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Let's Meet Halfway: CSA Adopts Amendments to Streamline Venture Issuers' Disclosure

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On April 9, 2015, the Canadian Securities Administrators (CSA) announced the adoption of amendments to continuous disclosure, governance and prospectus disclosure requirements (the Amendments).[1] Most of the Amendments streamline the disclosure requirements for venture issuers and aim to reduce some of the difficulties experienced by smaller issuers that generally have fewer resources available to comply with the requirements associated with public company status. The Amendments have two principal objectives: (i) to reflect the needs and expectations of venture investors by eliminating information that is less valuable to them and (ii) to allow management of venture issuers to focus on the growth of their businesses while maintaining an acceptable level of governance safeguards. In the opinion of the CSA, "the amendments strike an appropriate balance between an investor's need for disclosure and the venture issuer's need for a streamlined and efficient disclosure system."

Some of the Amendments will have an impact on non-venture issuers, including mining issuers.

Highlights of the Amendments

The highlights of the Amendments are set out below:

- Venture issuers will be permitted to file reports in the form of quarterly highlights instead of interim management's discussion & analysis, whether or not they had significant revenues in the most recently completed financial year.
- Venture issuers will be required to file executive compensation disclosure within 180 days of their financial year-end and will be allowed to elect a much simpler form of disclosure for executive and director compensation arrangements.
- The thresholds for venture issuers to prepare a business acquisition report (a BAR) will be increased to 100%, from 40%, and they will no longer be required to prepare *pro forma* financial statements for inclusion in the BAR.
- Venture issuers will have to form audit committees composed of at least three members, a majority of whom may not be executive officers, employees or control persons, except in certain circumstances.
- Venture issuers conducting an initial public offering (IPO) will only be required to present two-year audited financial statements in their IPO prospectuses.
- Non-venture issuers that are required to send management information circulars will be required to file executive compensation disclosure within 140 days of their financial year-end.
- The form of disclosure required to be included in an annual information form for issuers with mineral projects will be modified.

What Is a Venture Issuer?

The Amendments do not propose any change to the definition of "venture issuers", which are reporting issuers whose securities are not listed on the Toronto Stock Exchange, any national securities exchange in the United States (such as the New York Stock Exchange (NYSE) and the NYSE MKT, formerly the American Stock Exchange), the NASDAQ Stock Market or any other foreign exchanges, other

than the Alternative Investment Markets of the London Stock Exchange (AIM). In Canada, venture issuers are commonly issuers whose shares are listed on the TSX Venture Exchange or, alternatively, on the Canadian Stock Exchange.

The Road Map to the Amendments

The Amendments put an end to an initiative that the CSA introduced in 2011 (the 2011 Proposals) and that originally proposed a more thorough review of the continuous disclosure regime for venture issuers. Taking note of the lack of support for a major turnover of such a regime, the CSA has landed on a middle-of-the-road alternative to the 2011 Proposals. It is worth noting that the Amendments are substantially the same as the amendments published for comment by the CSA in May 2014 (the Proposed Amendments).

Coming into Force

The CSA expects that the Amendments will come into force on **June 30, 2015**.

Amendments Affecting Venture Issuers

MD&A Requirements

Under the Amendments, venture issuers will be able to elect to file (i) MD&A for the three-, six-and nine-month periods under current section 2.2 of Form 51-102F1 *Management's Discussion & Analysis*, or (ii) new "quarterly highlights" for such periods under section 2.2.1 of Form 51-102F1. This choice will apply whether or not venture issuers had significant revenues in the most recently completed financial year.[2] The CSA expects that venture issuers will consider the needs of their investors when making a decision to file a standard MD&A or quarterly highlights. Consequently, whereas the CSA anticipates that smaller venture issuers will most likely elect to file quarterly highlights, larger venture issuers with significant revenues will be more likely to file a more complete disclosure document, such as an MD&A. The CSA believes that the availability of the quarterly highlights filing alternative "will give venture issuers the flexibility they need to focus their disclosure".

The quarterly highlights will include a short discussion of the issuers' material information about the operations, liquidity and capital resources, including an analysis of the issuers' financial condition, financial performance and cash flows, known trends, risks or demands, major operating milestones, commitments, expected and unexpected events, or uncertainties that have materially affected the issuers' operations, liquidity and capital resources in the relevant quarter, or that are reasonably likely to have a material effect in the future, and any significant transactions between related parties that occurred during the quarter. However, venture issuers will not be allowed to use the new streamlined version of their MD&A for their first post-IPO interim MD&A. Similarly, fourth-quarter disclosure will continue to be included in annual MD&A, whose form remains unchanged.

The option to file quarterly highlights will apply in respect of financial years beginning on or after **July 1, 2015**.

Disclosure of Executive Compensation

Under the Amendments, a venture issuer may elect to provide compensation disclosure under the same form as previously provided (Form 51-102F6 *Statement of Executive Compensation*) or under a new more tailored form (Form 51-102F6V *Statement of Executive Compensation – Venture Issuers*). Among other things, new Form 51-102F6V:

i. streamlines the disclosure with respect to compensation governance and compensation discussion & analysis to include information that is more tailored to the reality of venture issuers;

ii. reduces the number of executive officers for whom compensation disclosure must be included to (i) the chief executive officer (or individual acting in such capacity), (ii) the chief financial officer (or individual acting in such capacity), and (iii) the other most highly compensated individual whose total compensation exceeded $150,000, for a total of up to three (in comparison with up to five for non-venture issuers);

iii. reduces the number of years – to two years, from three – for which the information on executive compensation must be presented, but increases the period for the director compensation information to two years, from one;

iv. combines the named executive officer and director compensation in one table instead of two;

v. includes staggered thresholds for the disclosure of the value of perquisites provided to executive officers and directors;

vi. simplifies the information with respect to compensation securities (*e.g.*, stock options, convertible securities, stock appreciation rights, deferred share units and restricted share units) issued or granted to the executive officers and directors by removing, among other things, the requirement to include the grant date fair value;

vii. includes information about executive officers' and directors' exercise of compensation securities, including the value of the compensation securities on the exercise date;

viii. includes a description of the material terms of any agreement or arrangement under which compensation was provided to an executive officer or a director as opposed to only agreements or arrangements that provide for payments in connection with a resignation, retirement, change of control of the issuer or change in the individual's responsibilities; and

ix. includes a description of the material terms of the venture issuer's stock option plan or any other compensation plan.

Finally, under the Amendments, venture issuers will be required to file the disclosure in the form of Form 51-102F6 or Form 51-102F6V within 180 days of their financial year-end. Considering that most of the issuers include executive compensation disclosure in their management information circulars, the new deadline for venture issuers represents an alignment with the current regime, which is mostly driven by corporate laws (or the constating documents) and which requires issuers to call an annual shareholders' meeting within six months of the financial year-end.[3]

The new filing deadlines for executive compensation disclosure will apply in respect of financial years beginning on or after **July 1, 2015**.

BAR Requirements

Under the Amendments, the thresholds for an "acquisition" (as defined in NI 51-102) to be a "significant acquisition" and therefore trigger the requirement to file a BAR for venture issuers will be increased to 100%, from 40%. Therefore, an acquisition will only be a significant acquisition if the result of the "asset test" or the "investment test" (as each is described in NI 51-102) or, alternatively, the "optional asset test" or the "optional investment test" (as each is described in NI 51-102), exceeds 100% of the consolidated assets of the venture issuers. This amendment should result in a substantial decrease of circumstances in which a BAR must be prepared and filed. The new threshold of 100% will also apply to prospectuses and management information circulars prepared in connection with a proposed acquisition.

In addition, venture issuers will not be required to include *pro forma* financial statements with the BAR.

Audit Committee Composition

Under the Amendments, an audit committee of a venture issuer must be composed of at least three members, a majority of whom may not be executive officers, employees or control persons of the venture issuer or of an affiliate (*i.e.*, a subsidiary, the parent company or a subsidiary of the parent company). Therefore, members of the venture issuer's audit committee will not need to be independent within the meaning of NI 52-110.

Temporary exceptions from the audit committee composition rule will be permitted if circumstances that affect the business or operations of the venture issuers arise, if a member becomes a control person outside his or her reasonable control and in circumstances of vacancy resulting from a member's death, disability or resignation.

The new audit committee composition requirements will apply in respect of financial years beginning on or after **January 1, 2016**.

IPO Prospectus Requirements

Under the Amendments, an issuer that qualifies as an "IPO venture issuer" under NI 41-101 (*i.e.*, a venture issuer) will be able to

i. present two-year audited financial statements in its IPO prospectus instead of three years;

ii. include in its IPO prospectus a description of its business over a two-year period instead of three years; and

iii. conform its IPO prospectus disclosure and ongoing requirements to the Amendments in NI 51-102 (continuous disclosure) and NI 52-110 (audit committees).

Amendments Affecting Non-venture Issuers

Filing Deadline for Disclosure of Executive Compensation

Under the Amendments, non-venture issuers that are required to send a management information circular will be required to file the disclosure in the form of Form 51-102F6 within 140 days of their financial year-end. Considering that most issuers include executive compensation disclosure in their management information circulars, the new deadline for non-venture issuers represents a departure from the current regime for meetings, which is mostly driven by corporate laws (or the constating documents) and which requires issuers to call an annual shareholders' meeting within six months of their financial year-end.[4] An alternative for non-venture issuers that wish to call their annual shareholders' meetings after the new deadline would be to file the executive compensation disclosure on a stand-alone basis within the new deadline and refile it later as a section to the management information circular.

The new filing deadlines for executive compensation disclosure will apply in respect of financial years beginning on or after **July 1, 2015**.

Amendments Affecting Venture and Non-venture Issuers

Description of Mineral Projects in AIF

In addition to the above, the CSA has modified the form of disclosure required to be included in an AIF for issuers with mineral projects. Issuers will still be permitted to satisfy the disclosure requirement to be included in the AIF by reproducing the summary from the technical report prepared in compliance with National Instrument 43-101 *Standards of Disclosure for Mineral Projects*, and incorporating the detailed disclosure in the technical report into the AIF by reference. Mining issuers that are contemplating this option should bear in mind that documents incorporated by reference into short form prospectuses filed in the province of Québec must be translated into French and should query whether this obligation extends to documents that are incorporated by reference into documents that are incorporated by reference in prospectuses.

[1] The Amendments include amendments to National Instrument 51-102 *Continuous Disclosure Obligations* (NI 51-102); National Instrument 41-101 *General Prospectus Requirements* (NI 41-101); and National Instrument 52-110 *Audit Committees* (NI 52-110). The Amendments also include amendments to the companion policies or policy statements for NI 51-102 and NI 41-101.

[2] The CSA had originally considered whether the option to choose to file the new quarterly highlights instead of an interim MD&A should apply only to venture issuers without significant revenues. After a review of the comments submitted on the Proposed Amendments, the CSA has chosen a simpler and harmonised regime in which venture issuers are not "sub-divided".

[3] Under both the *Business Corporations Act* (Québec) (QBCA) and the *Business Corporations Act* (Ontario) (OBCA), an annual shareholders' meeting must be held within 15 months of the last preceding annual meeting. Venture issuers will have the same alternative as non-venture issuers to call their annual shareholders' meetings after the new deadline and file the executive compensation disclosure on a stand-alone basis within the new deadline and refile it later as a section to the management information circular.

[4] The *TSX Company Manual* requires a listed issuer to hold its annual shareholders' meetings within six months of the end of its fiscal year. Under both the QBCA and the OBCA, an annual shareholders' meeting must be held within 15 months of the last preceding annual meeting.

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