

Goodmans^{LLP} Update

Highlights of OSC Corporate Finance Branch 2020 Annual Report

The Ontario Securities Commission (OSC) recently published [OSC Staff Notice 51-371 Corporate Finance Branch 2020 Annual Report](#) (the “**2020 Report**”). The 2020 Report summarizes the Corporate Finance Branch’s operational and policy work for the fiscal year ended March 31, 2020, and provides important guidance that can help issuers provide sufficient disclosure and reduce the risk of refilings or delays in capital markets transactions. Notably, the 2020 Report provides specific guidance about the impacts of COVID-19 on issuers’ disclosure obligations.

Continuous Disclosure

Each year, the OSC reviews the full continuous disclosure record of a select group of Ontario-based reporting issuers to assess whether they are complying with their disclosure obligations. The OSC also conducts “issue-oriented” reviews that focus on specific accounting, legal or regulatory issues the OSC determines warrant enhanced regulatory scrutiny. For the fiscal year ended March 31, 2020, some form of immediate disclosure, such as a refiling, was required in 17% of full reviews and 29% of issue-oriented reviews to address material deficiencies identified by OSC Staff. OSC Staff also reviews issuers’ continuous disclosure that is incorporated by reference into a short form or base shelf prospectus. Material deficiencies in issuers’ continuous disclosure can, therefore, also delay financing transactions.

The 2020 Report, together with prior reports, contain valuable guidance about the OSC’s expectations regarding key areas of focus that can assist reporting issuers in reducing the likelihood of a refiling or unexpected delays in financing transactions. The 2020 Report also includes specific guidance about disclosure of the impacts of COVID-19 that may be particularly important for issuers who may seek to raise capital while the pandemic is ongoing. Some of the key areas of focus in the 2020 Report with respect to continuous disclosure include:

- *Management’s Discussion and Analysis.* The quality of disclosure in MD&A continues to be a key focus of the OSC, as it views MD&A as the cornerstone of an issuer’s overall financial disclosure. The OSC continues to identify the use of incomplete or boilerplate disclosure as a material deficiency, particularly with respect to liquidity and capital resources, factors underlying variances in financial statement line items and risks and uncertainties. The 2020 Report provides specific guidance related to disclosure of COVID-19 impacts in each of these areas.
- *Non-GAAP Financial Measures.* As described in our February 25, 2020 Update, [Canadian Securities Administrators Publish Second Notice and Request for Comment on New Rules and Disclosure of Non-GAAP and Other Financial Measures](#), the Canadian Securities Administrators (CSA) are in the process of implementing new rules regarding the disclosure surrounding non-GAAP financial measures. In the 2020 Report, the OSC continues to express concern about the prominence given to disclosure of non-GAAP financial measures and the lack of transparency and appropriateness about the various adjustments made in calculating non-GAAP financial measures. The OSC also cautions issuers to be mindful when defining adjustments or alternative profit measures as “COVID-19 related” or describing COVID-19 impacts that extend over multiple reporting periods as non-recurring, infrequent or unusual.

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- *Forward-Looking Information (FLI)*. The OSC continues to identify deficiencies in FLI disclosure, including lack of a balanced discussion of the key assumptions used and risk factors inherent in FLI. In the 2020 Report, the OSC highlights a number of key questions for issuers to consider in light of COVID-19, including whether previously disclosed FLI needs to be updated in light of the impacts of COVID-19.
- *Other Areas of Focus*. The 2020 Report indicates that diversity, technical disclosure in mining reports, corporate governance in the cannabis industry (and other emerging growth industries) and climate change disclosure will continue to be areas of focus moving forward.

Prospectus Offerings

The OSC reviews prospectuses to ensure the disclosure in the prospectus (including any documents incorporated by reference in the prospectus) meets applicable disclosure standards. Much of the guidance regarding issuers' continuous disclosure discussed above is relevant to disclosure included in a prospectus. The 2020 Report includes additional guidance resulting from the OSC's prospectus reviews, which can be valuable for issuers undertaking or planning public financings or other capital markets transactions that require prospectus-level disclosure:

- *Confidential Pre-Filings*. As described in our March 9, 2020 Update, *Canadian Securities Administrators to Allow Confidential Prospectus Reviews*, issuers may now confidentially pre-file a prospectus with the OSC for review before publicly filing and announcing a proposed offering. Many of the substantive disclosure matters highlighted in the 2020 Report may be best addressed in confidential pre-file discussions between issuers and OSC Staff to avoid delays at the time of filing a prospectus. Confidential prospectus pre-filings have become an important tool in securities offerings, and we expect their use to increase over time. However, issuers are cautioned that the OSC may decline to review a draft preliminary prospectus if it is not at an appropriate stage for a pre-filing.
- *Primary Business in an IPO*. The disclosure requirements for an issuer's "primary business" remain under consideration by the OSC as part of its ongoing policy initiative to reduce regulatory burden. In the interim, an IPO prospectus must include a complete three-year financial history (two years for an IPO venture issuer) of the primary business that investors are investing in, including acquisitions during that period (or probable acquisitions) even if they are not "significant acquisitions" within the meaning of securities laws. Issuers may seek to address specific primary business fact patterns through a confidential pre-filing with the OSC.
- *Sufficiency and Use of Proceeds*. The 2020 Report highlights concerns about the sufficiency of proceeds raised in public offerings and disclosure of the use of those proceeds. The OSC can refuse to issue a receipt for a prospectus if the proceeds of the offering, together with the issuer's other resources, are insufficient to accomplish the purpose of the offering or if the issuer cannot demonstrate its ability to continue as a going concern. Inadequate disclosure can lead to unnecessary delays in completing an offering. These issues may be especially relevant for technology or other companies that don't generate meaningful cash flow, or issuers adversely impacted by COVID-19.
- *Cannabis Industry*. The 2020 Report contains extensive guidance for issuers in the cannabis industry and other emerging growth industries, including the psychedelic drug industry. The OSC will continue to scrutinize disclosure by these issuers to ensure that it is balanced and appropriately addresses the risks and uncertainties associated with these industries.
- *Testing the Waters Exemption*. The OSC continues to evaluate whether changes to Canadian rules governing marketing of public offerings are warranted in light of the expanded "testing the waters" exemption recently adopted in the United States. Market participants are encouraged to contact OSC Staff with questions relating to this issue in the interim.

The 2020 Report also includes guidance about disclosure standards for reverse takeover transactions, issuers with hybrid business structures, audit reports, audit committees and follow-on offerings by so-called "blind pool" issuers.

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Ongoing Policy Initiatives

The 2020 Report highlights a number of policy initiatives the OSC recently adopted, including codification of rules relating to at-the-market offerings, amendments to the test for determining whether an acquisition is “significant”, and pre-filing reviews of mining technical disclosure. The 2020 Report also provides an update on a number of ongoing policy initiatives, including a potential alternative prospectus model, adoption of an “access equals delivery” model for delivery of certain continuous disclosure documents by non-investment fund reporting issuers, an ongoing review of automatic securities disposition plans, and proposed amendments to the offering memorandum prospectus exemption.

Please contact any member of our [Corporate Finance and Securities Group](#) to discuss how any of the issues raised in the 2020 Report may impact your company.

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