

Securities Law Bulletin

AIRD & BERLIS LLP
Barristers and Solicitors

OSC Provides Guidance to Improve Forward-Looking Information Disclosure

By: Sherri Altshuler and Alyssa Gebert*

Following a review to assess the overall quality of forward-looking information (“**FLI**”) of 60 Ontario reporting issuers, the Ontario Securities Commission (“**OSC**”) released Staff Notice 51-721 *Forward-Looking Information Disclosure* on June 13, 2013 (the “**Staff Notice**”). The Staff Notice clarifies the disclosure requirements related to FLI, provides disclosure examples and highlights common areas of non-compliance.

The OSC’s review noted four common areas where improvement of FLI disclosure is required:

- a. identifying FLI clearly;
- b. disclosing the material factors or assumptions used to develop FLI;
- c. updating previously disclosed FLI; and
- d. comparing actual results to future oriented financial information (“**FOFI**”) or financial outlook previously disclosed.

Forward-looking Information

FLI is disclosure about possible events, conditions or financial performance that is based on assumptions about future economic conditions and courses of action. FLI includes both FOFI and financial outlook. The Staff Notice breaks down the disclosure requirements related to FLI into two main parts: (a) requirements relating to the initial disclosure of FLI; and (b) requirements relating to the ongoing obligations to update, compare to actual results and, if appropriate, withdraw previously disclosed FLI.

Clear Identification of FLI

Section 4A.3 of NI 51-102 requires reporting issuers to clearly identify material FLI. The Staff Notice stresses that generic or boilerplate disclosure that identifies FLI by words such as “believes”, “may”, “likely”, “plans”, or similar words, are frequent examples of non-compliant disclosure.

The OSC indicates that disclosure of FLI should be entity-specific. The Staff Notice suggests that specific sections of the MD&A which contain FLI be identified in the disclosure.

The Staff Notice also advises that specific events, activities or developments the company anticipates may occur in the future be clearly identified in the disclosure. An example of entity-specific disclosure is, “This MD&A includes, but is not limited to, forward-looking statements regarding: the ability to meet its working capital needs for the twelve-month period ending December 31, 2013...”. Here, the FLI is clearly identified so the information is understood not to be historical.

Inside

1. OSC Provides Guidance to Improve Forward-Looking Information Disclosure
2. Canadian Securities Regulators Decide not to Implement Proposed Rule for Venture Issuers
3. OSC Announces Consultation Regarding Women on Boards and in Senior Management Positions of TSX-Listed Companies

Disclosure of Material Facts or Assumptions used to Develop FLI

According to the Staff Notice, specific relevant factors or assumptions including material risk factors underlying the FLI should be disclosed. These underlying assumptions should be carefully analyzed, and they should be reasonable, supportable, entity specific and tied to FLI. Assumptions should also be quantified.

The Staff Notice notes that blanket statements such as, “In fiscal 2013, the Company anticipates meeting the following target: Total sales to increase by 5.0% to 6.0%”, is a common example of non-compliant disclosure.

The Staff Notice suggests including a description of key specific risk factors and assumptions that the expectation is based upon. A suggested improvement to the above target is, “In fiscal 2013, the Company anticipates meeting the following target: Total sales to increase by 5.0% to 6.0%. This expectation is based on same-store sales growth of between 3% and 4% and the introduction of new brands to our city centre store”.

The Staff Notice also suggests using a table format to clearly identify FLI statements and disclose relevant and specific material risk factors and assumptions. For example, the table can include the FLI statement, assumptions and risk factors, each in separate columns for easy identification.

Updating Previously Disclosed FLI

Section 5.8 NI 51-102 requires reporting issuers to discuss in the company’s MD&A or in a press release events and circumstances that are reasonably likely to cause actual results to differ materially from previously disclosed FLI. Reporting issuers must also disclose expected differences from targets. Events can include economic and market events that may cause actual results to differ materially from previous targets. Issuers should also include a quantified discussion.

The Staff Notice cautions against updating previously disclosed FLI without also disclosing events or circumstances that occurred during the period and how that impacted the target. For example, instead of providing a boilerplate update such as, “Gold production target for 2013 has been increased to 70,000 to 80,000 gold ounces”, the reporting issuer should include a discussion of the event that occurred and the impact it had on the original target. Updated risks and assumptions should also be included.

The Staff Notice notes that tables can be an effective strategy to clearly communicate FLI and update the information.

Comparison of Actual Results vs. FOFI and Financial Outlook in MD&A

Subsection 5.8(4) of NI 51-102 requires reporting issuers to provide a comparison of actual results to previously disclosed FOFI and financial outlook if actual amounts differ materially. The discussion should be comprehensive, entity-specific and include both qualitative and quantitative explanations of the material differences.

For instance, instead of simply providing the results such as, “ABC Company achieved sales growth of 10.5% in 2012”, the disclosure should provide a comprehensive discussion comparing actual results to those previously disclosed.

Practice Points

The Staff Notice provides the following practice points to assist in promoting clear, transparent disclosure for FLI:

- a. Quality of assumptions: Assumptions should be reasonable and specific to the reporting issuer. Qualitative and quantitative assumptions should be provided;
- b. Timely updating of ongoing progress: Affirmation of targets, disclosure of affected material differences, and updates on trends likely to impact future performance should be updated on a timely basis;
- c. Key Performance Indicators (“KPIs”) – financial and non-financial: KPIs should be disclosed, as they can help investors understand how well an issuer is progressing towards their objectives. Examples of KPIs include: customer retention, capital expenditures, same store sales, and exploration success rate;
- d. Separate Presentation: A separate section of FLI, set out in a table that identifies objectives, key specific assumptions and risks will enable investors to easily identify the information that constitutes material FLI, as well as clarify the relationship between the underlying key components and the FLI; and,
- e. Role of the Audit Committee and Board of Directors: The audit committee and board of directors should consider reviewing and approving all FLI disclosure before it is publicly disclosed.

If you would like to discuss the information provided in this article please contact [Sherri Altshuler](#).

**Alyssa Gebert is currently a summer student at Aird & Berlis LLP.*

Canadian Securities Regulators Decide not to Implement Proposed Rule for Venture Issuers

By: James Leech

On July 25, 2013, the Canadian Securities Administrators (the “**CSA**”) announced that they will not pursue implementation of proposed National Instrument 51-103 *Ongoing Governance and Disclosure Requirements for Venture Issuers* (“**NI 51-103**”).

NI 51-103 stems from a project initiated by the CSA to examine the venture market with the goal of creating a distinct regulatory regime to streamline venture issuer disclosure to reflect the needs and expectations of venture issuer investors. The regime was also intended to make disclosure requirements more suitable and manageable for venture issuers given the stage of their development.

In May 2010, the CSA published CSA Multilateral Consultation Paper 51-403 *Tailoring Venture Issuer Regulation* and conducted in-person consultations across the country exploring the feasibility of, and support for, this endeavour. Feedback from the consultation paper and in-person consultations was generally positive.

Based on this feedback, the CSA published the proposed NI 51-103 and other rule amendments for two separate comment periods on July 29, 2011, and September 13, 2012, respectively. The proposals addressed

continuous disclosure and governance obligations for venture issuers, as well as disclosure for prospectus offerings and certain exempt offerings. Please see the Aird & Berlis LLP *Securities Law Bulletin* dated October 30, 2012, for a summary of the proposed NI 51-103.¹

Although market participants supported many aspects of proposed NI 51-103, some significant concerns were raised, including the burden placed on venture issuers to transition to a new regime and to prepare a mandatory annual report. After reviewing these comments, and after further consideration, the CSA decided not to pursue implementation of proposed NI 51-103.

The CSA has indicated that it is still considering implementing some of the proposals within NI 51-103 as amendments to the existing regulatory regime. The CSA has not given any further guidance on these proposed amendments at this time.

If you would like to discuss the information provided in this article please contact [James Leech](#).

1A copy of the bulletin can be found at: <http://www.airdberlis.com/Templates/Newsletters/newsletterFiles/247/Securities%20Law%20Bulletin%20October%202012.pdf>

OSC Announces Consultation Regarding Women on Boards and in Senior Management Positions of TSX-Listed Companies

By: Melanie Cole

On July 30, 2013, the Ontario Securities Commission (the “**OSC**”) announced the release of a staff consultation paper¹ regarding women on boards and in senior management positions in Ontario (the “**Consultation Paper**”). The stated purpose of the Consultation Paper is to advance the representation of women on boards and

in senior management positions, and to solicit feedback from investors, issuers, other market participants and advisors to inform the recommendations of the OSC to the Ontario Government, which highlighted gender diversity as a priority in the 2013 Budget.

In the Consultation Paper, the OSC proposes to amend the corporate governance disclosure rule² to require that

1 OSC Staff Consultation Paper 58-401 – Disclosure Requirements Regarding Women on Boards and in Senior Management. Available at http://www.osc.gov.on.ca/documents/en/Securities-Category5/sn_20130730_58-401_disclosure-requirements-women.pdf

2 National Instrument 58-101 – Disclosure of Corporate Governance Practices

non-venture issuers (other than investment funds) provide disclosure of gender diversity on boards and in senior management in areas such as:

- i. policies regarding the representation of women on the board and in senior management;
- ii. consideration of the representation of women in the director selection process;
- iii. consideration of the representation of women in the board evaluation process; and
- iv. measurement regarding the representation of women in the organization and specifically on the board and in senior management.

According to the Consultation Paper, this type of disclosure is intended to provide stakeholders with information on an issuer's approach to advancing the representation of

women on boards and in senior management, which in turn may impact investment and voting decisions.

The 60-day comment period will end on September 27, 2013. In addition to written comments on the proposals contained in the Consultation Paper, the OSC has also announced that it will hold a roundtable in the fall.

In a future Aird & Berlis LLP *Securities Law Bulletin*, we will discuss factors that may be of interest to issuers when considering the disclosure model proposed by the OSC in the Consultation Paper, including statistics on issuers who currently disclose their policies regarding the representation of women on their boards and in senior management, and those with diversity policies and practices in place.

If you would like to discuss the information provided in this article please contact [Melanie Cole](#).

If you have questions regarding these articles, please contact the authors or any member of the Aird & Berlis LLP Corporate Finance Group:

Lawyers:

Sherri Altshuler	416.865.3081	saltshuler@airdberlis.com
Daniel N. Bloch	416.865.4739	dbloch@airdberlis.com
Melanie Cole	416.865.4638	mcole@airdberlis.com
Thomas A. Fenton	416.865.4631	tfenton@airdberlis.com
Tony Gioia	416.865.3403	tgioia@airdberlis.com
Lorway Gosse	416.865.3430	lgosse@airdberlis.com
Rebecca Kacaba	416.865.7707	rkacaba@airdberlis.com
Steven Kelman	416.865.3446	skelman@airdberlis.com
Richard M. Kimel	416.865.3961	rkimel@airdberlis.com
Martin E. Kovnats	416.865.3419	mkovnats@airdberlis.com
James Leech	416.865.3070	jleech@airdberlis.com
Matthew V. Liberatore	416.865.4639	mliberatore@airdberlis.com
Andrew Magnus	416.865.4744	amagnus@airdberlis.com
Anne E. Markle	416.865.7717	amarkle@airdberlis.com
James G. Matthews	416.865.7748	jmatthews@airdberlis.com
Jeffrey K. Merk	416.865.7768	jmerk@airdberlis.com
Margaret T. Nelligan	416.865.7710	mnelligan@airdberlis.com
Morris Popowich	416.865.3413	mpopowich@airdberlis.com
Jennifer A. Wainwright	416.865.4632	jwainwright@airdberlis.com

AIRD & BERLIS LLP

Barristers and Solicitors

Brookfield Place
181 Bay Street, Suite 1800
Toronto, Ontario, Canada
M5J 2T9
T 416.863.1500 F 416.863.1515
www.airdberlis.com

Any of the articles or papers written by our professionals can be viewed at:
www.airdberlis.com

This bulletin offers general comments on legal developments of concern to business organizations and individuals and is not intended to provide legal opinions. Readers should seek professional legal advice on the particular issues that concern them.

© 2013 Aird & Berlis LLP

This bulletin may be reproduced with acknowledgment.