Canadian Securities Administrators
Autorités canadiennes en valeurs mobilières

# CSA STAFF NOTICE 58-306
# 2010 CORPORATE GOVERNANCE DISCLOSURE COMPLIANCE REVIEW

December 2, 2010

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# 1. INTRODUCTION

The purpose of this notice is to:

- summarize the results of a corporate governance disclosure compliance review, and
- provide guidance on compliance with the existing corporate governance disclosure requirements in the areas of concern identified during the review.

**Compliance review**

Staff of the securities regulatory authorities in Ontario, British Columbia, Manitoba and Québec (the Participating Jurisdictions or we) conducted a review (the 2010 review) of compliance with the requirements of *Regulation 58-101 respecting Disclosure of Corporate Governance Practices* (the Corporate Governance Regulation). We reviewed the corporate governance disclosure of 72 reporting issuers (other than investment funds) in the Participating Jurisdictions. The review was intended to build on the results of the 2007 CSA compliance review, outlined in CSA Staff Notice 58-303 *Corporate Governance Disclosure Compliance Review* (the 2007 review).

**Guidance**

This notice sets out guidance to reporting issuers, other than investment funds (referred to in this notice as issuers) on the existing continuous disclosure (CD) requirements under securities legislation relating to corporate governance matters. It is intended to clarify existing disclosure requirements relating to corporate governance matters and does not create any new legal requirements or modify existing ones. It is also intended to assist issuers in (1) determining what information about corporate governance matters needs to be disclosed, and (2) enhancing or supplementing their disclosure regarding corporate governance matters. Issuers should consider this guidance when preparing their corporate governance disclosure in their next management information circular or other filing.

**Summary of results and future action**

Over half of the issuers reviewed were required to make prospective enhancements to their corporate governance disclosure. We view the level of non-compliance with the disclosure requirements of the Corporate Governance Regulation to be unacceptable. Although significant efforts have been made to comply with the corporate governance disclosure requirements, issuers need to further improve their disclosure. We will continue to review corporate governance disclosure as part of our overall CD review program. Issuers should anticipate staff requests for additional disclosure, re-filings or other staff action, where appropriate, if an issuer has not fully met its corporate governance disclosure obligations.

## 1.1 Corporate governance regime

The Corporate Governance Regulation came into force on June 30, 2005 in conjunction with *Policy Statement 58-201 respecting Corporate Governance Guidelines* (the Corporate Governance Policy Statement).

**Corporate Governance Policy Statement**

The Corporate Governance Policy Statement applies to all issuers. Part 3 sets out guidelines for corporate governance practices. The guidelines are not intended to be prescriptive. Issuers are encouraged to consider the guidelines in developing their own corporate governance practices.

**Corporate Governance Regulation**

The Corporate Governance Regulation applies to all issuers with limited exceptions. It requires, among other things, that issuers disclose their corporate governance practices in their management information circulars (or in their annual information forms (AIF) or management's discussion and analysis (MD&A), as applicable).

There are two sets of disclosure requirements:

- **TSX-listed issuers.**[1] TSX-listed issuers must comply with the disclosure requirements in Form 58-101F1 *Corporate Governance Disclosure* (Form 58-101F1). Under Form 58-101F1, they must provide disclosure about their corporate governance practices with reference to the guidelines set out in the Corporate Governance Policy Statement.

- **Venture issuers.** The Corporate Governance Regulation's disclosure requirements for venture issuers are less extensive than those applicable to TSX-listed issuers. The requirements for venture issuers are set out in Form 58-101F2 *Corporate Governance Disclosure (Venture Issuers)* (Form 58-101F2). They must provide disclosure regarding their practices in the areas addressed by the guidelines set out in the Corporate Governance Policy Statement, but they are not required to compare their practices against the guidelines.

## 1.2 Importance of corporate governance information to investors and the market

A strong corporate governance disclosure regime is a key feature of market-based monitoring of corporate conduct and is central to the ability of shareholders to exercise their voting rights effectively. Disclosure can be a powerful tool for protecting investors. Shareholders and potential investors require access to regular, reliable and comparable information in sufficient detail for them to assess the stewardship of the board and management and make informed decisions about the valuation, ownership and voting of shares. Insufficient or unclear information may hamper the ability of markets to function, may increase the cost of capital and may result in a poor allocation of resources.

[1] References to TSX-listed Issuers in this notice include references to all reporting issuers that are not venture issuers (as defined in *Regulation 51-102 respecting Continuous Disclosure Obligations*).

## 2. REVIEW RESULTS

### 2.1 Review program

We selected a sample of 72 issuers for review. Our selection criteria included the size of the issuer's market capitalization, its industry sector and its listing status to achieve a broad cross-section of all issuers. Our sample included 46 TSX-listed issuers and 26 venture issuers. In the 2007 review, a sample of 100 issuers was selected, including 65 TSX-listed issuers and 35 venture issuers.

We reviewed each issuer's corporate governance disclosure in its most recently filed management information circular to determine whether it complied with the requirements in the Corporate Governance Regulation. In our view, disclosure that does not sufficiently describe the corporate governance practices of an issuer or that is boilerplate does not meet those requirements.

### 2.2 Summary of results

We found an unacceptable level of compliance with the Corporate Governance Regulation. In 2010, 55% of the total number of issuers reviewed were required to make prospective enhancements to their corporate governance disclosure, compared to 36% in the 2007 review. However, no issuers reviewed in 2010 were required to restate and refile their corporate governance disclosure. In contrast, two issuers in the 2007 review did not provide any corporate governance disclosure and were required to restate and refile their management information circulars. A summary of our review outcomes is set out below:

| TSX-listed issuers | | |
|---|---|---|
| | **2010 review** | **2007 review** |
| **Prospective enhancements** | 63% | 42% |
| **Restatements** | 0% | 0% |

| Venture issuers | | |
|---|---|---|
| | **2010 review** | **2007 review** |
| **Prospective enhancements** | 42% | 26% |
| **Restatements** | 0% | 6% |

The results of the review identified significant and frequent disclosure deficiencies in each of the following areas:

- board of directors
- position descriptions
- orientation and continuing education
- ethical business conduct
- nomination of directors, and
- assessments.

Guidance on the disclosure requirements relating to these areas is set out in Part 3 of this notice. Given that a higher percentage of the issuers reviewed in the 2010 review compared to the 2007 review were required to make prospective enhancements to their corporate governance disclosure, this notice is meant to be an educational tool for issuers when preparing their corporate governance disclosure. As noted above, we will continue to monitor corporate governance disclosure as a part of our overall CD review program.

## 3. GUIDANCE FOR CORPORATE GOVERNANCE DISCLOSURE IN AREAS OF CONCERN

To further assist issuers in complying with the disclosure requirements in the Corporate Governance Regulation, we have set out guidance and examples of disclosure below in the areas where we noted deficiencies during our review.

**Examples of entity-specific disclosure**
The examples have been included for illustration purposes only, and should not be viewed as applicable to all issuers, or comprehensive in all cases. Issuers are reminded that their CD documents filed with the securities regulatory authorities must comply with all applicable disclosure requirements. While particular corporate governance practices are identified in the examples, we are not suggesting that all issuers adopt those practices. We recognize that there is no single model of good corporate governance and that the practices that are most appropriate will vary among issuers. Nonetheless, the practices adopted by issuers need to be clearly articulated and disclosed so that investors can make their own assessments.

### 3.1 Requirements for TSX-listed issuers

#### A. Board of directors

Identity of non-independent directors and basis for determination

**Disclosure requirement**
Item 1(b) of Form 58-101F1 requires an issuer to disclose the identity of directors who are not independent (as defined in National Regulation 52-110 *Audit Committees*), and describe the basis for that determination.

**Findings of review**
The majority of issuers reviewed disclosed the identity of non-independent directors. However, many issuers did not disclose the basis for that determination. While for many issuers it was obvious that those directors were not independent because of their position with the issuer, the issuer did not explicitly note the executive relationship. For other issuers, no disclosure was included to facilitate a reader's understanding of why the director was considered to be non-independent.

**Commentary**
An issuer must explain why directors are identified as non-independent. It is not sufficient to include vague and general statements regarding the non-independence of directors, such as "when deciding whether a particular director is or is not an independent director, the board will examine the factual circumstances of each director and consider them in the context of many factors".

Where a director has been identified as non-independent, the issuer must disclose, at a minimum:

- the fact that the non-independent director has a direct or indirect material relationship with the issuer, or a subsidiary entity or parent of the issuer, which could, in the view of the board of directors, be reasonably expected to interfere with the exercise of his or her independent judgement
- how it determined whether a director has such a material relationship, and
- the nature of the material relationship in sufficient detail for investors to understand it.

Below is an example of entity-specific disclosure that elaborates on the basis for determining if a director is independent.

Example of entity-specific disclosure

A director is considered independent only where the board determines that the director has no direct or indirect material relationship with the company or its subsidiaries (together referred to as the company). A "material relationship" is defined in *Regulation 52-110 respecting Audit Committees* to mean any relationship, which could, in the view of the board, be reasonably expected to interfere with the exercise of a director's independent judgement.

On an annual basis, the board of directors, in consultation with the x committee, reviews each relationship that a director has with the company in order to determine whether the director is or remains independent.

Based on reference to these requirements and a review of the applicable factual circumstances against these standards, the board, in consultation with the x committee, has determined that the majority of its directors are independent. The following table identifies which directors are not independent and the basis for that determination.

| **Director** | **Independence status** | **Basis for determination of non-independence** |
|---|---|---|
| Director A | Independent | Not applicable – no material relationship |
| Director B | Not independent | Director B is considered to have a material relationship with the company by virtue of her executive officer position with the company since 20XX. |
| Director C | Independent | Not applicable – no material relationship |
| Director D | Independent | Not applicable – no material relationship |
| Director E | Not independent | Director E is considered to have a material relationship with the company as a result of being the relationship partner of the company's primary external legal counsel. |
| Director F | Not independent | Director F is considered to have a material relationship with the company's subsidiary, subsidiary x, because Director F is the CEO of supplier Y, and subsidiary x is the most significant customer of supplier Y's products. |
| Director G | Independent | Not applicable – no material relationship |

## Meetings of independent directors

### Disclosure requirement

Item 1(e) of Form 58-101F1 requires, among other things, an issuer to disclose whether or not the independent directors hold regularly scheduled meetings at which non-independent directors and members of management are not in attendance. If the independent directors hold such meetings, the issuer must disclose the number of meetings held since the beginning of the issuer's most recently completed financial year. If the independent directors do not hold such meetings, the issuer must describe what the board does to facilitate open and candid discussion among its independent directors.

### Findings of review

A significant portion of the issuers reviewed met part of the disclosure requirement in Item 1(e).

- **Held meetings with only independent directors.** The majority of issuers disclosed that they held meetings of the independent directors, but they did not disclose how many meetings were held or if such meetings were held regularly.

- **Did not hold meetings with only independent directors.** Other issuers disclosed that they did not hold regularly scheduled meetings at which non-independent directors and members of management are not in attendance, but failed to explain how the board facilitates open and candid discussion among the independent directors. Some issuers included a general statement on why they did not hold regularly scheduled meetings of their independent directors. For example, they may have disclosed that they believed there is active discussion among the independent directors outside of formal meetings or that appropriate structures and procedures are in place to ensure that the board can function independently of the management, but did not elaborate on the basis for that belief or describe what the appropriate structures and procedures are. In particular, they did not specifically explain what the board does to facilitate open and candid discussion among its independent directors, as required by Form 58-101F1.

### Commentary

It is important for investors to understand whether an issuer facilitates open and candid discussions among its independent directors, either through holding regular meetings with only the independent directors in attendance or through other practices.

Below are examples of questions an issuer should consider when drafting this disclosure.

- Do the independent directors of the board have a forum in which to address issues or concerns?
- At each board meeting, is a portion of the meeting reserved for independent directors where the non-independent directors and members of management are not in attendance?
- At each committee meeting, is a portion of the meeting reserved for independent directors where the non-

independent directors and members of management are not in attendance?

- If a portion of the board and committee meetings is not reserved for independent directors where the non-independent directors and members of management are not in attendance, do the independent directors have the opportunity to meet regularly and discuss matters of interest, independently of any managerial influence?
- If the issuer has no formal structures in place to ensure that the independent directors can meet without the non-independent directors and management:
    - what does the issuer do to ensure open and candid discussions?
    - does the issuer put procedures in place to have ad hoc in-camera meetings?
        - does the issuer have in-camera meetings on a regular basis or on an as needed basis?
        - what does the issuer consider when deciding if an in-camera meeting is needed?
        - are in-camera meetings held at the beginning or end of the meeting and why does the board consider this approach to be effective?
    - does the board ask one or more members of management or non-independent directors to withdraw during certain discussions, if the circumstances require it?

Below are examples of entity-specific disclosure elaborating on how a board facilitates open and candid discussion among its independent directors.

Example 1 -- Entity-specific disclosure where regular meetings with only independent directors

The board regularly meets independently of management and non-independent directors at the request of any independent director, or may excuse members of management and non-independent directors from all or a portion of any meeting where a potential conflict of interest arises or where otherwise appropriate. The board is also scheduled to meet without management and non-independent directors before or after each board meeting. In addition, after each board meeting held to consider interim and annual financial statements, the board meets without management and non-independent directors. In 20XX, the board met without management and non-independent directors at each board meeting, being seven separate occasions, including the four regularly scheduled quarterly meetings.

Example 2 -- Entity-specific disclosure where no regular meetings with only independent directors

The independent directors do not have regularly scheduled meetings. However, they have the opportunity to hold ad hoc meetings that are not attended by the non-independent directors and members of management and they avail themselves of this opportunity, at their entire discretion, whenever they deem necessary. Among other things, during meetings of the x committee, non-independent directors, executive officers who are not members of the board and other guests attending these meetings are asked to withdraw from these meetings for a certain period in order to allow the independent directors to discuss issues freely among themselves. In 20XX, no such meetings were held. In 20XX and to date, x such meetings were held.

## Independent chair and independent lead director

**Disclosure requirement**

Item 1(f) of Form 58-101F1 requires an issuer to describe what the board does to provide leadership for its independent directors if it has neither a chair nor a lead director that is independent.

**Findings of review**

Our review found that some of the issuers reviewed did not meet this disclosure requirement. In many cases, the chair was identified as a non-independent chair, but there was no disclosure on whether the board had an independent lead director. In other cases, the non-independent chair or non-independent lead director was identified, but it was unclear as to what steps the board took to provide leadership for its independent directors.

We also found that some issuers simply stated that their current independence structure was an appropriate leadership structure for the issuer and that they would periodically evaluate whether such structure continued to be in the best interests of the issuer and its shareholders.

**Commentary**

An issuer must clearly disclose whether the chair or lead director is independent.

Where the chair or the lead director is not independent, the issuer must disclose what specific steps the board takes to provide leadership to its independent directors. Below are examples of questions an issuer should consider when drafting this disclosure.

- Has an independent director been tasked with the function of identifying whether the board's mandate is being effectively carried out by the board and its committees?
- How does the board create a balance of authority and provide for objective leadership?
- How does the issuer ensure that the responsibilities of the board are understood by both the board and management and that the boundaries between board and management responsibilities are understood and respected?
- Does the board provide all directors, including its non-independent directors, with unfettered access to information regarding the issuer's activities?
- How does the board ensure that the views of its independent directors are heard?
- Do the independent directors have the ability to engage outside advisors?

If a board does not take any steps to provide leadership for its independent directors, it should disclose that fact and explain its rationale for that decision.

Below are examples of entity-specific disclosure on what a board with an independent chair, and an independent lead director, does to provide leadership for its independent directors.

Example 1 -- Entity-specific disclosure for board with independent chair

In addition to chairing all board meetings and setting the board's agenda, the chair's role is to facilitate and chair discussions among the company's independent directors, and to facilitate communication between the independent directors and the company's management. The chair is also charged with the responsibility of leading the board and organizing it to function in partnership with, but independently of, management of the company in order to facilitate the achievement of the goals of the company. The chair reviews any comments or requests made by an independent director and oversees the process by which unfettered information to independent directors is made available regarding the company's activities.

Example 2 -- Entity-specific disclosure for board with independent lead director

The responsibilities of the lead independent director are, among other things, to ensure that the board is able to function independently of management, set board agendas, oversee the quality of the information sent to directors and review any comments or requests made by an independent director. The independent lead director also chairs periodic meetings of the independent directors without management and non-independent directors and reports to the board on their deliberations, as required. In addition, the independent lead director is charged with the responsibility of assisting the independent directors with fulfilling their governance responsibilities and to oversee the governance obligations of the board and its committees generally. The lead director is elected annually by a vote of the directors who qualify as independent directors.

## B. Position descriptions

**Disclosure requirement**

Item 3 of Form 58-101F1 requires an issuer to disclose whether or not:

- the board has developed written position descriptions for the chair and the chair of each board committee, and
- the board and CEO have developed a written position description for the CEO.

If written position descriptions have not been developed, the issuer must briefly describe how the board delineates the roles and responsibilities of each such position.

**Findings of review**

While some of the issuers reviewed included this disclosure, we found that improvements could be made and that a significant number of issuers did not fully meet this disclosure requirement.

Many issuers did not disclose whether they developed written position descriptions, nor did they disclose what the board does to delineate the roles and responsibilities of the specified individuals.

Other issuers disclosed that they had not developed written position descriptions, but they did not adequately explain how the board delineates the role and responsibilities of the specified individuals. In some instances, issuers disclosed that they had adopted written position descriptions for only some of the specified individuals, but failed to describe how the board delineates roles and responsibilities for the other specified individuals.

Some issuers simply made positive statements that they had created position descriptions as required by the Corporate Governance Regulation and that all position descriptions are reviewed and approved on an annual basis.

**Commentary**

It is important for an issuer to clearly disclose whether or not it has developed written position descriptions for each of the chair, the chair of each board committee and the CEO.

If an issuer has developed written position descriptions, it is not required to include the text of those position descriptions in its disclosure. However, it may be helpful to provide investors trying to understand the issuer's corporate governance structure with a cross-reference or a link to a website where those written position descriptions can be found.

Where an issuer has not developed written position descriptions, it should include a brief summary of the roles and responsibilities of each of the chair, the chair of each board committee and the CEO. It is not sufficient to disclose that the issuer relies on a mutual understanding of these roles and responsibilities.

Below are two examples of entity-specific disclosure regarding the position description for the chair. In the first example, a written position description has been developed, and in the second example, the issuer is relying on less formal means for delineating roles and responsibilities.

Example 1 -- Entity-specific disclosure where written position description for chair developed

The board mandate includes a position description of the chair, which sets out his or her duties and responsibilities. A copy of the position description, together with the rest of the board mandate, can be found at: www.x.ca. This position description is reviewed by the x committee on an annual basis.

Example 2 -- Entity-specific disclosure where position description for chair not developed

The board does not believe that it is necessary to develop a formal written position description for the chair of the board, given the size of the company and the fact that the board has not changed in the last x years.

The chair is responsible for the management, development and effective performance of the board, and for providing leadership to the directors in carrying out their collective responsibilities to supervise the management of the business and affairs of the company. The chair is also charged with the responsibility of leading the board and organizing it to function in partnership with, but independently of, management of the company in order to facilitate the achievement of the goals of the company, including sustainable growth and maximizing shareholder value. In particular, the chair sets all board meeting agendas with the CEO, and leads all board discussions

- facilitates and chairs discussions among the company's independent directors, facilitates communication between the independent directors and the company's management, and is responsible for discussing any performance issues of any director, and
- if and when necessary, acts as a spokesperson on behalf of the board in dealing with the press and members of the public.

## C. Orientation and continuing education

### Orientation of new directors

**Disclosure requirement**

Item 4(a) of Form 58-101F1 requires an issuer to briefly describe what measures the board takes to orient new directors regarding:

- the role of the board, its committees and its directors, and
- the nature and operation of the issuer's business.

**Findings of review**

We found that the majority of issuers' disclosure was limited to identifying that an orientation and training program exists, but did not describe what comprises such orientation and training. In other cases, issuers simply disclosed that they did not provide a formal orientation or education program for board members because they did not believe those programs were appropriate given the size of the issuer, its geographic concentration and board member expertise.

**Commentary**

To satisfy this disclosure requirement, an issuer must disclose the measures that the board takes to orient new directors, regardless of whether the issuer has a formal orientation program for new directors. It is not sufficient to merely state that the board has or does not have an orientation and training program. Understanding how a board orients its new members contributes to investors' understanding of how a board effectively functions.

Below are examples of questions that an issuer should consider when drafting this disclosure.

- Do new directors meet with the chair, other directors and CEO? If so, when do they meet?
- Are new directors given the opportunity to ask questions about the role of the board, its committees and its directors, and about the nature of the issuer and its operations?
- Are new directors provided with briefings and copies of the issuer's key documents, including a code of business conduct and ethics, insider trading and continuous disclosure policies, and board and committee mandates and charters?
- Do new directors receive an orientation session in order to familiarize themselves with the issuer, its business, industry, senior management team and the contribution individual directors are expected to make?
- Are new directors informed of the legal duties and obligations required of a director of a publicly-held entity?
- Are new directors provided with up-to-date information on the issuer's corporate organization, operations and strategy, its current year business plan and financial information?
- Does the issuer offer on-site visits to its corporate headquarters and main facilities?
- Has the board assigned a standing committee to be responsible for carrying out its orientation function?

Below is an example of entity-specific disclosure on the measures a board takes to orient new directors regarding (i) the role of the board, its committees and directors, and (ii) the nature and operation of the issuer's business.

> Example of entity-specific disclosure
>
> All new directors receive a comprehensive orientation on their election or appointment to the board. The orientation includes:
>
> - a detailed briefing with the chair of the board
> - a detailed briefing with the chair of each of the Audit Committee, x committee and x committee
> - a detailed briefing with the independent directors
> - a detailed briefing on the role of the director in the company and other matters by the company's general counsel and external legal counsel
> - a detailed briefing on the legal duties and obligations required of a director of a publicly-held company
> - a detailed briefing on the company and its business by the CEO, CFO and other members of senior management, including a discussion of the company's key products and operations, and
> - a tour of the company's head office and main facility.
>
> The orientation program is reviewed regularly by either the board or the x committee in connection with new appointments.

Below is an example of entity-specific disclosure where an issuer has no formal orientation program in place for its new directors.

> Example of entity-specific disclosure
>
> Given that the board of directors of the company has not changed in the last x years, the board has not been required to take any measures to orient new directors. If and when a new director is appointed to the board, the board will consider what orientation measures are appropriate at such time.

## Continuing education

### Disclosure requirement

Item 4(b) of Form 58-101F1 requires an issuer to briefly describe what measures, if any, the board takes to provide continuing education for its directors, and if it does not provide continuing education, how it ensures that its directors maintain the skill and knowledge necessary to meet their obligations as directors.

### Findings of review

We observed a range of disclosure from the issuers reviewed. Some issuers disclosed that directors attend presentations and information sessions concerning board responsibilities, as well as education on current trends in governance that is available to the directors through their membership in various governance-related organizations. Other issuers explained that board members are encouraged to attend conferences, seminars or courses at the issuer's expense. However, many issuers included blanket statements that the board would ascertain and make continuing education available to its directors when required, but did not elaborate on how it determines when continuing education is needed or the nature of such continuing education.

**Commentary**

To satisfy this requirement, an issuer must provide meaningful disclosure on how it encourages its directors to maintain the skill and knowledge necessary to meet their obligations as directors. It is not sufficient to merely state that continuing education will be available when needed. Understanding how a board ensures that its directors maintain their skills and knowledge contributes to investors' understanding of how a board effectively functions.

Below are examples of questions that an issuer should consider when preparing this disclosure.

- What continuing education opportunities are provided to directors to increase their knowledge and understanding of the issuer and its business?
- Are the directors regularly briefed on strategic issues? Do these briefings include assessments of the issuer's competitive environment, the issuer's performance relative to its peers, and any other developments that could materially affect the issuer's business?
- What steps does the issuer take to keep directors informed about their fiduciary duties and trends in corporate governance?
- What steps does the issuer take to keep directors informed about significant regulatory developments that affect the issuer?
- Who is responsible for planning training activities for the directors?
- Do directors participate in the issuer's continuing education program or opportunities?

Below is an example of entity-specific disclosure of the measures a board takes to provide continuing education for its directors.

Example of entity-specific disclosure

The company has a continuing education program for its directors, for which the x committee is responsible. The program was developed to help directors maintain or enhance their skills and abilities, and update their knowledge and understanding of the company and its industry. The key components of the program include:

- **Regular briefings.** Directors are briefed regularly (and at least on a quarterly basis) on strategic issues affecting the company, and these briefings include reviews of the competitive environment, the company's performance relative to its peers, and any other developments that could materially affect the company's business such as the enactment of Act x, which is expected to have a significant impact on the company's operations in the Province of x. The briefings are conducted by the CEO, CFO and other members of the executive management team, as well as external advisors to the company.

- **Internal educational seminars**. The x committee also plans training activities to be held at certain board meetings, in addition to regular education sessions and presentations made to the board. For example, recent presentations have been made to the board relating to proposed new regulations, trends in corporate governance and certain specific business units. In 20xx, x seminars were held.

- **Conferences and other industry events.** Directors also participate in external education seminars at the company's expense that are relevant to their role on the board. As part of the company's continuing education program, the company provides directors with a list of the principal education activities that are aimed at the company's industry and the role of a director of a public company. In 20xx, the directors attended x conferences in relation to the company's business and industry.

## D. Ethical business conduct

**Disclosure requirement**

Item 5 of Form 58-101F1 requires, among other things, an issuer to disclose whether or not the board has adopted a written code of business conduct and ethics (a code) for directors, officers and employees. If so, the issuer must, among other things,

- disclose how a person or company may obtain a copy of the code, and
- describe how the board monitors compliance with its code, or if the board does not monitor compliance, explain whether and how the board satisfies itself regarding compliance with its code.

**Findings of review**

Generally, our review revealed that many issuers disclosed that they adopted a code, but did not provide any of the other required information contained in Item 5. Particularly, we identified disclosure gaps when addressing how an issuer monitors compliance with its code. A significant portion of issuers included a positive statement in their disclosure that the board and/or a designated standing committee of the board monitors compliance, but did not provide a description or explanation of that process. Some issuers disclosed that they "take the necessary steps to ensure that all those covered by the relevant policies comply with such policies", but failed to include a description of those "necessary steps". Other issuers simply stated that when situations of non-compliance become known to management, appropriate disciplinary actions are taken.

**Commentary**

Blanket statements that a board monitors compliance with its code are not sufficient to satisfy this disclosure requirement. It is important for investors to understand what procedures the issuer has implemented or what actions it has undertaken to monitor compliance with the code.

Below are examples of questions that an issuer should consider when preparing this disclosure.

- Has the board delegated oversight of compliance with the code to one of its standing committees?
- Does the board or a designated standing committee annually or quarterly review with management compliance with the code and any issues arising from non-compliance?
- How does the board or a designated standing committee become aware of non-compliance with the code?
- Does the issuer require its directors, officers and employees to complete an acknowledgement (on an annual, semi-annual or other basis) whereby they confirm they have read the code and agree to follow its terms and fully

comply? If not, is there a process whereby members of management and employees confirm they have read and understand the code?

- Has the issuer appointed a compliance officer? If so, what are the compliance officer's roles and responsibilities? Does the compliance officer report regularly to the board (or its designated standing committee) on compliance with the code?
- Does the issuer have a process in place whereby directors or officers disclose transactions or holdings that may be, or appear to be, in conflict with the code?
- Does the issuer have a whistleblower program or other compliance program available to employees that allows for anonymous reports to be made?
- Has the issuer designated a person with whom employees can discuss any issues regarding the code?

An issuer may include a description of its process to monitor compliance with the code in the code itself. In order to meet this disclosure requirement, the issuer must either describe the process in its corporate governance disclosure, or incorporate that description by reference. Providing investors with a cross-reference or a link to a website where the code can be found may also be useful.

Below is an example of entity-specific disclosure of the measures a board takes to monitor compliance with its code.

Example of entity-specific disclosure

The board reviews its code of conduct on an annual basis and has delegated compliance oversight to the x committee. The company monitors compliance with its code as follows:

- **External Reporting System**. The company uses a confidential and anonymous reporting system that allows officers and employees to report suspected illegal, unethical or improper conduct in violation of the code through the Internet, a toll-free telephone number and/or by mail. The reporting system is run by an independent third party and generates reports for management. Management reviews the reports on a [quarterly/monthly/other basis] and investigates any alleged breaches of the code. The chairs of the x committee and Audit Committee also have access to all reports filed through the reporting system.

- **Internal Reporting System**. Complaints can also be made internally to the following members of the executive management team: x, x and x.

Management prepares reports for the x committee, noting any alleged violations of the code on a [quarterly/monthly/other basis]. The x committee updates the board on a [quarterly/monthly/other basis] about compliance with the code, and reports any alleged violations to the board as necessary. The Audit Committee is also notified of any alleged violations of the code relating to accounting, internal controls or auditing matters. The x committee, in consultation with the board, reviews the process for administering the code every year.

The board believes that providing a procedure for employees and officers to raise concerns about ethical conduct on an anonymous and confidential basis fosters a culture of ethical conduct within the company. The company requires that directors, officers and employees annually certify they have complied with the code. To date, the company has not been required to file a material change report relating to a departure from the code.

## E. Nomination of directors

**Disclosure requirement**

Item 6 of Form 58-101F1 requires, among other things, an issuer to describe the process by which the board identifies new candidates for board nomination.

**Findings of review**

Generally, this was an area where staff identified significant disclosure deficiencies. Many issuers included positive statements in their corporate governance disclosure acknowledging that they had a process in place for identifying candidates, but failed to describe the process itself. Similarly, many issuers disclosed who is responsible for identifying new candidates, but did not describe the process undertaken by such person or committee identified. Other issuers disclosed that the process for identifying new candidates for board nomination was outlined in the nominating committee's charter, but did not include the text of the charter in its disclosure.

**Commentary**

It is not sufficient to merely state that the board has a process in place for identifying new candidates. To comply with this requirement, the issuer must describe that process, regardless of whether that process has been formalized. A description of that process provides meaningful information to investors.

Below are examples of questions that an issuer should consider when preparing this disclosure.

- Who leads the candidate selection process and what is such person/committee's mandate in this respect?
- Does the board or the person/committee responsible for the nomination process identify any gaps in the board's composition or expertise before it seeks candidates to fill those gaps?
- Does the board have a formal policy on the recruitment of new candidates to the board?
- Does the board or the person/committee responsible for the nomination process invite suggestions for potential candidates from other directors, management, shareholders, external sources or does it consider self-nominated candidates?
- What is the role, if any, of the CEO in the nomination process?
- Does the board or the person/committee responsible for the nomination process take into account the appropriate size of the board, with a view to facilitating effective decision making?
- Does the board or the person/committee responsible for the nomination process establish criteria in respect of the competencies, skills and characteristics, and expertise that each candidate for appointment or election to the board would bring to the board?
- Does the board consider diversity of experience, background and views when considering a candidate for appointment or election to the board?
- Does the board or the person/committee responsible for the nomination process consider the following criteria when considering a candidate for appointment or election to the board:

- a proven track record of substantial achievement
- specific industry or geographic experience
- the ability of the candidate to bring an objective appraisal of management's plans
- potential conflicts that could arise
- personal characteristics and other considerations,
- the integrity of the candidate, and
- the ability of the candidate to devote sufficient time and resources to his or her duties as a board member?

If an issuer does not have a process for identifying new candidates, it should explain why. For example, an issuer may not have a process for identifying new candidates as changes are made to the board very infrequently.

Below is an example of entity-specific disclosure of the measures a board takes to identify new candidates for board nomination.

Example of entity-specific disclosure

The x committee, which is comprised entirely of independent directors, is responsible for participating in the recruitment and recommendation of new candidates for appointment or election to the board. When considering a potential candidate, the x committee considers the qualities and skills that the board, as a whole, should have and assesses the competencies and skills of the current members of the board. Based on the talent already represented on the board, the x committee then identifies the specific skills, personal qualities or experiences that a candidate should possess in light of the opportunities and risks facing the company. Potential candidates are screened to ensure that they possess the requisite qualities, including integrity, business judgment and experience, business or professional expertise, independence from management, international experience, financial literacy, excellent communications skills and the ability to work well with the board and company. The x committee considers the existing commitments of a potential candidate to ensure that such candidate will be able to fulfill his or her obligations as a board member.

The x committee maintains a list of potential director candidates for its future consideration and may engage outside advisors to assist in identifying potential candidates. The x committee also considers recommendations for director nominees submitted by the company's shareholders.

## F. Assessments

**Disclosure Requirement**

Item 9 of Form 58-101F1 requires an issuer to describe the process used for assessments, if the board, its committees and individual directors are regularly assessed with respect to their effectiveness and contribution. If assessments are not regularly conducted, the issuer is required to describe how the board satisfies itself that the board, its committees, and its individual directors are performing effectively.

**Findings of review**

A significant portion of the issuers reviewed did not fully satisfy this requirement.

- **Regular assessments conducted.** A significant portion of the issuers reviewed did not describe the process used for assessments. Many issuers disclosed that they conduct regular assessments and other issuers included disclosure on the importance of completing assessments, but they did not in either case describe the process used for the assessments. In addition, we often noticed that issuers did not disclose how “regularly” these assessments are conducted.

- **Regular assessments not conducted.** Other issuers reviewed indicated that they did not have a formal assessment procedure in place because the board believes that such assessments are generally more appropriate for issuers of significantly larger size and complexity and which may have significantly larger boards of directors. However, they did not describe how the board satisfies itself that the board, its committees, and its individual directors are performing effectively.

**Commentary**

It is not sufficient to merely state whether or not the board conducts regular assessments. To satisfy this requirement, the issuer must either describe the process used for any assessments or describe how the board satisfies itself that the board, its committees, and its individual directors are performing effectively. Understanding how a board manages its performance is important for investors.

Below are examples of questions that an issuer should consider when preparing this disclosure.

*Assessments*

- Are assessments conducted annually, semi-annually or at different intervals?
- Are assessments undertaken through the use of questionnaires and/or confidential interviews, or by third parties hired for this purpose?
- Who is responsible for conducting the assessments?
- If a questionnaire is the method used for the assessment:
    - Is it reviewed and approved by the board or a board committee in advance of its use?
    - Is it submitted on a confidential basis?
    - Does it facilitate a written evaluation of the performance and effectiveness of the board and each board committee?
    - Does it incorporate peer assessments and self-assessments on the part of individual board members?
    - Does it cover such matters, among other things, as the operation of the board and its committees, the adequacy and timeliness of the information provided to directors, agenda planning for board meetings and contributions of board and committee members?
    - Are the findings analyzed and presented to the board for further consideration?

- Upon review of the results of the assessment, do the board and members of each board committee consider whether any changes to the composition, structure or charter of the board or committee are appropriate?

*Other measures*

- Are board members free to discuss the performance of a fellow director with the chair of the board or with an appropriate board committee?
- Is there a dialogue between the chair or lead director and each individual director regarding his or her performance and continuance on the board?
- Is there a review of individual directors' performance when they are standing for re-election? If so, who conducts the review?

Below are examples of entity-specific disclosure of formal and informal processes used for assessments.

Example 1 -- Entity-specific disclosure for formal assessment process

The board of directors conducts an annual evaluation of the performance and effectiveness of the board in light of its charter. The results of the evaluation are analysed and reviewed by members of the x committee and the board, who consider whether any changes to the board's processes, composition or committee structure are appropriate. Additionally, senior management is advised of any suggestions made by directors for enhancement of processes to support the work of the board.

Assessment of individual board members involves directors participating in an annual written peer review to assess individual directors on the board and attributes that contribute to an effective board. This consists of both an evaluation of each directors' peers and a self-evaluation which are based on questionnaires approved by the board. The written peer evaluation process is complemented with one-on-one meetings between the chair of the board and each director. In addition, each board committee annually evaluates its effectiveness in carrying out the duties specified in its charter. The results are reviewed by the members of each committee who consider whether any changes to its structure or charter may be appropriate.

Example 2 -- Entity-specific disclosure for informal assessment process

The board, its committees and individual directors are not regularly assessed with respect to their effectiveness and contribution, as the board believes that such assessments are generally more appropriate for corporations of significantly larger size and complexity than the company and which may have significantly larger boards of directors. However, the chair of the board meets annually with each director individually which facilitates a discussion of his or her contribution and that of other directors. When needed, time is set aside at a meeting of the board for a discussion regarding the effectiveness of the board and its committees. If appropriate, the board then considers procedural or substantive changes to increase the effectiveness of the board and its committees. On an informal basis, the chair is also responsible for reporting to the board on areas where improvements can be made. Any agreed upon improvements required to be made are implemented and overseen by the x committee. A more formal assessment process will be instituted as, if, and when the board considers it to be necessary.

## 3.2 Requirements for venture issuers

### A. Board of directors

**Disclosure requirement**

Item 1 of Form 58-101F2 requires a venture issuer to disclose how its board of directors facilitates its exercise of independent supervision over management, including,

- the identity of directors who are independent, and
- those who are not independent, and the basis for that determination.

**Findings of review**

While the majority of issuers disclosed the identity of independent and non-independent directors, many issuers did not disclose how the board facilitates its exercise of independent supervision over management.

**Commentary**

More meaningful disclosure to investors would have identified and explained what the board does to facilitate its exercise of independent supervision over management. In particular, issuers should describe what processes are in place to safeguard the independent supervisory role of the board in relation to management.

Below are examples of questions that an issuer should consider when preparing this disclosure.

- Does the board operate in an independent manner, generally, from management?
- Does the board meet regularly without the presence of management to ensure the independence of the board from management?
- Is the independence of the board enabled through the separation of the positions of chair and CEO?
- Does the board hold periodic meetings to approve various matters and discuss the business and operations of the issuer in the absence of management?
- Does the board have free access to the issuer's external auditor, legal counsel and to any of the issuer's officers?
- If the chair is not independent, is there an independent lead director?

### B. Other board committees

**Disclosure requirement**

Item 7 of Form 58-101F2 requires a venture issuer to disclose if the board has standing committees other than the audit, compensation and nominating committees and if so, to identify the committees and describe their function.

**Findings of review**

Many of the issuers reviewed disclosed that they did not have other standing committees. However, some issuers noted that they did have standing committees and identified such committees (i.e. industry specific committees), but did not describe their function.

**Commentary**

It is helpful for investors to understand what functions standing committees of the board have in regards to the overall functioning of the issuer.

Below are examples of questions that an issuer should consider when preparing this disclosure.

- Why was the standing committee formed?
- What are the standing committee's responsibilities?
- What functions is the standing committee tasked to perform?

## 3.3 Executive compensation

In light of the proposed amendments to Form 51-102F6 *Statement of Executive Compensation* of *Regulation 51-102 respecting Continuous Disclosure Obligations* published for comment on November 19, 2010 (the Proposed Executive Compensation Amendments), we will not provide commentary on the corporate governance disclosure requirements relating to compensation. Please refer to the Proposed Executive Compensation Amendments for further information on changes that may impact your corporate governance disclosure regarding compensation made in regards to Item 7 of Form 58-101F1 for TSX-listed issuers and Item 6 of Form 58-101F2 for venture issuers.

## 3.4 Risk management

Understanding how the board manages risk is very important for investors. Intensified concerns about risk management, auditing and fraud detection, and corporate governance have sensitized boards and management to adopt a more active role in the oversight of business strategy and operations. Boards and other market participants are receiving increased scrutiny regarding their risk management practices.

**Disclosure requirements**

There are two sets of disclosure requirements relating to risk management:

1. **Board mandate.** Item 2 of Form 58-101F1 requires TSX-listed issuers to disclose the text of the board's written mandate, or if the board does not have a written mandate, to describe how the board delineates its role and responsibilities. Section 3.4 of the Corporate Governance Policy Statement states that the board should adopt a written mandate in which it explicitly acknowledges responsibility for, among other things:
    - adopting a strategic planning process and approving, on at least an annual basis, a strategic plan which takes into account, among other things, the opportunities and risks of the business, and
    - identifying the principal risks of the issuer's business and ensuring the implementation of appropriate systems to manage those risks.

2. **Board committees.** There are two relevant disclosure requirements relating to board standing committees and audit committees:

   - Item 8 of Form 58-101F1 requires TSX-listed issuers to disclose if their boards have standing committees other than the audit, compensation and nominating committees, and if so, to identify the committees and describe their function. The mandate of those committees may include responsibility for risk management.
   - Item 1 of Form 52-110F1 *Audit Committee Information Required in an AIF* and Form 52-110F2 *Disclosure by Venture Issuers* requires issuers to disclose the text of the audit committee's charter in the AIF. The audit committee may have responsibility for risk management.

**Findings of review**

A significant portion of the issuers reviewed included disclosure in the board's mandate relating to how the issuer manages risk and explained that risk management was a part of the board's oversight function. Similarly, many issuers disclosed that the board's mandate includes responsibility for a strategic plan taking into account the risks of the business. However, many of the issuers reviewed did not disclose whether the board's standing committees addressed risk management. For some issuers, the disclosure indicated that the audit committee was charged with this responsibility or that the board oversees the process by which the issuer assesses and manages risk.

**Commentary**

Material risks are required to be disclosed in regulatory filings such as an AIF or a prospectus. The way in which an issuer manages those risks may vary between industries and even between issuers within an industry according to their particular circumstances. It is important for investors to understand how issuers manage those risks. Disclosure regarding oversight and management of risks should indicate:

- the board's responsibility for oversight and management of risks, and
- any board and management-level committee to which responsibility for oversight and management of risks has been delegated.

The disclosure should provide insight into:

- the development and periodic review of the issuer's risk profile
- the integration of risk oversight and management into the issuer's strategic plan
- the identification of significant elements of risk management, including policies and procedures to manage risk, and
- the board's assessment of the effectiveness of risk management policies and procedures, where applicable.

In light of ongoing international developments regarding the disclosure of risk management practices, this is an area that we will continue to monitor.

## 4. CONCLUSION AND QUESTIONS

Issuers should consider the Corporate Governance Regulation, Corporate Governance Policy Statement and the guidance in this notice when preparing their corporate governance disclosure to ensure that it complies with securities legislation and provides investors with meaningful information for making investment decisions. It is important for investors to understand what corporate governance practices an issuer has adopted and why.

Questions regarding this notice can be referred to:

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