Securities Law Bulletin

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CSA Publishes Results of Continuous Disclosure Review Program

By: Richard Kimel and Morris Popowich

On July 18, 2013, the Canadian Securities Administrators (the "**CSA**") published Staff Notice 51-339 (the "**Staff Notice**") detailing the results of its review of continuous disclosure documents filed by selected reporting issuers for the fiscal year ended March 31, 2013. The Staff Notice discusses a number of common deficiencies identified in financial statements and MD&A, as well as provides guidance concerning certain other key disclosure topics.

Common Deficiencies

1. Financial Statements

Judgments – Under paragraph 122 of IAS 1 *Presentation of Financial Statements*, reporting issuers are required to disclose certain judgments that management has made in the process of applying the entity's accounting policies and that have the most significant effect on the amounts recognized in the financial statements. The CSA found that the disclosure in this area is generally deficient and boilerplate.

Impairment of Goodwill – Under paragraph 134 of IAS 36 *Impairment of Assets*, reporting issuers are required to disclose certain information relating to the goodwill and intangible assets of cash-generating units. The CSA determined that certain reporting issuers did not disclose all of the information required by IAS 36.

Going Concern – The Staff Notice discusses certain common problems with going concern disclosure. These problems include inconsistent information provided in the reporting issuer's disclosure documents, such as the failure to provide explicit going concern disclosure in the financial statements despite such language being present in the auditor's report.

2. MD&A

Liquidity – Under section 1.6 of Form 51-102F1, reporting issuers are required to provide detailed disclosure regarding liquidity. The CSA found that MD&A disclosure under this heading often reproduces information from the financial statements, which may not fully comply with all of the MD&A form requirements.

Discussion of Operations – The CSA found that reporting issuers often reproduce information from the statement of profit or loss and other comprehensive income in MD&A, without providing an explanation for changes compared to previous periods. To comply with section 1.4 of Form 51-102F1, MD&A should include entity-specific disclosure regarding the factors which contributed to changes in the reporting issuer's operations.

Related Party Transactions – Under section 1.9 of Form 51-102F1, reporting issuers are required to disclose certain prescribed information regarding related party transactions. The CSA notes that MD&A disclosure often repeats the related party disclosure from the notes to the financial statements, which may not fully comply with all of the MD&A form requirements.

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3. Other Deficiencies

Mineral Disclosure – Common mineral disclosure deficiencies listed in the Staff Notice include incomplete or inadequate disclosure of preliminary economic assessments, mineral resources and mineral reserves and non-compliant certificates and consents of qualified persons for technical reports.

Oil and Gas Disclosure – Common oil and gas disclosure deficiencies identified by the CSA include the failure to adapt to current form requirements for technical disclosure and non-compliance with certain sections of NI 51-101 regarding disclosure of resources other than reserves, classification to the most specific category of resources, summation across resource categories and disclosure of high case estimates.

DC&P and ICFR – Venture issuers using Forms 52-109FV1 or 52-109FV2, known as the Venture Issuer Basic Certificates, are reminded that MD&A should not include any conclusions on the effectiveness of DC&P or ICFR. Where appropriate, the prescribed cautionary language set out in the Companion Policy to NI 52-109 should be included in MD&A.

If you would like to discuss the information provided in this article, or you have questions regarding reporting issuer continuous disclosure obligations in Canada, please contact Richard Kimel or Morris Popowich.

Toronto Stock Exchange Issues Guidance on Director Election and Disclosure Requirements

By: Sherri Altshuler and Melanie Cole

On October 4, 2012, the Toronto Stock Exchange (the "**TSX**") announced that it had received approval from the Ontario Securities Commission to proceed with amendments to Part IV of the TSX Company Manual (the "**Manual**") relating to how a listed issuer elects its board of directors. The amendments, which became effective on December 31, 2012, included requirements for issuers to elect directors individually on an annual basis, to publicly disclose the votes received for the election of each director, to disclose if they have adopted a majority voting policy for uncontested director elections and, if the issuer does not have a majority voting policy, to disclose to the TSX if a director receives a majority of 'withhold' votes (collectively, the "**Requirements**").

Certain TSX-listed issuers residing and listed on another stock exchange or market in foreign jurisdictions ("**Interlisted International Issuers**") have expressed concerns regarding the impact of the Requirements, in particular the requirement to elect directors on an annual basis.

On July 10, 2013, the TSX issued Staff Notice 2013-0002 (the "**Staff Notice**") providing issuers with new guidance regarding the application of the Requirements as well as setting out a framework for Interlisted International Issuers seeking a waiver from the Requirements. The principal aspects of the Staff Notice are summarized below.

Waiver Applications by Interlisted International Issuers

The Staff Notice states that the TSX will accept applications from Interlisted International Issuers for a waiver from the Requirements, and provides guidance on the key factors that the TSX will consider in granting such a waiver. The Requirements were adopted by the TSX to strengthen the Canadian corporate governance regime and to enhance the integrity of, and domestic and global confidence in, Canadian capital markets. In considering waiver applications, the TSX will consider the level of activity of the issuer in the Canadian market and whether the broader corporate governance framework to which that issuer is subject demonstrates a comparable commitment to these policy objectives.

The Staff Notice outlines the factors to be addressed by an Interlisted International Issuer in an application for a waiver of the Requirements, including but not limited to:

i. the name of the stock exchange or market on which the issuer primarily trades (the "**Home Market**");

ii. the issuer's jurisdiction of incorporation;

iii. the level of trading in Canada and the Home Market (the TSX states in the Staff Notice that it will be more receptive to an application where at least 75% of the value and volume of an issuer's trading in the

six months preceding the date of the application has occurred outside of Canada);

iv. if the issuer's jurisdiction of incorporation is outside of Australia, the United Kingdom or the State of Delaware (or another U.S. state with corporate laws comparable to the state of Delaware) (the "**Known Jurisdictions**"), a detailed description of: (x) the issuer's compliance with director election standards and practices of its jurisdiction of incorporation, (y) comparative director election practices of similar-sized issuers in its sector in its Home Market, and (z) the corporate governance regime for director elections in the Home Market, including a description of current practices and trends; and

v. if the issuer's jurisdiction of incorporation is a Known Jurisdiction, confirmation that the issuer is in compliance with director election standards and practices of its jurisdiction of incorporation and of its Home Market.

If the TSX grants a waiver from the Requirements, the relief granted and reasons for requesting such relief must be disclosed by the issuer in its annual information circular. A waiver from the Requirements will only be effective for a period of one year or until the issuer's next annual general meeting of securityholders. If a waiver is granted, subsequent waiver applications must address changes, if any, from the initial application. In the event that no changes have occurred since the granting of the initial waiver, the issuer only needs to confirm this fact in their application.

Application of Requirements to Interlisted International Issuers at the Time of Listing

The Staff Notice clarifies that the Requirements will not apply to Interlisted International Issuers at the time of initial listing, and will only begin to apply at the time the issuer mails the materials for its first annual general meeting of securityholders after listing on the TSX (provided that the issuer has been listed on the TSX for at least six months at the time of mailing). For issuers who have been listed on the TSX for a period of less than six months, the Requirements will not come into effect until the next annual general meeting of securityholders.

Director Recommendation Requirements

The Manual requires the board of directors of TSX-listed issuers to permit securityholders of each class or series to vote on the election of all directors to be elected by such class or series on an annual basis. In some instances, and in particular when issuers are subject to the laws of foreign jurisdictions pursuant to which director elections are staggered, amendments to an issuer's constating documents may be required in order to implement the election of directors on an annual basis. In instances where an issuer's board of directors concludes that recommending such amendments will be contrary to its fiduciary duties, the TSX will consider that an issuer has satisfied the requirement if the board states that such amendment is "as required by the TSX". In such instance, the information circular must provide balanced information about annual elections and the proposed amendment to implement annual elections. If securityholders do not approve the amendment to the issuer's constating documents, the TSX does not consider the issuer in breach of the Requirements, but the issuer must re-submit and recommend the amendments for approval to securityholders at the issuer's annual meeting every three years until the required amendments are approved by securityholders.

During the recently completed proxy season, certain issuers incorporated under the laws of Australia put forward amendments to their constating documents in order to comply with the annual director election requirements of the TSX.[1] These amendments were approved by the securityholders of all but one issuer, suggesting that securityholders of foreign issuers may be amenable to approving changes required in order to comply with the Requirements.[2]

News Release Requirement

As discussed above, the TSX requires that all issuers disseminate a news release disclosing detailed results of the vote for the election of directors. In the Staff Notice, the TSX suggests that issuers disclose one of the following in their news release in order to meet this requirement:

i. the percentage of votes received 'for' and 'withheld' for each director;

ii. the total votes cast by proxy and ballot, together with the number that each director received 'for'; or

iii. the percentages and total number of votes received 'for' each director.

If no formal count has occurred that would meaningfully represent the level of support received by each director (such as when a vote is conducted by a show of hands), the TSX expects issuers to disclose the votes represented by proxy that would have been withheld from each nominee had a ballot been called, as a percentage of votes represented at the meeting.

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1 Coalspur Mines Limited, Inova Resources Limited (formerly Ivanhoe Australia Limited), Mirabela Nickel Limited and Aurora Oil & Gas Limited.

2 Pursuant to the governing statute of Mirabela Nickel Limited, special resolutions require that at least 75% of the votes cast by members entitled to vote must be in support of the resolution. This resolution attracted only 66% of the votes cast by securityholders at the meeting.

Requirements for the Election of all Directors and Appointment Rights

As discussed above, the Manual requires that securityholders must be allowed to vote for each director to be elected by such class or series. In the Staff Notice, the TSX clarifies that these provisions do not apply to issuers that have granted appointment rights accepted by the TSX at the time of original listing or otherwise.

Compliance with the Policy Objectives of the Requirements

The Requirements were adopted by the TSX to strengthen the Canadian corporate governance regime and to enhance the integrity and reputation of the Canadian capital markets. The Staff Notice states that any means adopted by an issuer that have the effect of frustrating or avoiding the policy objectives of the Requirements (such as a by-law provision containing an extraordinary quorum requirement for the election of directors) will be viewed by the TSX as a failure to comply with the Requirements.

Further Proposed Amendments

As noted above, issuers are currently required to disclose in their management information circular whether a majority voting policy for uncontested director elections has been adopted and, if the issuer does not have a majority voting policy, to disclose why a policy has not been adopted and to disclose to the TSX if a director receives a majority of 'withhold' votes. Under the current TSX rules, when an election is held, even if a director receives a majority of 'withhold' votes, that individual is validly elected as a director. During the comment period leading up to the implementation of the Requirements, the TSX received a number of comments in support of mandatory majority voting rules and, as a result, published further proposed amendments for comment that would require all TSX-listed issuers to formally adopt such a policy.

The TSX believes that making majority voting mandatory will enhance Canada's reputation for supporting strong governance standards, and will bring Canada closer to the practices of other major international jurisdictions. According to the TSX, majority voting provides securityholders with a meaningful way to hold directors accountable. The comment period on the additional proposed amendments closed on November 5, 2012, but the TSX has not yet announced whether the proposed changes will be implemented.

If you would like to discuss the information provided in this article, or you have other questions regarding TSX requirements, please contact Sherri Altshuler or Melanie Cole.

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

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