors, officers, or promoters are parties, other than a contract of employment;
2. a continuing contract to sell the majority of the reporting issuer's products or services or to purchase the majority of the reporting issuer's requirements of goods, services, or raw materials;
3. a franchise or licence or other agreement to use a patent, formula, trade secret, process or trade name;
4. a financing or credit agreement with terms that have a direct correlation with anticipated cash distributions;
5. an external management or external administration agreement (includes contracts with a third party, the reporting issuer's parent, or an affiliate of the reporting issuer, under which management or other administrative services are being provided to the reporting issuer); and
6. a contract on which the reporting issuer's business is "substantially dependent" — a reporting issuer is "substantially dependent" on a contract if its business depends on the continuance of that contract. For example, a financing or credit agreement providing a majority of the reporting issuer's capital requirements for which alternative financing is not readily available at comparable terms, qualifies as a substantially dependent contract.

Now, NI 51-102 provides a list of items in material contracts that cannot be redacted even if their disclosure would be seriously prejudicial to the reporting issuer or would violate confidentiality provisions, such as debt covenants and ratios in financing or credit agreements, or terms relating to the termination of the material contract.

Before the amendments, if disclosure of a provision in a material contract would be seriously prejudicial to the interests of a reporting issuer or would violate confidentiality provisions, the reporting issuer could redact such provision. Now, NI 51-102 provides a list of items in material contracts that cannot be redacted even if their disclosure would be seriously prejudicial to the reporting issuer or would violate confidentiality provisions, such as debt covenants and ratios in financing or credit agreements, or terms relating to the termination of the material contract. Further, NI 51-102 now requires that, where a redaction is made, the issuer provide a brief one-line description as to the type of information being redacted.

NI 51-102 now specifically stipulates that schedules, side letters, exhibits or amendments to a material contract must also be filed.

Practical Considerations

A contract must be filed on SEDAR if it

- is considered to be material to the reporting issuer,
- has not previously been disclosed,

- was entered into within the most recently completed financial year or, if still in effect, on or after January 1, 2002, and
- does not fall under the 'ordinary course of business' filing exemption.

If the above filing requirements are triggered, the deadline for filing a material contract on SEDAR will be the earlier of: (a) the date a material change report must be filed, if entering into the contract constitutes a material change; and (b) the date of the reporting issuer's Annual Information Form (AIF) or, in the case of a TSX-V issuer, 120 days after its financial year-end.

Reporting issuers must be alert to the new material contract filing obligations for new contracts and should conduct a review of all material contracts entered into after January 1, 2002, which are still in effect and were not previously filed, to ensure they still qualify for the now limited 'ordinary course of business' filing exemption. Contracts that were filed on SEDAR prior to March 17, 2008 do not require review or re-assessment by the reporting issuer.

When filing an AIF, a reporting issuer should consider whether any additional or amended disclosure in the AIF concerning the particulars of a material contract is required, even if the contract has been previously filed. Reporting issuers must also adjust their redaction practices to conform to the amended NI 51-102. In addition, reporting issuers should be cognizant of these new rules when negotiating contracts and avoid unnecessarily including sensitive information.

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XBRL – Tag, You're It: Revolutionizing Financial Reporting

John Conway

In addition to preparing for the implementation of IFRS (International Financial Reporting Standards) on January 1, 2011, Canadian companies should be cognizant of another acronym, XBRL, that stands to revolutionize financial reporting worldwide.

What is XBRL?

XBRL stands for e**X**tensible **B**usiness **R**eporting **L**anguage which is an emerging business reporting language being developed by a non-profit consortium of international companies, organizations and government industries that is designed to make it easier for entities that produce, collect and use financial information to share and analyze financial data.

How does XBRL work?

Instead of treating financial data as a large block of text (as in a standard internet page or a printed document), XBRL applies computer readable identification tags to each individual item of data. The tags provide information about the item, such as whether it is a percentage, fraction, or monetary item. These tags enable computers to recognize the information in an XBRL document, store it, analyze it, exchange it with other computers and display it automatically in a variety of ways for users. XBRL works regardless of the language or accounting standard used by the reporting company, enabling financial data to be compared and analyzed globally between companies using a variety of accounting standards.

What are the benefits?

Through the use of identification tags, XBRL will save users of financial information time and money by eliminating the need to re-key financial data into a spreadsheet (a process prone to error) for comparison and analysis. Entities that collect business data (for example, governments, regulators and financial information companies) and entities that produce or use business data (for example, auditors, company managers, financial analysts and investors) all stand to benefit from XBRL. Once data is gathered in XBRL, different types of reports using varying subsets of the data can be produced with minimum effort. The data can also be checked by software for accuracy.

When will XBRL become mandatory?

Currently, there is no requirement in Canada or the U.S. that financial statements be filed in XBRL format. However, the regulators are moving in that direction.

In the United States, the Securities and Exchange Commission (**SEC**) introduced a voluntary XBRL filing program in 2005 allowing companies to submit XBRL documents as exhibits to their ordinary financial statement filings. There are over 50 companies participating in the SEC's voluntary XBRL filing program. In June of this year, the SEC released a proposal to implement new rules requiring companies to provide their financial statements in XBRL format. The proposed rules are scheduled to be phased-in beginning this fall and will require companies that have a world wide public float of over $5 billion to provide XBRL filings as exhibits to their ordinary filings for periods ending as early as December 15, 2008. The SEC plans to replace the EDGAR (Electronic Data Gathering, Analysis and Retrieval) system with IDEA (Interactive Data Electronic Applications) which will be capable of handling XBRL filings. The launch of mandatory XBRL filings is much further on the horizon for Canadian companies. The Ontario Securities Commission (**OSC**) launched a voluntary XBRL filing program in the spring of last year and currently a handful of companies are participating. At a Canadian Securities Administrators (**CSA**) panel discussion held in September 2008, it was suggested that Canadian regulators will not make XBRL filing mandatory until after Canada converts its accepted accounting standard from Canadian GAAP (generally accepted accounting principles) to IFRS (International Financial Reporting Standards) in 2011. Additionally, a new or updated Canadian electronic filing system will likely be required before XBRL becomes mandatory in Canada as SEDAR, in its current state, does not have the capability to support the amount of XBRL filings that would be filed if XBRL was mandatory. (SEDAR is the official site that provides access to most public securities documents and information filed by public companies and investment funds with the CSA.)

Looking Forward

The CSA and the OSC support the move towards XBRL and believe that it will benefit both Canadian investors and the Canadian capital markets. XBRL could be specifically useful in Canada because of the large number of public companies in Canada with small market capitalization. XBRL will make the financials of these companies much more accessible to analysts and will assist analysts in discovering smaller companies for potential investment.

As XBRL becomes mandatory in increasingly more jurisdictions worldwide (mandatory XBRL filing and an accounting standard conversion were recently simultaneously implemented in Israel at the beginning of this year), Canadian companies that take the initiative and file their financial statements in XBRL may enjoy a competitive advantage in the global marketplace.

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The SEC Bans Naked Short Selling

Daniel Dex

Tom Hakemi

September's upheaval in the financial markets prompted international securities regulators, led by the United States Securities and Exchange Commission (**SEC**), to adopt emergency restrictions on short selling of certain financial stocks. The SEC also enacted emergency measures that effectively banned "naked" short-selling of all equity securities. In support of the SEC's measures and to avoid regulatory arbitrage, the United Kingdom's Financial Services Authority and some Canadian regulators also implemented emergency restrictions on short selling of certain financial stocks. In October, the U.S. and Canadian emergency measures against short sales of financial stocks were allowed to expire, but the SEC took further action to extend its restrictions against naked short sales.

We described the September emergency measures in an article that is now available on our website.[1] In this article, we describe the SEC's ban on naked short selling, which appears to be permanent.

What is Naked Short Selling?

Short selling is the practice of selling securities the seller does not own, with the intention of acquiring the securities (or "covering" the short position) at a lower price in the future. The short-seller traditionally borrows the securities from a dealer for a fee and makes a profit based on how far the price of the security declines before he must pay for the covered securities.

For those unfamiliar with it, short-selling has historically been seen as somewhat of a black art. More recently, it has been blamed for contributing to the recent crisis in financial stocks and institutions. For example, Morgan Stanley's John Mack complained that short sellers wrestled his company's stock to the ground. The second largest pension fund in the U.S. called short-sellers "piranhas" and refused to lend stock to them. New York's Attorney General Andrew Cuomo likened short-sellers to "looters after a hurricane."

In a "naked" short sale, the short seller does not formally borrow the security (i.e. obtain a positive confirmation that the dealer is in a position to lend the shorted securities) before shorting. Furthermore, the short-seller does not meet the standard requirement for settlement by delivery of shares within three days of the trade (**T+3 Settlement**).

The fact that the naked short seller does not borrow the security puts downward price pressure on the security through what is in effect an artificial increase in the supply of that security. In a naked short sale, the short seller is at immediate risk of a buy-in if delivery of the shares is insisted upon by the buyer of the securities sold short. For this reason, naked short selling is often done with a very short-term outlook where price declines are in progress.

SEC Action Against Naked Short Selling

On September 18, 2008, the SEC adopted temporary measures against naked short-selling. Unlike the SEC's restrictions against short sales of certain financial stocks, these measures were not allowed to lapse. On October 14, 2008, the SEC extended these measures by adopting an interim final temporary rule (Rule 204T), effective as of October 17, 2008.

To avoid exacerbating price declines in securities, the SEC's new rule effectively prevents naked short selling by requiring a T+3 Settlement. The ban applies to naked short selling in all stocks, not just financial ones.

To avoid exacerbating price declines in securities, the SEC's new rule effectively prevents naked short selling by requiring a T+3 Settlement. The ban applies to naked short selling in all stocks, not just financial ones.

Under the rule, short sellers and their broker-dealers must deliver shorted securities for clearance and settlement by the close of business within three days of the date of the short sale. If they have not delivered the shares by the settlement date, they must immediately purchase or borrow securities to close out the fail to deliver position no later than the beginning of regular trading hours on the next day. A participant or broker-dealer who fails to comply with this rule may not accept further short sales in that stock, unless it has previously arranged to borrow or has borrowed the security, until the fail to deliver position is closed.

The SEC also adopted a final rule that makes options market makers subject to the T+3 Settlement requirement.

As part of these efforts, on September 18, 2008, the SEC also adopted on a temporary basis a new anti-fraud rule under Section 10(b) of the Exchange Act to address deceptive short selling practices. On October 14, 2008, the SEC made this rule permanent, effective October 17, 2008.

New Rule 10b-21 provides that short sellers who make misrepresentations about their intent and ability to deliver equity securities in compliance with the T+3 Settlement requirements are in violation of the law when they fail to deliver the securities as represented. This rule is intended to flush out the situation where the short seller does not advise the broker that the shares are being sold short but rather directs the broker to sell shares which are not in the account on the basis of an implied promise by the seller to lodge the shares before settlement is required or buy them back and cover at that time.

Canadian Restrictions to Come?

The SEC coordinated some of its recent activity to stabilize markets with the United Kingdom's Financial Services Authority, which passed some similar measures. Canada's financial sector has not been rocked as severely by sub-prime loan related market turmoil and the imperatives for action have not appeared as compelling as they have in the U.S. and perhaps the U.K. With respect to short-selling specifically, Canadian short selling rules require that the short sale may occur only on an "up-tick" trade (that is, one that is higher than the previous trade), which inhibits short selling in a falling market. The SEC did away with its up-tick rule last year, which likely exacerbated the current problem with short-selling in the U.S. Although possible, it is unlikely that Canadian regulators will pass significant, permanent restrictions on short selling, as the current rules appear to address the concerns that led to the restrictions in the United States.

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1. http://www.langmichener.ca/index.cfm?fuseaction=content.contentDetail&id=10265&lid=0

Interpreting the Defence for Misrepresentations in Forward-Looking Information

Christos Gazeas

Forward-looking information is defined by Ontario securities laws to include disclosure about possible events, conditions or results of operations that is based on assumptions about future courses of action and economic conditions. The definition also includes future-oriented financial information typically found in documents such as financial statements or management's discussion and analysis.

Forward-looking information can help shareholders and investors gain an understanding of a company's future prospects, yet the uncertain nature of such information can leave that same company open to potential liability for misrepresentation. The *Securities Act* of Ontario (the **Act**) provides secondary market purchasers with the right to assert a cause of action for misrepresentations in forward-looking information contained in public documents and public oral statements. Recognizing the value of forward-looking information, the Act also provides a defence from statutory civil liability where there is responsible and balanced disclosure about a company's future prospects. On October 3, 2008, the Ontario Securities Commission (**OSC**) adopted Policy 51-604 (the **Policy**), setting out how it interprets certain aspects of section 138.4 of the Act with respect to the defence against misrepresentation in forward-looking information. This Law Note provides a brief summary of the OSC's views from the Policy.

Forward-looking information can help shareholders and investors gain an understanding of a company's future prospects, yet the uncertain nature of such information can leave that same company open to potential liability for misrepresentation.

Defence for Forward-Looking Information

A public document or oral statement containing forward-looking information will be protected from statutory civil liability if:

1. the document or statement contains
   a. reasonable cautionary language identifying the forward-looking information and material risk factors that could cause the projection, forecast or conclusion of the forward-looking statement to differ materially, and
   b. a statement of the material factors or assumptions that were applied in making the forward-looking statement;
2. the risk factors and assumptions appear proximate to the forward-looking information; and
3. there was a reasonable basis for drawing the conclusion or making the forecast or projection.

Oral Statements

The Act recognizes that oral statements require a more flexible approach when determining if the requirements for the defence are satisfied. A public oral statement containing forward-looking information is deemed to have provided the cautionary language and assumptions above, if the speaker states that:

- the oral statement contains forward-looking information;
- actual results could differ materially from a conclusion, forecast or projection;
- certain material factors or assumptions were applied in drawing the conclusion; and
- additional information about the applicable risk factors and assumptions are contained in a 'readily available' document (i.e. a document filed with the OSC) and the oral statement identifies that document.

Further, in appropriate circumstances, the requirements for the defence may be satisfied where a spokesperson introducing the individual making the public statement containing forward-looking information complies with the criteria noted above.

"Proximate" Requirement

Generally, the more closely-tied a risk factor or assumption is to the forward-looking information, the more 'proximate' they should be to one another. Where a closely tied risk factor or assumption does not immediately precede or follow a forward-looking statement, a cross reference or footnote should link them together. This clarification by the OSC recognizes that it is not always practical or desirable to immediately juxtapose cautionary statements with the forward-looking information.

Generally, the more closely-tied a risk factor or assumption is to the forward-looking information, the more 'proximate' they should be to one another. Where a closely tied risk factor or assumption does not immediately precede or follow a forward-looking statement, a cross reference or footnote should link them together.

Reasonable Basis

A determination of whether a company has a reasonable basis for making a forward-looking statement includes consideration of the reasonableness of the assumptions and factors being applied, and the inquiries made and process for preparing and reviewing the forward-looking statement.

Practical Considerations

The defence for a misrepresentation in forward-looking information under section 138.4 of the Act is not applicable to:

1. a document released in connection with an initial public offering, or
2. financial statements.

While the Policy provides guidance only and does not impose any legal requirements, historically the courts have shown great deference to specialized regulatory bodies, such as the OSC, and its guidance would likely be influential to a court.

When making a forward-looking statement a company should be satisfied that its recipient is able to readily:

- understand that there is forward-looking information in the document or statement;
- identify the forward-looking information; and
- inform itself of the material assumptions underlying the forward-looking information and the material risk factors associated with it.

A company need not identify all factors or assumptions applicable to forward-looking information in order to avail itself of the defence, only those considered material. Further, a company only has to identify significant and reasonably forseeable 'material' risk factors that may cause a conclusion, projection or forecast to differ materially. The failure to identify a 'risk factor' that causes forward-looking information to differ materially will not necessarily preclude the use of the defence against misrepresentation.

The Policy also provides that the OSC believes the defence for misrepresentation in forward-looking information does not impose any duty to update forward-looking information beyond what is already required under the securities laws of Ontario.

This law note offers a brief note or comment on an area or point of law that may be of interest.

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New and Announcements

Lang Michener Welcomes New Faces

Casper Bych joined the Vancouver Securities Group as associate counsel in October, 2008 and will focus on the China practice.

Casper Bych
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Amy Chen joined the Vancouver Securities Group as an associate in October, 2008 after articling in Toronto. She will focus on the China practice.

Amy Chen
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Alexis Cloutier joined the Vancouver Venture Capital Group as an associate in May, 2008 after completing her articles. Her practice focuses on transactional, regulatory and general corporate and commercial matters.

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Christos Gazeas joined the Toronto Corporate Finance/Securities Group as an associate in September, 2008, after completing his articles. His practice focuses on mergers and acquisitions, corporate finance, and public company regulation.

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Andrew Tam joined the Toronto Corporate Finance/Securities Group in June, 2008. He practices primarily in the areas of securities, corporate finance and commercial law.

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Recent and Upcoming Events

Mark Skwarok was course leader and moderator at the Federated Press "Second Advanced Securities Compliance Course" held in September, 2008 in Calgary. Mark also participated on the UBC Securities Regulation Panel at the annual meeting of the National Centre for Business Law on October 23, 2008.

Rod Kirkham and **Grant Wong** spoke on October 15, 2008 at a conference on China jointly produced by Lang Michener LLP, Sauder School of Business and Deloitte & Touche LLP.

Gary Floyd spoke on regulation of capital raising for the Simon Fraser University Public Companies Course on October 23, 2008.

Many of our lawyers are participating in the TSX roadshows in the United States and China this year: **Michael Taylor**, **Rod Kirkham**, **Herb Ono** and **Gary Floyd** participated in the TSX 2008 US Campaign in Denver, Minneapolis, Houston and Phoenix; **Stephen Wortley** and **Sandy Wang** participated in the TSX 2008 China Campaign, most recently at the mid-October session in Qingdao, China; **Herb Ono** and **Barbara Collins** participated in the TSX 2008 US Campaign session in San Diego on October 30, 2008, and **Michael Taylor** will participate in the Campaign's sessions in Atlanta and Raleigh later this fall.

Rod Kirkham spoke at the Global Chinese Financial Forum in Dalian, China on October 30, 2008.

Susan Goscoe will chair an OBA breakfast presentation "Canadian Deal Points Study: Deal Terms for Acquisitions of Private Targets". The presentation will take place between 8:00 and 10:00 a.m. at the OBA Conference Centre in Toronto on November 26, 2008.

Leo Raffin will co-chair the upcoming British Columbia CLE Securities Law Update in Vancouver in February, 2009.

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