

Update

Securities and Environmental Law

June 5, 2008

OSC Tightens Rules on Environmental Reporting

Disclosures by publicly traded issuers concerning environmental matters present unique challenges. These challenges arise because although an increasing amount of attention is focused on environmental matters generally, environmental issues are by their nature especially difficult to quantify. Notwithstanding the difficulties inherent in environmental disclosures, the Ontario Securities Commission (OSC) has issued clear notice that “boilerplate disclosure” on environmental-related matters, in annual information forms (AIF) and in quarterly and annual management discussion and analysis (MD&A) of financial results, is not acceptable. Given the potential for liability associated with misrepresentations, environmental disclosures are clearly a matter warranting increased attention.

In the OSC’s Staff Notice on Environmental Disclosure (the Notice), OSC staff advised that it had conducted a review of 35 reporting issuers, examining disclosure about the following five matters, in each case finding that the disclosures being provided were generally insufficient.

Financial Liabilities Related to the Environment

The Notice highlights that securities law requirements stipulate that where disclosure of environmental liabilities involves an accounting estimate (for example, potential exposure from environmental litigation) certain disclosures must be provided.

In particular, in OSC staff’s view, issuers should quantify accounting estimates and provide a detailed discussion of the estimates where quantitative information is reasonably available and would provide material information to investors.

The Notice also states that discussion of material contingent environmental liability should be included in an issuer’s MD&A and/or AIF even where the liability has not been accrued in the financial statements or disclosed in the notes to the financial statements (for example, in the case where potential environmental liabilities are not reflected in the financial statements because their long-term or contingent nature makes them particularly difficult to quantify).

Asset Retirement Obligations

The Notice reminds public issuers of the disclosure requirements associated with asset retirement obligations, and indicates that an issuer should provide supplemental disclosure in its MD&A concerning such obligations, such as details of environmental remediation costs.

Financial and Operational Effects of Environmental Protection

The Notice reflects OSC staff’s view that in order for an issuer to discharge its obligation to disclose the financial and operational effects of environmental protection requirements on its capital expenditures, earnings and competitive position, the issuer should include in its AIF, where reasonably available, a quantification of the costs associated with environmental protection requirements, and the impact or potential impact of such costs. This is reflective of OSC staff’s recognition of the challenges of quantifying environmental issues and its expectation that additional disclosures including, where reasonably possible, quantifications, should be provided.

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Environmental Policies Fundamental to Operations

Similarly, with respect to environmental policies, issuers are expected by OSC staff to evaluate and describe the impact or potential impact these policies may have on their operations, including a quantification of the costs associated with these environmental policies where quantitative information is reasonably available and would provide meaningful information to investors.

Environmental Risks

On the subject of disclosure of environmental risks, the Notice is clear in discouraging use of boilerplate language, indicating instead that disclosures should include a detailed discussion of environmental risks.

The Notice is a clear statement of the importance attached by securities regulators to public issuer disclosures on environmental matters. Issuers must be aware of these expectations, and prepare for the challenges presented by these requirements.

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