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Canadian Securities Law News

December 2010
Number 203

GOODBYE BOILERPLATE: CANADIAN SECURITIES ADMINISTRATORS RELEASE GUIDANCE ON ENVIRONMENTAL DISCLOSURE

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On October 27, 2010, the Canadian Securities Administrators ("CSA") published CSA Staff Notice 51-333 – *Environmental Reporting Guidance* (the "Notice")[1] to aid reporting issuers (other than investment funds) in interpreting existing disclosure requirements.

The Notice builds on OSC Staff Notice 51-716 – *Environmental Reporting*, which had surveyed existing environmental disclosure practices.[2] The Notice also draws from environmental disclosure guidance provided by the Canadian Institute of Chartered Accountants (CICA)[3] and from a recent climate change disclosure guidance published by the U.S. Securities and Exchange Commission.[4]

Prior to the Notice, Canadian securities regulators had largely responded to boilerplate environmental disclosure with general requests to enhance disclosure. The Notice, however, provides detailed guidance as well as sample disclosure provisions.

The Notice, and this bulletin, discuss the following aspects of environmental disclosure: materiality, environmental risks and related matters, risk oversight and management, the impact of adoption of IFRS, forward-looking information requirements, and governance.

Inside

materiality

Issuers are reminded that qualitative, as well as quantitative, factors must be considered in assessing what information is material. They are also reminded that some facts, immaterial in isolation, become material in the aggregate. The Notice further states that matters likely to become increasingly material, such as a prospective expenditure on clean technologies, should be disclosed as soon as possible.

environmental risks and related matters

National Instrument 51-102 – *Continuous Disclosure Obligations* contains disclosure requirements bearing on environmental risks, trends and uncertainties, environmental liabilities, asset retirement obligations, and financial and operational effects of environmental protection requirements.

environmental risks

Environmental risks can be classified under the following categories: litigation risks, physical risks, regulatory risks, reputational risks, and business model risks. The Notice provides a table of questions that issuers should consider in determining risks under each of the categories.

An issuer's reliance on raw materials from a hurricane-prone region is an example of an environmental physical risk. Steps being taken to mitigate such risks should also be disclosed. With respect to regulatory risks, disclosure should include the anticipated future cost of compliance. Where a risk is difficult to quantify, additional information on the factual basis underpinning the risk should be disclosed.

Consumers' response to an environmentally unsustainable product represents a reputational risk. The Notice remarks that such risks could, in turn, affect the issuer's cost of capital. An example of an environmental risk relating to the business model is the prospect of significantly higher energy costs due to upstream regulation. The Notice seems to suggest that business model opportunities, as well as risks, should be disclosed under Item 5.2 of Form 51-102F2 – *Annual Information Form*.

trends and uncertainties

Form 51-102F1 – *Management's Discussion & Analysis* requires, among other things, the disclosure of material information that may not be reflected in the financial statements and the disclosure of trends that may affect the issuer in the future. In particular, Item 1.4(g) of Form 51-102F1 requires the disclosure of commitments, events, risks or uncertainties that may affect future performance. The Notice suggests that the time horizon of a known trend or uncertainty may be relevant to an issuer's assessment of its materiality and whether or not the impact is reasonably likely.

environmental liabilities

The Notice classifies liabilities into two categories: those reflected in the issuer's financial statements and those that are not. With respect to the former category, the Notice describes the critical accounting estimates required pursuant to Item 1.12 of Form 51-102F1. It notes that issuers should disclose the probability of liabilities and consider including sensitivity analyses.

With respect to the latter category, the Notice acknowledges that the contingent nature of many environmental liabilities renders quantification difficult. To comply with Part 1(a) of Form 51-102F1, issuers should nevertheless provide some disclosure of the probability, magnitude, and timing of such liabilities or potential liabilities.

asset retirement obligations

The Notice defines an asset retirement obligation ("ARO") to be a requirement to perform certain procedures (e.g., to remediate the site of an abandoned facility), rather than a promise to pay cash. Many AROs will be caught by Item 1.2 of Form 51-102F1, which requires the disclosure of commitments, events or uncertainties that are reasonably likely to affect the issuer's business. AROs that constitute material long-term obligations will require disclosure and quantification in tabular format pursuant to Item 1.6 of Form 51-102F1. Finally, as the CSA is of the view that AROs are critical accounting estimates, AROs must be disclosed under Item 1.12 of Form 51-102F1.

CANADIAN SECURITIES LAW NEWS

Published monthly as the newsletter complement to the CANADIAN SECURITIES LAW REPORTER and the CANADIAN STOCK EXCHANGES MANUAL by CCH Canadian Limited. For subscription information, contact your local CCH Account Manager, or call 1-800-268-4522 or (416) 224-2248 (Toronto).

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financial and operational effects of environmental protection requirements

Item 5.1(1)(k) of Form 51-102F2 requires the disclosure of financial and operational effects of environmental protection requirements on the issuer's capital expenditures, earnings and competitive position in the current financial year and the expected effect in future years. Issuers should disclose quantified compliance costs to the extent possible, anticipated trends in such costs, and their potential impact on financial and operational results.

risk oversight and management

Disclosure of risk oversight and management manifests itself through the disclosure of environmental policies and through corporate governance disclosure.

environmental policies

Item 5.1(4) of Form 51-102F2 requires the issuer to describe the policies and steps taken to implement them. The Notice goes significantly further, suggesting that the issuer should also consider disclosing the impact of the policies on operations, a quantification of the costs associated with the policies, an evaluation of the effectiveness of the policies, and how the policies are monitored and updated.

board mandate and committees

Items 2 and 8 of Form 58-101F1 – *Corporate Governance Disclosure* require disclosure of how the board and its committees delineate their responsibilities.[5] An issuer facing environmental risks should thus describe how the board manages such risks. To the extent the audit committee manages environmental risk, such functions should be described in the charter required by Item 1 of 52-110F1 – *Audit Committee Information Required in an AIF*. Ultimately, the aim is for the issuer to provide the investor with further insight into the issuer's risk profile.

impact of adoption of IFRS

Under IFRS, issuers may be required to accrue more environmental liabilities, at higher amounts, and provide more disclosure regarding these liabilities. For example, the definition of a constructive obligation under IFRS is more detailed and arguably more inclusive than that contained under Canadian GAAP. Further, under IFRS, disclosure of provisions and contingent liabilities will be expanded:

> Issuers will be required to disclose a provision continuity schedule for each class of provision, disclosing the beginning and ending carrying amounts, additional provisions made in the period, amounts used in the period, unused amounts reversed during the period and changes resulting from the passage of time and any revisions to the discount rate. Issuers will also have to disclose a description of the nature of the obligation, the expected timing of any resulting outflows of economic benefits and an indication of the uncertainties about the amount or timing of those outflows and where necessary, they will have to disclose the major assumptions made concerning future events.[6]

Finally, amounts to be accrued are subject to different treatment in the two regimes. Under Canadian GAAP, where a number of different outcomes in a range were equally possible, the issuer had the option of applying the low end of the range. Under IFRS, the midpoint must be applied.

forward-looking information requirements

Forward-looking information is defined to be disclosure regarding possible events, conditions or results of operations that is based on assumptions about future economic conditions and courses of action. Forward-looking information can include information found on the issuer's website and in voluntary reports, but does not include oral statements.[7] Pursuant to Part 4A.3 of National Instrument 51-102, issuers must identify material forward-looking information as such, caution users that actual results may vary, list risk factors that may cause results to vary, state material factors or assumptions used to develop the forward-looking information, and describe the issuer's policy for updating it.

governance structures around environmental disclosure

An issuer's environmental disclosure in continuous disclosure documents is subject to three levels of oversight: review by the audit committee, approval by the board of directors, and certification by the CEO and CFO. Control measures must thus be instituted to ensure the accuracy of environmental disclosure. According to the Notice, issuers should consider whether information about environmental matters is subject to the same governance processes, controls and procedures as financial reporting.

conclusion

The Notice provides welcome clarity and depth to securities regulators' prior calls for enhanced environmental disclosure. Issuers should consider the Notice when drafting environmental disclosure, both to ensure compliance and to provide meaningful information to investors. In particular, the Notice's sample disclosure provisions provide helpful reference points. The CSA has stated that it will continue to monitor disclosure of environmental matters as part of its ongoing continuous disclosure review program.

Notes:

[1] Canadian Securities Administrators, Staff Notice 51-333, "Environmental Reporting Guidance" (27 October 2010), online: Ontario Securities Commission http://www.osc.gov.on.ca/documents/en/Securities-Category5/csa_20101027_51-333environmental-reporting.pdf.

[2] See the McMillan bulletin on the topic, Barbara Hendrickson et al., *Securities Disclosure of Environmental Matters Including Risks Related to Greenhouse Gas Emissions and Climate Change* (August 2008).

[3] See the McMillan bulletin on the topic, Marty Venalainen, *CICA Issues Climate Change Disclosure Guidance* (December 2008).

[4] US, Securities and Exchange Commission, *Commission Guidance Regarding Disclosure Related to Climate Change* (8 February 2010), online: US Securities and Exchange Commission http://www.sec.gov/rules/interp/2010/33-9106.pdf.

[5] Further, National Policy 58-201 – *Corporate Governance Guidelines* recommends the adoption by the board of a written mandate, including a discussion of the oversight of risks and opportunities facing the issuer.

[6] *Supra* note 1 at 19.

[7] To the extent the forward-looking information is also future oriented financial information Part 4B of National Instrument 51-102 applies in addition to Part 4A.

HOW THE OSC VIEWS CLOSED-END FUNDS THAT CONVERT TO MUTUAL FUNDS

By Kathleen Jones-Lepidas. © CCH Canadian Limited.

The OSC recently issued OSC Staff Notice 81-711 – *Closed-End Investment Fund Conversions to Open-End Mutual Funds*, which sets out the views of its staff on the regulatory issues related to the conversion of closed-end funds into mutual funds and discusses the types of comments that OSC staff will generally raise in the course of reviewing a built-in conversion feature or a conversion.

How Do Closed-End Funds and Mutual Funds Differ?

- Mutual funds are usually distributed continuously; they issue an unlimited number of shares or units from treasury. Closed-end funds are not in continuous distribution; instead, they issue a finite number of units or shares from treasury on an initial public offering (an "IPO"), which may be followed by subsequent offerings.

- Mutual funds provide a regular redemption feature, usually daily, and can be redeemed at the fund's net asset value ("NAV"). In contrast, after the units or shares of closed-end funds have been issued, they are usually traded on a stock exchange, often at a discount to NAV. However, closed-end funds may offer an annual redemption at NAV.

- Mutual funds are regulated by National Instrument 81-102 – *Mutual Funds* ("NI 81-102"), which prescribes product requirements such as rules related to investment restrictions, borrowing, incentive fees, organizational costs, conflicts of interest, purchases and redemptions, and sales communications. Closed-end funds are not regulated by NI 81-102; furthermore, they often engage in investment strategies, such as borrowing, that are beyond the limits prescribed for mutual funds.

Types of Closed-End Fund Conversions

OSC staff have recently become aware of numerous closed-end funds that intend to convert to mutual funds, often within less than two years of their initial offering. Closed-end funds often convert in order to provide their investors with increased liquidity, which will enable them to redeem their shares more frequently at NAV. The following list describes the most common approaches to conversion:

- If a closed-end fund is structured with **an automatic, built-in conversion feature**, it will typically be triggered (1) as at or before a specified date that is usually within two years of the fund's initial offering date; or (2) after a specified date, if the fund trades at a certain discount (usually 2%) to NAV for more than a set period of time (often 10 days).

- **Securityholder approvals** may be sought by the fund's manager at some point after the initial distribution, to either convert or merge the closed-end fund into a mutual fund.

- A **merger** of a closed-end fund with a mutual fund may take place at some point after the closed-end fund's initial distribution, often in accordance with the "permitted merger" provisions of the closed-end fund's declaration of trust. The requirement for securityholder approval is usually not triggered under such provisions as long as certain conditions are met, such as the merging funds having consistent investment objectives and strategies.

Regulatory Issues Related to the Conversion of Closed-End Funds

OSC Staff have identified a number of key regulatory issues for consideration in the context of a conversion-related review:

1. The Conversion Process

- **Transparency**: OSC staff expect that the key aspects of the conversion process, such as a description of the event or events that will trigger the conversion, be clearly disclosed to investors. Closed-end investment funds with built-in conversion features should provide prominent disclosure on the conversion in the fund's initial prospectus. For closed-end funds that do not contain a built-in feature but may convert to a mutual fund within a foreseeable period of time after their initial conversion, OSC staff will generally expect the initial prospectus to provide disclosure about the possible conversion, as well as key aspects of the contemplated conversion process. However, where closed-end funds do not contain a built-in feature and the decision to convert is made only after the initial distribution of the closed-end fund, OSC staff will expect that this decision will trigger the material reporting requirements. Finally, if the fund manager is seeking securityholder approval for the conversion, OSC staff will expect appropriate disclosure on the conversion to be included in the circular sent to investors in connection with the approval.

- **Notice to Investors**: OSC staff expect that investors will be provided with sufficient written notice before the closed-end fund converts. For closed-end funds with a built-in conversion feature, the fund's initial prospectus should disclose that prior written notice of the conversion will be provided to investors and should provide the length of the notice period. In instances where securityholder approval is not being sought, OSC staff would generally consider at least 60 days' prior written notice to be appropriate; however, where securityholder notice is being sought for the conversion, securities legislation sets out the notice requirements for a securityholders' meeting.

- **Redemption Right and Periods of No Liquidity**: A closed-end fund will usually cease trading on an exchange and may temporarily suspend redemptions before, and immediately following, its conversion to a mutual fund. OSC staff expect that investors be provided with a redemption right before such a suspension and conversion and that the conversion be structured so that any period of no liquidity, both before the conversion and after it, be as short as possible.

2. Post-Conversion Compliance with NI 81-102

- **Compliance with NI 81-102**: OSC staff usually expect a closed-end fund with a built-in conversion feature to comply with NI 81-102 from its inception, especially if the conversion may, or will, happen within a foreseeable period of time from the closed-end fund's initial distribution. However, if the closed-end fund intends to operate in a manner not permitted by NI 81-102, it may need exemptive relief to continue certain investment strategies or features when it converts to a mutual fund. In such instances, OSC staff recommend that the application for exemptive relief be filed concurrently with the initial prospectus filing of the closed-end fund. If the decision to convert is made only after the closed-end fund's initial distribution, OSC staff expect the issuer to have considered what modifications, if any, must be made to the features or investment strategies of the fund so that it complies with NI 81-102 upon its conversion to a mutual fund.

- **Consistent Investment Objectives and Strategies**: For a closed-end fund without a built-in conversion feature that converts after the initial distribution, OSC staff expect the issuer to consider if there will be a fundamental change to the closed-end fund's investment objectives, strategies, fees, management, and operations after it has been converted to a mutual fund; if so, OSC staff generally expect the fund's securityholders to be given the opportunity to vote on these fundamental changes.

- **Illustration of Past Performance**: OSC staff have noted that after their conversion to mutual funds, some funds wish to show the past performance of the closed-end fund in sales communications. Under section 15.6 of NI 81-102, a mutual fund is prohibited from showing in sales communications its past performance from a period that is before the time when the mutual fund offered its securities under a simplified prospectus; this provision would prohibit the display of the closed-end fund's past performance. However, the form requirements that apply to management reports of fund performance under Form 81-106F1 require that reporting issuers show past performance from inception, including pre-conversion past performance. Furthermore, the OSC expects issuers who are contemplating a conversion feature or conversion to consider how they intend to illustrate past performance. If the issuer requests exemptive relief to permit the mutual fund to show the past performance of the closed-end fund in sales communications, OSC staff will consider whether the fund's past performance is relevant and useful to investors and whether such information will be appropriately presented and qualified, as necessary.

3. Costs Associated With the Conversion

- **Merger Costs**: When conversions are structured as a merger between the closed-end fund and a mutual fund, OSC staff will expect the fund manager to absorb the costs of the merger. It is more appropriate for the costs of the merger to be borne by the fund manager, as opposed to securityholders, in instances where the fund manager decides to merge the funds and the manager benefits from the merger. In OSC staff's view, it is inappropriate for any of the merger's costs to be charged either to the terminating closed-end fund or to the continuing mutual fund.

Conclusion

The OSC encourages issuers and their counsel to contact OSC staff at an early stage in the planning of a conversion feature or conversion that may give rise to questions related to the issues in this notice. For further information, please refer to OSC Staff Notice 81-711, which has been reproduced in Volume 3A of the CANADIAN SECURITIES LAW REPORTER at 490-687a.

CANADIAN SECURITIES ADMINISTRATORS

CSA Amendments To Be Brought Into Force

The following amendments have been included in the December report; all of them are effective on December 30, 2010:

- National Instrument 51-101, Forms 51-101F1, 51-101F2, and 51-101F3, and Companion Policy 51-101CP have been amended and 51-101F4 has been adopted.

The following amendments have also been included in this report; all of them are effective on January 1, 2011:

- National Instrument 31-103, Form 31-103F1, and Companion Policy 31-103CP;
- Form 33-109F6;
- National Instrument 41-101, Form 41-101F1, and Companion Policy 41-101CP;
- National Policy 41-201;
- National Instrument 44-101, Form 44-101F1, and Companion Policy 44-101CP;
- National Instrument 44-102;
- National Instrument 45-106, Forms 45-106F2 and 45-106F3, and Companion Policy 45-106CP;
- National Instrument 51-102, Forms 51-102F1, 51-102F2, 51-102F4, 51-102F5, and 1-106F6 (financial years ending on or after December 31, 2008), and Companion Policy 51-102CP;
- National Instrument 52-107 and Companion Policy 52-107CP;
- National Instrument 52-109, related forms (52-109F1, 52-109FV1, 52-109F1 – IPO/RTO, 52-109F2, 52-109FV2, 52-109F2 – IPO/RTO, and 52-109F2R), and Companion Policy 52-109CP;
- National Instrument 52-110 and Forms 52-110F1 and 52-110F2; and
- Form 54-101F1.

CSA and IIROC Issue Position Paper on Dark Liquidity

The CSA and IIROC recently issued Position Paper 23-405, which deals with dark pools and dark orders. The views expressed in the paper take into account consultations conducted by the CSA and IIROC since the end of 2009. The paper will be reproduced in Volume 1 of the CANADIAN SECURITIES LAW REPORTER at ¶2345 in a future report.

Amendments to Form 51-102F6 Proposed

The CSA are seeking comments on proposals to improve the disclosure shareholders receive regarding executive compensation and corporate governance in Form 51-102F6, *Statement of Executive Compensation (in respect of financial years ending on or after December 31, 2008)*. For further information, please refer to the CSA Web site.

CSA Extends Registration Exemption

The CSA recently issued Staff Notice 31-322 to extend until March 31, 2011 the exemptive relief granted on August 20, 2010 for mortgage investment entities from the investment fund manager registration requirement and the adviser registration requirement under securities legislation. The notice will be reproduced in a future report in Volume 1 of the CANADIAN SECURITIES LAW REPORTER at ¶3152.

Corporate Disclosure Compliance Review Results Reported

The CSA recently issued Staff Notice 58-306 to summarize the results of a corporate disclosure compliance review and to provide guidance on compliance with the existing corporate governance disclosure requirements in the areas of concern identified during the review. The notice will be reproduced in a future report in Volume 1 of the CANADIAN SECURITIES LAW REPORTER at ¶5836.

INVESTMENT INDUSTRY REGULATORY ORGANIZATION OF CANADA

File Copy Request Form Replaced

The amendment to the Form has been incorporated in Volume 1 of the CANADIAN STOCK EXCHANGES MANUAL, at ¶660-723.

ICE FUTURES CANADA

Rule 25 Replaced

The amendments to the ICE Futures Canada Rules have been incorporated in Volume 1 of the CANADIAN STOCK EXCHANGES MANUAL, at ¶903-101.

CANADIAN NATIONAL STOCK EXCHANGE

Notice 2010-006 Added

The Notice has been incorporated in Volume 1 of the CANADIAN STOCK EXCHANGES MANUAL, at ¶1102-044.

MONTREAL EXCHANGE

List of Fees Replaced

The amendments to the List of Fees have been incorporated in Volume 2 of the CANADIAN STOCK EXCHANGES MANUAL, at ¶3500-501.

Rule Fifteen Amended

The amendments to the Rules have been incorporated in Volume 2 of the CANADIAN STOCK EXCHANGES MANUAL, at ¶4500-405.

PROVINCIAL UPDATES

Alberta

S.A. 2010, c. 10, the *Securities Amendment Act, 2010*, amending the *Securities Act*, sections 2(*d*), 4, 8, 20 and 21(*a*) were proclaimed in force January 1, 2011. This Bill received Royal Assent April 22, 2010.

As a result of the adoption of National Instrument 31-103, *Registration Requirements and Exemptions*, on September 28, 2009, the Alberta Securities Commission ("ASC") has adopted Blanket Orders 31-516, *Exemption from the Requirement to Establish Whether a Client is an Insider (Section 13.2(2)(b) of NI 31-103)*, and 31-517, *Exemption from the Requirement that Mutual Fund Dealers Identify Individuals with 10% Interests in Corporate Clients (Section 13.2(3)(b)(i) of NI 31-103)*. Blanket Order 31-511 was revoked by Blanket Order 31-516. These blanket orders are effective November 5, 2010, and have been reproduced in Volume 2 of the CANADIAN SECURITIES LAW REPORTER at ¶175-230 and ¶175-232, respectively.

Alberta Securities Commission Policy 51-601, *Reporting Issuer List*, was amended, effective January 1, 2011. These changes are a result of amendments to National Instrument 52-107, *Acceptable Accounting Principles and Auditing Standards*, effective January 1, 2011.

British Columbia

S.B.C. 2009, c. 15, the *Finance Statutes Amendment Act, 2009*, amending the *Securities Act*, sections 16 to 19, and 21 were proclaimed in force November 19, 2010 by B.C. Reg. 324/2010. This Bill received Royal Assent October 29, 2009.

The British Columbia Securities Commission ("BCSC") has adopted BC Instruments 32-511, *Exemption from obligation to establish whether clients are insiders*, and 32-520, *Exemption from specific obligation to identify those who own or control more than 10% of a corporate client*. BCI 32-511 replaces BCI 32-511 dated February 26, 2010. These instruments are effective November 5, 2010, and have been reproduced in Volume 2 of the CANADIAN SECURITIES LAW REPORTER at ¶218-327d and ¶218-330f, respectively.

On August 20, 2010, the BCSC adopted BC Instrument 32-517, *Exemption from dealer registration requirement for trades in securities of mortgage investment entities*. This instrument expires on December 31, 2010, and was granted to allow Commission staff time to analyze how dealer registration requirements apply to mortgage investment entities operating in British Columbia. The BCSC has extended this order to June 30, 2011, to give Commission staff additional time to complete their analysis. Notice 2010/40, which outlines these changes, has been reproduced in Volume 2 of the CANADIAN SECURITIES LAW REPORTERat ¶222-941.

Manitoba

The Manitoba Securities Commission ("MSC") has adopted Blanket Orders 31-511, *Relief from the requirement under paragraph 13.2(2)(b) of NI 31-103 to establish whether a client is an insider*, and 31-513, *Relief from the requirement under subparagraph 13.2(3)(b)(i) for mutual fund dealers*. Blanket Order 31-511 dated February 26, 2010 was replaced. These orders are effective November 5, 2010, and have been reproduced in Volume 2 of the CANADIAN SECURITIES LAW REPORTER at ¶276-313 and ¶276-317, respectively.

The Commission has adopted Blanket Order No. 6230, *Exemption from Requirements for Mortgage Investment Corporations and Mortgage Syndicators*, effective December 3, 2010. This order extends the relief from the investment fund manager registration requirement and adviser registration requirement until March 31, 2011.

New Brunswick

Blanket Order 31-512, *Relief from the Requirement Under Paragraph 13.2(2)(B) of NI 31-103 to Establish Whether a Client is an Insider and Revocation of Blanket Order 31-509*, dated November 3, 2010 and effective November 5, 2010, has been added.

Blanket Order 31-516, *Relief from Subparagraph 13.2(2)(B)(I) for Mutual Fund Dealers*, dated November 3, 2010 and effective November 5, 2010, has been added.

Blanket Order 31-509, *Exemption From Paragraph 13.2(2)(B) of NI 31-103 for Mutual Fund Dealers*, has been revoked, effective November 5, 2010.

Northwest Territories

N.W.T. Reg. R-066-2008, Securities Fees Regulations under the *Securities Act*, was amended by N.W.T. R-088-2010, dated November 9, 2010 and effective November 20, 2010, and by N.W.T. R-089-2010, dated November 9, 2010 and effective December 13, 2010. These changes have been incorporated in the CANADIAN SECURITIES LAW REPORTER.

Blanket Order 31-510, *Relief from the requirement to establish whether a client is an insider under paragraph 13.2(2)(B) of National Instrument 31-103 Registration Requirements and Exemptions*, dated and effective November 5, 2010, has been added. This order revokes Blanket Order 31-507.

Blanket Order 31-511, *Exemption for Mutual Fund Dealers from subparagraph 13.2(2)(B)(I) of National Instrument 31-103 Registration Requirements and Exemptions*, dated and effective November 5, 2010, has been added.

Implementing Rule 11-801, *Implementation of CSA Instruments (national and multilateral) in effect in other Canadian jurisdictions on the coming into force of the Securities Act*, effective October 26, 2008, has been amended effective January 1, 2011.

Implementing Rule 31-802, *International Financial Reporting Standards – Registration Requirements and Information,* effective January 1, 2011, has been added.

Implementing Rule 41-801, *Client Brokerage Commissions Disclosure – Investment Funds*, effective December 30, 2010, has been added.

Implementing Rule 41-802, *International Financial Reporting Standards – Prospectus Disclosure*, effective January 1, 2011, has been added.

Implementing Rule 45-802, *International Financial Reporting Standards – Prospectus and Registration Exemptions*, effective January 1, 2011.

Implementing Rule 51-803, *Standards of Disclosure for Oil and Gas Activities*, effective December 30, 2010, has been added.

Implementing Rule 51-804, *International Financial Reporting Standards – Continuous Disclosure*, effective January 1, 2011, has been added.

Implementing Rule 52-801, *Acceptable Accounting Principles and Auditing Standards*, effective January 1, 2011, has been added.

Implementing Rule 52-802, *International Financial Reporting Standards – Certification of Disclosure in Issuers' Annual and Interim Filings*, effective January 1, 2011, has been added.

Implementing Rule 81-801, *Mutual Fund Prospectus Disclosure*, effective January 1, 2011, has been added.

Nova Scotia

Bill 79, *An Act to Amend the Securities Act*, received first reading November 1, 2010, second reading November 4, 2010, and third reading November 25, 2010.

Blanket Order 51-801, *Implementing National Instrument 51-102 Continuous Disclosure Obligations*, is amended by 51-801 (Amendment), effective January 1, 2011.

Blanket Order 31-518, *Exemption for mortgage investment entities from the requirement to register as investment fund managers and advisers under National Instrument 31-103 Registration Requirements and Exemptions*, dated December 2, 2010 and effective December 3, 2010, will be added to a future release of the CANADIAN SECURITIES LAW REPORTER. This order revokes Blanket Order 31-514.

Prince Edward Island

Bill 12, *Government Reorganization Act*, amending the *Companies Act* and the *Securities Act*, received first reading November 7, 2010.

Saskatchewan

As as result of the adoption of NI 31-103, the Saskatchewan Financial Services Commission (SFSC) has adopted General Orders 31-913, *Relief from the requirement under paragraph 13.2(2)(b) of NI 31-103 to establish whether a client is an insider*, and 31-914, *Relief from the requirement under subparagraph 13.2(3)(b)(i) for mutual fund dealers*. General Order 31-913 also revoked General Order 31-909, *Exemption from paragraph 13.2(2)(b) of National Instrument 31-103 where trading by a mutual fund dealer is limited to mutual funds and certain other securities*. These changes are effective November 5, 2010.

The SFSC has adopted General Order 31-915, *Exemption for mortgage investment entities from the requirement to register as investment fund managers and advisers*, effective December 3, 2010. This order exempts mortgage investment entities from certain registration requirements and expires on March 31, 2011.

Yukon

O.I.C. 2009/66, Securities Fees Regulation, has been amended by O.I.C. 2010/193, s. 2, effective November 20, 2010, and s. 3, effective December 13, 2010. These changes have been incorporated in the CANADIAN SECURITIES LAW REPORTER.

Superintendent's Order 2010/019 Y.S.A., *Relief from the requirement under section 13.2(2)(b) of NI 31-103 to establish whether a client is an insider*, dated November 4, 2010 and effective November 5, 2010, has been added. This order revokes Superintendent Order 2010/007, *Exemption from Section 13.2(2)(b) of National Instrument 31-103 Registration Requirements and Exemptions for Mutual Fund Dealers*.

Superintendent's Order 2010/020 Y.S.A., *Relief from the requirement under subparagraph 13.2(3)(b)(i) of NI 31-103 for mutual fund and scholarship dealers*, dated November 4, 2010 and effective November 5, 2010, has been added.

Superintendent's Order 2010/023 Y.S.A., Exemption for Mortgage Investment Entities from the Requirement to Register as Investment Fund Managers and Advisers, dated and effective December 3, 2010, will be added to a future release of the CANADIAN SECURITIES LAW REPORTER. This order revokes Superintedent's Order 2010/016.

Recent Cases

Oppression remedy

• • • **British Columbia Supreme Court** • • • Lions Gate Entertainment Corp. ("Lions Gate") is a motion picture, television, and entertainment company which produces and distributes film and television programming throughout North America; it was incorporated under the laws of British Columbia and its shares are publicly traded on the New York Stock Exchange. Michael Burns ("Burns") is a Vice-Chairman and Director of Lions Gate. The Icahn Group comprises limited partnerships and certain other limited liability companies directly and indirectly controlled by Carl Icahn ("Icahn"). As of February 5, 2010, the Icahn Group held approximately 18.06% of Lions Gate's shares. Kornitzer Capital Management, Inc. ("Kornitzer Capital") is an investment adviser for private and institutional clients with the power to vote or dispose of securities held for its clients; John Kornitzer ("Kornitzer") is the Chairman and CEO of Kornitzer Capital. As of July 20, 2010, Kornitzer Capital held approximately $110 million in convertible senior subordinated notes in Lions Gate which were acquired in 2004 and 2005 (the "Notes"). MHR manages various private funds that invest primarily in distressed and undervalued middle-market companies; by August 2005, MHR had over 5% of the outstanding shares of Lions Gate. MHR was co-founded by Mark Rachesky ("Rachesky"), a Lions Gate board member.

On February 16, 2010, Icahn issued a press release announcing his intention to make an unsolicited partial takeover bid at US$6 per share of Lions Gate, with the tender offer to commence on March 1, 2010. A Lions Gate special committee evaluated the Icahn bid and determined that it was inadequate and on March 11, 2010, the Lions Gate Board adopted the special committee's recommendation to adopt a shareholders rights plan (the "SRP") also known as a "poison pill", which would be voted on at a special meeting of the shareholders set for May 4, 2010. In late April, the Icahn Group successfully challenged the SRP before the British Columbia Securities Commission (the "BCSC") (see 2010 CSLR 900-351, 2010 CSLR 900-363, and 2010 CSLR 900-367), and an appeal by Lions Gate to the British Columbia Court of Appeal was dismissed in early May. While the SRP was in effect, the Icahn Group improved its bid to US$7 per share, however, the Lions Gate Board continued to oppose it. Shareholders voted on the SRP on May 12, 2010, despite the court decision, and 58 million shares were voted in favour of the SRP, while approximately 47 million shares were voted against it. As of July 1, 2010, the Icahn Group held 37.9% of Lions Gates' common shares. Around this time, Lions Gate was also negotiating a merger with or acquisition of Company A, which was in possession of a valuable film library. On July 9, 2010, the Icahn Group and Lions Gate entered into a standstill agreement pursuant to which both parties would work together to acquire Company A; further, under the standstill agreement, Lions Gate agreed not to issue securities to board members or affiliates. The standstill agreement expired at midnight on July 19, 2010. In the beginning of July 2010, Kornitzer had approached Burns to discuss the conversion of the Notes to common shares of Lions Gate. Burns knew that Rachesky was seeking to gain more shares in Lions Gate, and advised him of Kornitzer's proposal. On the morning of July 20, 2010 at approximately 12:01 a.m., the Lions Gate special committee met to discuss among other things the debt refinancing exchange respecting the Notes held by Kornitzer Capital and the beneficial deleveraging effect. Shortly thereafter, the Lions Gate Board approved the exchange of the Notes, which Kornitzer Capital then sold to MHR. MHR converted the Notes to common shares (together, the "Impugned Transactions"). The effect of the Impugned Transactions was that the Icahn's Groups shareholdings were diluted to 33.5% from 37.9%, while MHR increased its Lions Gate shareholdings to 28.9%. The deleveraging effect of the Impugned Transactions was well received in the marketplace.

The Icahn Group applied to the Court for an order to set aside the Impugned Transactions. The Icahn Group alleged that the Lions Gate Board had acted oppressively by thwarting the reasonable expectations of the Icahn Group and the Board acted to entrench itself, and the Icahn Group was entitled to a remedy under section 227 of the British Columbia *Securities Act* (the "Act"). The Lions Gate Board took the position that the primary purpose in converting the debt to equity was to deleverage the company, and the secondary purpose was to dilute the Icahn Group holdings and impede the takeover. Lions Gate and the other respondents say that the Icahn Group came to court seeking relief as a "bitter bidder", not as an oppressed shareholder. Further, Lions Gate is of the position that "the Icahn Group has limited experience in operating a business in Lions Gate's industry . . . the Icahn Group has not articulated a clear plan or vision for Lions Gate . . . [Icahn Group] has sought disproportionate representation on the Board and control of major decisions while being only a minority shareholder . . . [and] the Icahn Group has a poor track record in related industries in which it does have experience".

The application was dismissed. The Court began by considering the seminal case regarding oppression, *Re BCE Inc.*, 2008 SCC 69. In *BCE*, the Supreme Court held that oppression required a court to: "(1) first look to the principles underlying the oppression remedy, and in particular the concept of reasonable expectations; and (2) if a breach of a reasonable expectation is established, then go on to consider whether the conduct complained of is "oppressive" or "unfairly prejudicial"". *BCE* also provided the following factors which provide the framework for the determination of a claimant's reasonable expectations: general commercial practice, the nature of the corporation, the relationship between the parties, past practice, steps the claimant could have taken to protect itself, representations and agreements, and the fair resolution of conflicting interests between corporate stakeholders.

The Icahn Group's expectations as articulated by Icahn's in-house counsel were that the Lions Gate Board would not orchestrate a series of transactions which diluted the holdings of the Lions Gate's largest shareholder, substantially increased the shareholding of one of the members of the Board, and virtually guaranteed the re-election of the existing Board at the next AGM. In determining whether these expectations were reasonable, the Court applied the *BCE* factors. The Court first concluded that the timing of the Impugned Transactions was not unreasonable due to the expiration of the standstill agreement and the Icahn Group's announcement of a second tender offer on July 20, 2010. Prior to the Impugned Transactions, Lions Gate had determined that deleveraging would benefit the company, and had previously acted to retire or convert debt instruments when the opportunities arose; industry analysts also applauded the Impugned Transaction. The past relationship between Lions Gate and the Icahn Group was also demonstrably acrimonious, with Icahn attempting to make unreasonable demands, including the appointment of his son on the Board, and powers that exceeded his shareholding. Icahn also did not refute the Lions Gate position that the Icahn Group had very little experience in the industry in which Lions Gate did business and had, in fact, made poor decisions in other companies that were similar to Lions Gate in which the Icahn Group had interests. Finally, the Court also accepted that the Board fairly resolved the conflicting interests of the stakeholders. MHR had been uncomfortable about its investment in Lions Gate due to the actions of the Icahn Group and was able to solidify its position. Kornitzer was able to reduce its debt position in Lions Gate. While the Impugned Transactions did reduce the Icahn Group's holdings, it was not, in the opinion of the Court, significant, and the reduction of debt meant that, "the Icahn Group owned less of a more valuable company". The consideration of the *BCE* factors led the Court to conclude that the expectations of the Icahn Group were unreasonable.

The Icahn Group additionally argued that the purpose of the transactions was to entrench the existing Board and foil the Icahn Group at its proxy battle at the next Annual General Meeting. The Court rejected this argument. The evidence supported that with the exception of two management Board members, the Board was independent of Lions Gate and did not rely on the company for remuneration. Second, the sought after merger or acquisition with Company A would have resulted in a change to the current slate of directors. Third, nothing in the affidavits demonstrated that the Board was seeking to entrench itself, and finally, the Lions Gate Board had offered the Icahn Group positions on the Board.

In the view of the Court, the only reasonable expectation the Icahn Group could have had, as a shareholder, was that the Board would act within its legal rights in the best interests of the company, based on their reasonably held views. As such, the business judgment rule as affirmed by the Supreme Court of Canada in *Kerr v. Danier Leather Inc.*, 2007 SCC 44 ("*Danier*") was applicable. From *Danier*, "[t]he court looks to see that the directors made a reasonable decision not a perfect decision. Provided the decision taken is within a range of reasonableness, the court ought not to substitute its opinion for that of the Board even though subsequent events may have cast doubt on the Board's determination. As the long as the directors have selected one of several reasonable alternatives, deference is accorded to the Board's decision . . .". Based on the evidence, the Lions Gate Board's views were reasonably held. The Court accepted that the deleveraging effect was the primary purpose of the Impugned Transactions, and the consequential effect, the dilution of the Icahn Group's position in the midst of a hostile takeover bid, were reasonably held to be in the Lions Group's best interests. Ultimately, the Court determined that the Icahn Group was complaining of conduct as a "bitter bidder", and the oppression remedy does not protect the interests of such a group and therefore Icahn had no standing to be heard. Even if that analysis was wrong, the Icahn Group's expectations were not reasonable, and even if they were, the Lions Gate Board had not acted in a manner that was oppressive or prejudicial to the Icahn Group's interests.

Icahn Partners LP v. Lions Gate Entertainment Corp. 2010 CSLR ¶900-375, November 1, 2010 (British Columbia Supreme Court)

Disclosure

• • • **Ontario Securities Commission** • • • Biovail, a reporting issuer in the Province of Ontario, is an international full-service pharmaceutical company, engaged in the formulation, clinical testing, registration, manufacture, sale, and promotion of pharmaceutical products using advanced drug delivery technologies. Biovail Laboratories Incorporated ("BLI") is incorporated under the laws of Barbados and a subsidiary of Biovail. Eugene N. Melnyk ("Melnyk") is the founder of Biovail, and during the relevant times held senior positions on the Biovail board and executive. In the fall of 2001, BLI entered into an agreement with GlaxoSmithKline Inc. ("GSK") granting GSK the exclusive right to sell Wellbutrin XL ("WXL"), an antidepressant drug manufactured by Biovail. Biovail would be paid for the WXL sold to GSK based on a percentage of the revenue that GSK sold on the U.S. market. On October 1, 2003, a truck carrying WXL was involved in an accident while in transit to GSK, and a portion of the WXL was damaged and had to be returned to Biovail for inspection. On October 3, 2003, Biovail issued a two-page news release (the "October 3 Release") that stated that Biovail's third quarter revenues would be below previously issued guidance, and "[c]ontributing significantly to this unfavourable variance was the loss of revenue and income associated with a significant in-transit shipment loss of Wellbutrin XL as a result of a traffic accident" (the "Accident Contribution Statement"). The October 3 Release also stated that the revenue associated with the damaged WXL was in the range of $10 to $20 million (the "Revenue Loss Statement") (the Accident Contribution Statement and the Revenue Loss Statement together are the "Truck Accident Statement"). Following the October 3 Release, Biovail held a call with analysts (the "Analysts Call") to discuss the earnings miss. During the call, Biovail officers repeated the Accident Contribution Statement, but increased the lower end of the Revenue Loss Statement to $15 million. On October 8, 2003, an analyst with the Bank of America issued a report that questioned Biovail's statement of revenue associated with the accident. On the same day, Biovail's share price fell approximately $4 per share, and in response, Biovail issued a news release (the "October 8 Release") confirming that the WXL was recovered and repeating the Revenue Loss Statement. From October 13 to October 16, 2003, Biovail officers took part in a series of meetings with investors in North America (the "Roadshows") during which the Accident Contribution Statement and Revenue Loss Statement were repeated. On October 30, 2003, Biovail issued a 14-page news release (the "October 30 Release") reporting its third quarter revenues which stated that none of the WXL involved in the truck accident was recognized in the third quarter revenues. In March 2004, Biovail issued a 15-page news release (the "March 2004 Release") stating that the actual third quarter revenue loss from the WXL involved in the accident was $5 million; the March 2004 Release in effect repeated the Accident Contribution Statement and corrected the Revenue Loss Statement. Staff of the Ontario Securities Commission alleged that the truck accident did not contribute to or affect Biovail's 2003 third quarter financial results and the $10 to $20 million revenue loss was grossly inflated.

The issues before the Ontario Securities Commission (the "Commission") include:

1. Were the statements made in the October 3 Release, the Analysts Call, the October 8 Release, the Roadshows, the October 30 Release, and the March 2004 Release misleading or untrue?

2. If the statements were misleading or untrue, were they materially untrue at the time they were made and in light of the circumstances under which they were made? Or did the statements fail to state a fact that was required to be stated or that was necessary to make the statements not misleading?

3. Did Melnyk authorize, permit, or acquiesce in Biovail's misconduct and did he act contrary to the public interest? If so, is Melnyk entitled to a due diligence defence to the allegation that he acted contrary to the public interest?

Melnyk was found to have engaged in conduct that was contrary to the public interest. The Commission had approved a settlement agreement with Biovail and other senior officers, and this proceeding only related to Melnyk's conduct but required a consideration of Biovail's conduct. To the first issue of whether the statements were misleading or untrue, the Commission first examined the evidence connected to the Accident Contribution Statement. It was determined from the agreement between Biovail and GSK that title to the WXL did not pass to GSK until it was delivered to GSK's facility in the United States, and given that the trucks left Biovail on September 20, 2003, the last day of Biovail's third quarter, it was not possible for GSK to have taken title until after Biovail's third quarter ended. Accordingly, it was also not possible for the accident to have had any effect on Biovail's 2003 third quarter earnings. This rendered the Accident Contribution Statement untrue. To the issue of whether the Revenue Loss Statement was untrue, the Commission was not convinced that Biovail could not have determined an accurate WXL revenue loss at the time of the October 3 Release. Invoicing of the WXL product to GSK was based on formulas set out in the agreement between GSK and Biovail, and it was clear on October 3, 2003, that net sales of WXL would not exceed the threshold that would result in greater Biovail revenue. The Commission concluded that Biovail saw the accident as a ready excuse for the third quarter earnings miss, and grossly inflated the value of the WXL involved in the accident. The next issue was whether the statements were misleading or untrue in a material respect.

In its consideration of "materiality", the Commission held that it would treat a statement as material if there was "a substantial likelihood that a reasonable investor would consider the statement to be important in making an investment decision. By an investment decision, we mean a decision to buy, sell or hold shares. That will require us to determine whether the statement or omission would have assumed actual significance to a reasonable investor".

Turning first to the October 3 Release, the Commission held that neither the Accident Contribution Statement nor the Revenue Loss Statement on their own were misleading or untrue in a material respect. However, the Truck Accident Statement was. The earnings miss in the October 3 Release was clearly material information (demonstrated by the adverse impact on the price of Biovail's shares), but in the opinion of the Commission, disclosure of the reasons for the earnings miss was also material as it permitted an investor to assess the implications on future financial performance. Whether the earning miss was a one-time event, such as the truck accident, or something that may recur would likely have an impact on the longer term consideration of a reasonable investor. In its analysis, the Commission compared the Truck Accident Statement against an accurate statement which included the information that the damaged WXL could not have been recognized in the third quarter revenue and its value was $5 million, and concluded that the difference between the Truck Accident Statement and the accurate statement was material to investors. The same conclusion was reached regarding the Analysts Call, where the Truck Accident Statement was repeated to analysts and similarly, in a material respect, was misleading or untrue. The Commission was not satisfied that the Truck Accident Statement was made during the Roadshows, and dismissed the allegations is respect thereof. Turning to the October 30 Release, the Commission held that by that date, it should have been clear to Biovail that the revenue associated with the WXL in the accident could never have been recognized in the third quarter results. By that date, senior officers had concluded that the internal accounting policies and the agreement with GSK required the WXL revenue to be included in the fourth quarter revenues, and further, Biovail had internally determined by the value of the WXL which had by that date been reshipped to GSK. That Biovail omitted to include this information in the October 30 Release made the release misleading or untrue. Finally, turning to the March 2004 Release, the Commission held that the Accident Contribution Statement included was not, in a material respect and at the time and in light of the circumstances under which it was made, misleading or untrue. However, the Commission did note that the March 2004 Release was notable for other reasons, those being the inclusion of an inaccurate statement about the October 3 Release, an acknowledgement that the Revenue Loss Statement was untrue in previous news releases, and the inclusions of justifications for why the Revenue Loss Statement could not be accurately determined in the October statements, which the Commission found to be untenable.

The ultimate question before the Commission was Melnyk's responsibility for the misleading statements, and based on the evidence and his position in Biovail, the Commission held that "Melnyk cannot separate himself from the actions of Biovail". As Chairman and CEO, Melnyk had access to information that was available to Biovail and its senior officers and could have obtained it at any time; was directly involved in the decisions regarding the content of the disclosures; and had final approval of the news releases and other public statements made by Biovail. The evidence before the Commission demonstrated that Melnyk participated in the preparation of and approved the various releases and authorized, permitted, or acquiesced in the making of the Truck Accident Statement on the Analysts Call. The Commission held that Melnyk could not simply claim innocence on the basis that he relied in good faith on the statements of Biovail's senior officers. In the opinion of the Commission, Melnyk failed to establish that he acted with due care and diligence in light of obvious red flags that arose, including the skeptical reaction of analysts to the Truck Accident Statement and Melnyk's knowledge of the details of the WXL shipments made to GSK. Melnyk knew or should have known that the statements made by Biovail were untrue and in some cases materially so, and while Melnyk did not contravene Ontario securities law, his conduct was contrary to the public interest.

The appropriate sanctions were to be scheduled for a later date.

Re Biovail Corporation 2010 CSLR ¶900-376, September 30, 2010 (Ontario Securities Commission)

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