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Update on Canada’s Executive Compensation Disclosure – “Say on Pay” Form 51-102F6 and CSA Staff Notice 51-331

Background

On September 18, 2008, the Canadian Securities Administrators (CSA) announced that effective **December 31, 2008** all CSA jurisdictions would adopt the revised Form 51-102F6 – Statement of Executive Compensation (with respect of financial years ending on or after December 31, 2008 (the **Form**)).

Over the **course of 2009**, the CSA monitored the implementation of the new rule to ensure it was working as intended. This process included doing targeted compliance reviews. The CSA reviewed a total of **70 (unnamed) reporting issuers**.

As a result of this review, the CSA issued **CSA Staff Notice 51-331** on **November 20, 2009** reporting findings of their targeted compliance review of executive compensation disclosure of these 70 reporting issuers, in relation to compliance with the new executive compensation rules that were implemented on December 31, 2008. The focus of the reviews was to:

- assess compliance with the new executive compensation disclosure requirements,
- use the review results to educate companies about the new requirements, and
- Identify any requirements that need clarification or further explanation to assist companies in fulfilling their disclosure obligations.

Sixty-two of the 70 companies reviewed filed disclosure that generally met the requirements of the Form; however, most were asked to improve their disclosure in future filings. Disclosure provided by the other eight companies did not meet the minimum acceptable standards and they were instructed to file supplemental executive compensation disclosure.

This chart summarizes the disclosure issues that the CSA identified in their review. These findings emphasize principles that all companies should consider when preparing their upcoming executive compensation disclosure.

Area	Significant Disclosure Issue	Number of Companies with Significant Disclosure Issue
Compensation Discussion & Analysis (CD&A)	Performance Goals or similar conditions	45
	Benchmarking	42
	Performance Graph	16
Summary compensation table	Grant date fair value of multi-year awards	3
	Reconciliation of grant date fair value and accounting for fair value	15
Pension plan benefits	Annual lifetime benefit payable at the end of the most recently completed financial year	1
Termination and change of control benefits	Qualification	13

New Guidance that will be Required

The Staff Notice includes some guidance regarding certain disclosure issues that could result from interpretation of the new disclosure requirements, including CD&A disclosure (in particular in relation to performance goals, the “seriously prejudice” exemption and benchmarking) and how the grant date fair value of share-based awards that include conditions (including performance goals or vesting) in relation to future years should be determined and disclosed. The disclosure of share-based award in particular gives rise to considerable issues that many companies struggled with in preparing disclosure this past year.

In addition, the Staff Notice, in a few cases, comments favourably on certain practices by some companies, which might be considered as a possible ‘best practice.’ This includes the voluntary provision by some issuers of an additional line in the performance graph showing the trend of the NEOs’ total compensation, and tabular presentation of termination and change of control benefits.

For reporting companies this year

In preparing executive compensation disclosure this year, companies should carefully consider the guidance provided by the CSA in this Staff Notice – to try to improve their disclosure and avoid the disclosure issues discussed in the notice – and, if necessary, should seek appropriate advice.

The Staff Notice indicates that the CSA will continue to review executive compensation disclosure, focusing in particular on the significant disclosure issues discussed in this Staff Notice. It is likely that the CSA will continue to be vigilant – perhaps even more so, in the second year.

A more detailed discussion of the Staff Notice and its implications, as well as other emerging trends and US reforms and the Canadian Coalition for Good Governance’s recently released “Best Practices in Executive Compensation Related Information 2009.” (www.ccg.ca)

In summary, based on the reported findings, issuers should consider the following in preparing this year’s executive compensation disclosure:

- Check that the **Compensation Discussion & Analysis (CD&A)** sufficiently explains the process of making executive compensation decisions, and that the discussion in the CD&A is specifically tied to the rest of the company’s executive compensation disclosure and the compensation that is reported.
- Provide meaningful disclosure of specific corporate and individual performance metrics.
- Provide complete disclosure regarding the selection criteria for the benchmark comparator group, a list of all peer companies, and a description of how benchmark information is used and for what purposes.
- Disclosure relating to how the trend shown in the performance graph, relates the company’s cumulative total return over five years, compared to the trend in the compensation of executive officers over that period.
- Ensure appropriate disclosure in the **Summary Compensation Table (SCT)**, in the year of the grant, of the grant date fair value of multi-year share-based awards that are subject to conditions being satisfied, or vesting, in future years, where it may be appropriate to discount the accounting fair value, and quantify and explain the difference between the reported grant date fair value and accounting fair value. Disclosure cannot be deferred until the conditions are satisfied in the future or on the basis that the board intended to pay a part of the award in a future period.
- Expanded disclosure should outline pension plan benefits (including non-compensatory amounts under defined contribution plans) and quantification of termination and change-of-control benefits.
- Ensure that columns are not deleted or added to the tables in the SCT, in order to avoid de-emphasizing the total compensation column.

The **CSA Staff Notice 51-331** contains some very useful guidance for issuers in relation to preparing executive compensation disclosure for this year. The CSA Staff Notice 51-331 is available at (http://www.osc.gov.on.ca/documents/en/Securities-Category5/csa_20091120_51-331_rpt-eed.pdf)

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