

## Corporate Securities Law

August 2, 2005

### Material Difference Between Issuer's Financial Results and Analysts' Estimates is a Material Fact

Staff at the Ontario Securities Commission recently issued a news release regarding a warning letter sent to CP Ships Limited. The warning letter was a result of an investigation into the following circumstances: (i) the disclosure that certain financial statements of CP Ships would have to be restated; and (ii) trading by insiders in the shares of CP Ships during the period May 19 to June 4, 2004.

In June 2004 management of CP Ships recognized that financial statements for the years ending December 31, 2002 and 2003 and the financial results for the first quarter of 2004 would need to be restated, but could not at that time determine the extent of that restatement. The announcement that CP Ships would have to restate its financial statements was made on August 9, 2004 when the quantum of the restatement was determined. OSC Staff found that the determination by management in June 2004 that the financial statements needed to be restated constituted a material change that should have been disclosed forthwith. Staff cautioned that a material change occurred once an obligation to restate financial statements was identified and disclosure was required immediately even if the full magnitude of the required restatement was not yet known.

OSC Staff also found that trading by certain insiders of CP Ships prior to the end of the interim period ending June 30, 2004 should not have taken place because the insiders had knowledge at the time of the trading of

internal forecasts that results for the period were expected to be materially below market expectations. Staff expressed the view that it is a material fact (which is not the same as a material change) if forthcoming financial results of an issuer are expected to vary materially from analysts' estimates (presumably used as an effective proxy for market expectations). While it is clear that staff considered trading by insiders to be improper while this fact was not generally disclosed, it is less clear whether Staff is suggesting that issuers have an obligation to disclose such facts (which might be suggested by the proceedings initiated by Staff against ATI Technologies Inc. alleging, among other things, that failure to disclose a material fact on a timely basis in contravention of the (broader) requirements of the Toronto Stock Exchange was "contrary to the public interest").

OSC staff cautioned CP Ships regarding these matters but did not elect to commence formal disciplinary proceedings in light of CP Ship's cooperation and Staff's ability to protect the public interest by issuing a cautionary statement.

Please contact a member of the Goodmans securities team if you would like to discuss your disclosure obligations.

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