

## Amendments to Executive Compensation Disclosure Requirements

By R. Ian Mitchell, Partner, and Ann Lattanzio, Senior Securities Law Clerk

The Canadian Securities Administrators (the "CSA") are adopting amendments to Form 51-102F6 - *Statement of Executive Compensation* ("Form 51-102F6"), which will come into force on October 31, 2011, and apply to financial years **ending on or after October 31, 2011**. Changes to Form 51-102F6 range from clarifying existing disclosure requirements to new substantive requirements. Consequential amendments will also be made to Form 58-101F1 - *Corporate Governance Disclosure* and Form 58-101F2 - *Corporate Governance Disclosure (Venture Issuer)*.

Companies should be aware of the following substantive changes to executive compensation disclosure:

### Serious Prejudice Exemption

The serious prejudice exemption, which existed previously, allowed companies to withhold relevant performance goals or similar conditions on the basis that disclosure of such performance goals or conditions would seriously prejudice the company's interests. However, the regulators have found that in the past, companies have relied on the serious prejudice exemption without sufficient justification, even when the information was disclosed in documents that were publicly filed. A company that intends to rely on the serious prejudice exemption must explicitly state that it is doing so and explain why disclosing the relevant performance goals or similar conditions would seriously prejudice the company's interests.

A company will not be considered seriously prejudiced and able to rely on this exemption if the performance goals to be disclosed are based on broad corporate-level financial performance metrics, such as earnings per share, revenue growth and earnings before interest, taxes, depreciation and amortization.

### Risk Management Associated with Compensation Policies and Practice

Companies will be required to provide comprehensive disclosure with respect to risk management, and the board of directors or the compensation committee will be obligated to discuss whether they have given consideration to the risks associated with the company's compensation policies and practices. If the board of directors or the compensation committee (as the case may be) has contemplated the implications of such risks they must specifically state that consideration has been given to the risks associated with such compensation policies and practices and in particular describe:

- a. the nature and extent of the role of the board of directors or compensation committee in the oversight of such risks;
- b. any practices used by the company to identify and mitigate compensation policies and practices that could encourage a named executive officer ("NEO") or individual at a principal business unit or division to take inappropriate or excessive risks; and
- c. any identified risks arising from the company's compensation policies and practices that are reasonably likely to have a material adverse effect on the company.

### Disclosure Regarding Executive Officer and Director Hedging

Companies will be required to disclose whether any NEOs or directors are permitted to purchase financial instruments designed to hedge their positions in equity securities of the company granted as compensation or otherwise held by any such NEO or director.

This provision will require disclosure of, among other things, whether any NEO or director

is permitted to purchase financial instruments (such as prepaid variable forward contracts, equity swaps, collars, or units of exchange funds) that are designed to hedge or offset a decrease in the market value of the equity-based securities granted as compensation or held, directly or indirectly, by the NEO or director.

**Disclosure of Fees Paid to Compensation Consultants or Advisors**

Current requirements have also been expanded requiring companies to disclose fees paid to compensation consultants or advisors. If a compensation consultant has at any time since a company's most recently completed financial year been retained to assist the board or compensation committee in determining compensation for any of the company's executive officers or directors, the company must disclose the name of the consultant and provide a summary of the mandate the consultant has been given along with the date the consultant was originally retained.

Where the compensation consultant has provided additional services to the company, its affiliates or any of the company's directors or members of

management other than compensation services, the company must: (i) provide a description of the nature of this work; and (ii) disclose whether the board or compensation committee is required to pre-approve any such additional services.

**Summary Compensation Table**

Companies will be restricted from altering the format of the Summary Compensation Table (Section 3.1) by adding columns to the table. However, companies may continue to add separate tables and other disclosure as long as it is necessary to satisfy the objectives of Section 1.1 and so long as a reasonable person would view it as not detracting from the prescribed information in the Summary Compensation Table.

**Grant Date Fair Value for Share-based and Option-based Awards**

The CSAs have clarified that companies will be required to include a description of the methodology used to calculate the grant date fair value of all equity-based awards including key assumptions and estimates used for each calculation, and explain why the company chose such methodology in a footnote to the Summary Compensation Table. The CSAs have also clarified that this requirement

will not be met by simply referencing this disclosure from the company's financial statements in the Summary Compensation Table.

**Plain Language**

The CSAs have implemented a new requirement that information disclosed under Form 51-102F6 must be clear, concise, and presented in such a way that it provides a reasonable person, applying reasonable effort, with an understanding of how decisions about NEO and director compensation are made; and how specific NEO and director compensation relates to the overall stewardship and governance of the company.

**Amendments to Form 58-101F1 and Form 58-101F2**

Related consequential amendments have been made to Form 58-101F1 - *Corporate Governance Disclosure* and Form 58-101F2 - *Corporate Governance Disclosure (Venture Issuer)* allowing issuers to incorporate disclosure regarding compensation practices (Item 7 of Form 58-101F1 and Item 6 of Form 58-101F2) by reference to the information required to be included in Form 51-102F6.

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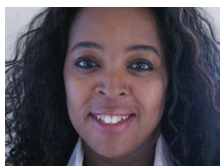


Ian's practice is focused on corporate finance and securities, with an emphasis on public and large private company transactions and advice. He has significant transactional experience in the areas of domestic and international private placements, public offerings, exchange listings, public and private mergers and acquisitions, and private equity. Ian also advises the boards of various public companies in connection with public disclosure, corporate governance and director liability issues.

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