



Securities Law Alert

June 29, 2007

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Proposed New Executive Compensation Disclosure Rules

The Canadian Securities Administrators ("CSA") have released for comment a proposed new set of compensation disclosure rules (the "Proposed Rules"). The goals of the Proposed Rules are to improve the quality and transparency of compensation disclosure and to provide greater insight into this aspect of the stewardship of issuers. The Proposed Rules are based heavily on new compensation disclosure rules adopted by the SEC in August 2006 and which were in force for the 2007 U.S. proxy season, however the CSA has simplified the U.S. rules in certain important respects. The CSA's goal is to have the new rules in force for the 2008 proxy season and to meet this schedule it would be necessary to publish the new rules in October. Whether this is possible will depend upon the nature of the comments received on the Proposed Rules and the nature of the changes made in response to such comments.

The following is a very brief summary of some of the major changes that result from the Proposed Rules, together with a discussion of certain actions that issuers might consider taking at this time to begin preparing for the new rules.

Compensation Disclosure and Analysis

One of the more significant changes is the replacement of the current Report on Executive Compensation with a compensation discussion and analysis ("CD&A"). The CD&A involves an MD&A type analysis of the material factors underlying the issuer's compensation policies and decisions and is intended to provide a context for the numbers set out in the various tables. The CD&A must discuss the material principles, underlying policies and compensation decisions in the prior fiscal period, including:

- the objectives of the compensation program;
- what the compensation program is designed to achieve;
- each element of compensation;

- why the issuer chooses to pay each element;
- how the issuer determines the amount (or formula) for each element; and
- how each element and the issuer's decisions regarding that element fit into the overall compensation objectives and affect decisions regarding other elements.

The discussion should give readers a sense of how compensation levels for the period (and future periods) might have been different under different performance scenarios. Target levels for specific quantitative and qualitative performance related factors for the named executive officers must be identified except where such disclosure would be detrimental to the issuer, in which case disclosure must be made of the percentage of total compensation that relates to undisclosed targets. A performance graph comparing shareholder returns to one market index continues to be required, however it must be accompanied by a discussion of a comparison of the trends of the shareholder returns to the trends in the executive compensation over the same period. Concerns with respect to option backdating are addressed through a requirement that the CD&A include a discussion of the process used to grant options including the role of the compensation committee and executive officers in setting or amending any option program. Although the CD&A is not required to be a report of Compensation Committee, in most cases the Compensation Committee would be involved in the review and approval of the CD&A. Unlike the U.S. rules, the compensation disclosure is not subject to specific officer certification, although this information would be included under the certification of disclosure controls and procedures.

Summary Compensation Table

A three year summary compensation table applicable to the five highest compensated executive officers continues to be required, however the new table differs

from the table in the existing rules in several important respects, including the following:

- information relating to stock awards and option awards will be reported in dollars rather than numbers of shares as currently required, with the dollar amounts being derived using the same methodology and assumptions used for financial statement purposes;
- a new column is added which shows the change in the actuarial present value of the accumulated benefits under defined benefit and actuarial pension plans (including supplemental plans);
- a total column is added;
- amounts reported as bonus is restricted to purely discretionary payments and as a result amounts previously reported as bonus may now be reported under other columns;
- a separate table must be provided showing the fair value at the date of grant (calculated under the CICA Handbook) of all grants of options and stock awards made during the year; and
- this table (and all other tables) must be accompanied by a narrative discussion of the material factors necessary to understand the information in the table.

Equity Based Awards

Two new tables provide expanded disclosure of all outstanding option and equity awards as well as amounts realized from the exercise of options and the vesting of stock awards.

Plan Based Awards

The Proposed Rules require a narrative discussion of the material terms of all plan based equity and non equity awards. This must include a discussion of performance based and other conditions as well as information of future payouts under non equity plans (threshold, target and maximum).

Retirement Plan Benefits

A new table containing enhanced disclosure of retirement benefits payable to each named executive officers under all defined benefit plans is required. This must include the present value of all accumulated benefits. If the number of years credited service differs from actual service, the difference must be quantified and explained. Issuers must also provide a narrative discussion of the material terms of any defined contribution plans and deferred compensation plans provided for the named executive officers.

Termination and Change of Control

Greater detail is required of payments to be made to named executive officers as a result of a termination or change in control. A quantification of estimated payments is required under various scenarios based upon the assumption that the triggering event occurred at the end of the financial year and the price per share was the closing price on such date.

Director Compensation

Enhanced disclosure of compensation paid to each director for the prior year is provided by way of a table similar to the summary compensation table. Disclosure must also be made of equity and plan based awards to directors.

Venture Issuers

The exemptions from certain of the existing compensation disclosure rules currently available to venture issuers will be removed and venture issuers will be subject to the same compensation disclosure rules as larger issuers, with the exception that they will not be required to provide a performance graph. The CSA is also proposing to amend the definition of venture issuer to exclude debt only issuers with assets of more than \$25 million and to include issuers whose securities are listed on AIM and Plus markets. Venture issuers who do not send a management information circular to shareholders must file executive compensation disclosure within 140 days of the fiscal year end.

Implications Of Proposed Rules For Issuers

Compliance with the new rules for the first time will be a very time consuming process. U.S. issuers have indicated that it has taken up to 6 months to prepare the compensation disclosure under the new U.S. rules. Given the long lead time involved, and the possibility that the new rules will be announced as late as October and applicable to the 2008 proxy season, issuers may find it necessary and prudent to start now on preparing for the new compensation disclosure regime. Some of the actions that can be taken at this time include the following:

- become familiar with the new rules and assess how they may impact disclosure;
- assemble a working group with the necessary skills (which may include legal, accounting, actuarial, human resources and benefit plan administration) to commence assembling the required information and to establish a work plan that allows appropriate lead time;
- familiarize the Compensation Committee with the new rules with a view to assessing the impact of the disclosure on the compensation programs of

the issuer and whether changes to the compensation programs and procedures should be made;

- review the mandate of the compensation committee and the disclosure policies and procedures to ensure that they appropriately address the responsibility for and review of this new disclosure;
- review compensation related disclosure in the corporate governance disclosure and assess what changes to it may be required as a result of the new compensation disclosure; and
- obtain some samples of 2007 compensation disclosure by comparable U.S. issuers and follow U.S. developments in this area. The SEC is conducting a review of 2007 U.S. compensation disclosure and will be publishing a report of its findings this fall.

Macleod Dixon LLP will be holding client information sessions on the Proposed Rules in September to assist clients in preparing for the new compensation disclosure regime. Please contact any member of the Macleod Dixon LLP Securities Group if you have any questions with respect to the Proposed Rules.