

## Corporate Securities Law

January 17, 2012

### New Executive Compensation Disclosure Rules in Effect for 2012

Heading into the proxy reporting season it is important to pay close and early attention to the new amendments to the executive compensation disclosure rules. The changes will not only affect annual disclosures, but will also require careful advance consideration to plan for those disclosures. The changes (the “Amendments”) introduced by the Canadian Securities Administrators (the “CSA”) apply to public issuers with financial years ending on or after October 31, 2011 and are in significant measure parallel to changes recently adopted in the United States. The Amendments will require issuers to consider matters such as the composition of compensation committees, the role(s) of compensation advisors, and compensation frameworks as a whole in order to identify and assess any risks inherent in compensation arrangements.

#### Summary of Key Changes

A summary of certain key changes reflected in the Amendments is as follows:

##### *Risk Management*

In response to concerns that, at some issuers, compensation policies may have become disconnected from long-term performance and consequently created incentives inconsistent with the overall interests of the issuer, disclosure will be required as to the extent (if any) to which an issuer’s compensation policies and practices create risks reasonably likely to have a material adverse effect on the issuer. The Amendments require disclosure concerning whether the Board (or a Board committee) considered the implications of any risks associated with the issuer’s compensation policies and practices, including disclosure of:

- the nature and extent of the role of the Board (or a Board committee) in the oversight of such risks;

- practices used to identify and mitigate compensation policies and practices that could encourage a NEO or other individual to take inappropriate or excessive risks; and
- any identified risks that are reasonably likely to have a material adverse effect on the issuer.

##### *Composition of Compensation Committee*

Similar to existing disclosure rules regarding auditors and audit committees, the Amendments require enhanced disclosure of the composition, expertise and experience of the issuer’s Compensation Committee, including whether a committee member is independent, whether the committee member has direct experience relevant to his or her responsibilities on the committee and a description of the skills and experience that enable the committee to make compensation-related decisions.

##### *Fees Paid to, and Independence of, Compensation Advisors*

In response to the perception that there may be a conflict of interest when compensation consultants work on projects both for the issuer and its Board of Directors, the intent of the Amendments was to require additional disclosure concerning relationships with any compensation consultant or advisor engaged since the beginning of the issuer’s most recently completed financial year (though the rule, in an apparent minor drafting error, refers to engagements since the end of the most recent financial year). Disclosure is required of the nature of any such advisor’s mandate, and the aggregate fees billed by each consultant or advisor in the two most recently completed financial years.

##### *Executive Officer and Director Hedging*

Under the Amendments, an issuer will be required to disclose whether or not directors and NEOs are permitted to hedge against declines in the market value of their equity-based compensation (or equity securities held by the director or NEO) through the purchase of financial instruments designed to offset such risk. Such arrangements, while not strictly prohibited, might be considered to undermine the purpose for which such compensation was granted (i.e. incentivizing positive future corporate performance).

# Goodmans<sup>LLP</sup> Update

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## *Compensation Discussion and Analysis (CD&A)*

The CD&A requirement has been supplemented in certain respects, including:

- *Benchmarking*: If the issuer used any benchmarking, disclosure regarding the benchmark group and the selection criteria.
- *Board Discretion*: Disclosure as to whether the Board can (and did) exercise discretion (either to award compensation absent attainment of relevant performance goals or to reduce or increase the size of any award or payout).
- *Significant Changes*: Disclosure as to whether the issuer will be making any significant changes to its compensation policies and practices in the next financial year.

## *Other Clarifying Amendments*

The Amendments also include other changes and clarifications, including:

- clarification that a “named executive officer” or “NEO” may include an executive officer who is employed by a subsidiary of the company, provided that individual performs a policy-making function at the issuer level (and not solely at the subsidiary level);
- limitation on issuers’ ability to omit disclosure of performance goals under the guise of “serious prejudice” (among other limitations, the Amendments provide that disclosure of targets based on broad corporate financial metrics such as earnings per share, revenue growth and EBITDA is deemed not to seriously prejudice the issuer) and requiring disclosure when that exemption is used, including a description of the reasons for its application;
- clarification regarding disclosure of the process used to grant share-based awards to executive officers (similar to the disclosure requirements applicable to option-based awards);

- prohibition on varying the format of the summary compensation table (the core element for executive compensation disclosure), while retaining flexibility for additional columns in other tables; and
- clarification that non-venture issuers’ executive certificates concerning disclosure controls and practices and internal controls extend to executive compensation disclosure matters.

## **Matters for Consideration**

In response to the Amendments and in anticipation of the pending proxy disclosures reporting issuers should consider the effect of the Amendments on their compensation practices. Considerations, and practical steps, include the following:

- conducting a review of past disclosure practices to determine where enhanced disclosure will be required;
- ensuring that compensation policies align compensation with the best interests of the issuer, while taking account of related risks;
- considering the compensation skills, literacy and experience of Compensation Committee members and, if required, encouraging committee members to enhance their credentials and/or considering adjusting the composition of the committee;
- evaluating whether or not to adopt a policy prohibiting NEOs from hedging equity awards and shares held under share ownership requirements; and
- reviewing the roles played by compensation advisors and determining if they are in a position of conflict.

Please contact any member of the Goodmans’ Corporate Securities Group to discuss the implications of these Amendments.