Goodmans LLP Update

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Corporate Securities Law

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Revised Corporate Governance Guidelines and Disclosure of Corporate Governance Practices

On January 16, 2004, the Ontario Securities Commission and certain of the other provincial securities regulatory authorities released for comment a proposed policy intended to provide guidance on corporate governance practices and a proposed instrument designed to provide greater transparency for the marketplace regarding issuers' corporate governance practices. The authorities in British Columbia, Alberta and Quebec subsequently released a different draft policy. On October 29, 2004, all of the provincial securities regulatory authorities together published for comment a revised policy and instrument.

Corporate Governance Practices

Similar to the existing corporate governance guidelines of the Toronto Stock Exchange (which are expected to be revoked once the proposed policy is effective), the proposed policy sets out corporate governance guidelines that reflect best practices but does not require that issuers adopt the specified practices. As a practical matter, however, it can be expected that issuers will experience pressure to conform to the policy's recommendations as a result of market scrutiny. As in the initial OSC proposal, the draft policy recommends that issuers:

- *Independence:* maintain a majority of independent directors on the board of directors,
- *Chair:* appoint a chair of the board or a lead director who is an independent director,
- *Meetings:* hold regularly scheduled meetings of independent directors at which members of management are not in attendance,
- *Board Mandate and Code of Ethics:* adopt a written board mandate and a written code of business conduct and ethics,
- *Position Descriptions:* develop position descriptions for the chair of the board, the chair of each board committee, and the chief executive officer,
- *Director Education:* provide each new director with a comprehensive orientation and provide all directors with continuing education opportunities,
- *Committees:* appoint a nominating committee and compensation committee, each composed entirely of independent directors,
- *Recruitment Objectives:* adopt a process for determining the competencies and skills that the board as a whole should have and apply this result to the recruitment process for new directors, and
- *Board Assessments:* conduct regular assessments of board effectiveness, as well as the effectiveness and contribution of each board committee and each individual director.

Below is a summary of a number of changes from the initial OSC proposal:

- *Income Trusts:* The policy now gives direction as to how the guidelines may be applied to issuers that are income trusts. In particular, the policy provides that income trust issuers in applying the guidelines should recognize that certain functions of a corporate issuer, its board and its management may be performed by any or all of the trustees, the board of a subsidiary of the trust or management of the subsidiary and, as such, the guidelines refer to both an income trust and its underlying entities, including the operating entity.
- *Scope of Board Responsibility:* The policy does not recommend, as the initial OSC proposal did, that a board's mandate set out decisions that require prior approval

of the board and that the board develop written position descriptions for directors, although the policy does recommend that the mandate set out expectations for, and responsibilities of, directors.

- *Breaches of the Code of Conduct:* The new policy changes the disclosure obligations of an issuer where there is a violation of the issuer's code of conduct. Issuers are advised that a material departure from the code by a director or executive officer will likely constitute a "material change" under securities laws, requiring a press release. The original OSC proposal required a press release any time a board of directors granted a waiver from the issuer's code in favour of a director or officer, whether or not material.

- *CEO Compensation:* The policy now clarifies that a compensation committee may either determine the CEO's compensation level itself or make a recommendation to the full board regarding the compensation level.

Revised Disclosure Requirements

The new proposal continues to require that issuers disclose whether they comply with the recommended governance practices. Where there is non-compliance, issuers will now have to include a description of what the board is doing to fulfill the objectives of the particular guideline. For example, if a majority of directors are not independent, there must be a description of what the board does to facilitate its exercise of independent judgement in carrying out its responsibilities. Companies listed on the TSX Venture Exchange will have to disclose their corporate governance practices but will not have to compare them to the recommended practices.

Changes from the initial OSC proposal include the following:

- *Disclosure in Proxy Circulars:* Instead of requiring issuers to include corporate governance disclosure in their annual information forms, the instrument now requires issuers to include the disclosure in their management proxy circulars. Circulars are much more widely read than AIFs.

- *Disclosure Obligations:* The proposed instrument requires disclosure for issuers that is not limited to the specific corporate governance guidelines. With respect to ethical business conduct, for example, the instrument now requires an issuer to disclose in its proxy circular any steps the board takes to ensure directors exercise independent judgement in considering transactions and agreements in respect of which a director or executive officer has a material interest and any other steps the board takes to encourage and promote a culture of ethical business conduct.

- *Independence Determinations:* The instrument now requires an issuer to disclose the identity of its independent and non-independent directors and the basis for its determination that a director is not independent. Additionally, under the revised instrument, an issuer will be required to disclose any other directorships of public companies held by its directors.

The comment period for the proposal expires December 13, 2004. Please contact a member of the Goodmans securities team should you wish to discuss the corporate governance guidelines.

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