



# Securities Law Subcommittee (Business Law)

## Ontario Bar Association | Association du Barreau de l'Ontario

June 27, 2007

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c/o John Stevens, Secretary  
Ontario Securities Commission  
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Suite 1903, Box 55  
Toronto ON M5H 3S8  
Anne-Marie Beaudoin, Directrice du secrétariat  
Autorité des marchés financiers  
Tours de la bourse  
800, square Victoria  
C.P. 246, 22<sup>e</sup> étage  
Montréal QC H4Z 1G3

Dear Sirs and Mesdames:

**Re: Proposed repeal and substitution of Form 51-102F6 *Statement of Executive Compensation* and proposed amendments to National Instrument 51-102 *Continuous Disclosure Obligations***

This submission is made by the Securities Law Subcommittee (the "Subcommittee") of the Business Law Section of the Ontario Bar Association (the "OBA") in reply to the request for comments published March 29, 2007 on the proposed repeal and substitution of Form 51-102F6 *Statement of Executive Compensation* (the "proposed executive compensation materials") and proposed amendments to National Instrument 51-102 *Continuous Disclosure Obligations* ("NI 51-102").

Our comments are presented in the following order: general comments and comments in answer to specific requests contained in the request for comments.

### **General Comments**

We agree with the stated purpose of the proposed executive compensation materials: to improve the quality and transparency of executive compensation disclosure. Most Canadian issuers do not currently provide full disclosure of their compensation practices or provide a total figure for what they are paying each named executive officer (“NEO”). We are therefore supportive of the proposed requirement to provide a total compensation number and the proposed compensation discussion and analysis. In addition, the inclusion of disclosure on director compensation is an improvement over the current form requirements.

We commend the Canadian Securities Administrators (the “CSA”) for not following every aspect of the executive disclosure compensation rules adopted by the U.S. Securities and Exchange Commission (the “SEC”) in 2006. We also recommend that the CSA look at the issues that have arisen in the U.S. and carefully consider the results of the SEC’s review of these issues before finalizing the proposed executive compensation materials. In particular, where there is overlap with the comments received by the CSA, the SEC’s review may provide assistance to the CSA on making appropriate changes to the proposed executive compensation materials.

### **Specific Comments**

The following are our comments on certain of the specific questions set out in the request for comments, which are reproduced below in italics and numbered to correspond to the request for comments.

#### ***General provisions***

*3. Should information be provided for up to five people individually, or should the information be provided separately for the CEO and CFO, then on an aggregate basis for the remaining three named executive officers?*

Information for up to five people individually provides a more complete picture of the compensation of a company’s executive team. Although most companies are managed by executive teams of more than five officers, providing information relating to three officers in addition to the CEO and the CFO nonetheless assists in obtaining a more comprehensive view of how a company awards its highest paid executives.

We submit that providing information on an aggregate basis for the three named executive officers other than the CEO and the CFO would reduce the quality and transparency of the disclosure, since it would not be correct in every instance to simply average the aggregate compensation in order to determine what each executive was paid, should investors be interested in obtaining this information.

***Compensation discussion and analysis (CD&A)***

*4. Will the proposed CD&A requirements elicit a meaningful discussion of a company's compensation policies and decisions?*

We support the “principles-based” approach to the disclosure of executive compensation taken by the CSA and believe that issuers must strive to apply the principles outlined in the CD&A requirements to their facts in order to provide investors with clear, concise and meaningful disclosure.

However, as a result of the lengthy disclosure provided by U.S. companies during the 2007 proxy season, we believe that the CSA must be prepared to provide additional guidance in the form of a companion policy or staff notice, taking into consideration issues raised in the U.S., to assist companies in presenting meaningful information.

We also believe that the CD&A would be of even greater benefit to investors if the CSA required that it be reviewed and approved by the compensation committee, as its members are responsible for making decisions relating to compensation. We submit that, like U.S. companies, Canadian companies should be required to include a separate report of the compensation committee over the names of compensation committee members recommending that the CD&A be included in the proxy materials as a means of emphasizing the committee's involvement in the disclosure.

Finally, we agree with the CSA's decision not to require certification of the CD&A by the CEO and the CFO. We agree that the CD&A should be the responsibility of the board or the compensation committee and that it would not be appropriate for the CEO and CFO to certify disclosure relating to their own compensation.

***Summary compensation table***

*7. Should the summary compensation table continue to require companies to disclose compensation for each of the company's last three fiscal years, or is a shorter period sufficient?*

In our view, the summary compensation table should continue to require companies to disclose compensation for each of the company's last three fiscal years. This allows shareholders to assess the trend in each NEO's compensation over an appropriate period rather than simply looking at compensation for one year in isolation.

*10. Is it appropriate to present stock and option awards based on the compensation cost of the awards over the service period? If no, how should these awards be valued?*

In our view, it would be more appropriate if the summary compensation table disclosed the Board's intended compensation value (rather than the compensation cost for accounting purposes), as this should more accurately reflect the value of the compensation paid to executives and is consistent with current best practices for compensation disclosure. Although the grant date fair value of stock and option awards would be disclosed immediately following the summary compensation table, this information would be better included in the summary compensation table and included in the total compensation figure.

We are also concerned that the new SEC executive compensation disclosure requirements, which also require stock and option awards to be presented in the summary compensation table based on the compensation cost of the awards, have resulted in some negative numbers appearing in the summary compensation table as a result of accounting standards for equity-based awards. We believe that a negative total compensation figure in the summary compensation table is misleading and will not be useful to investors.

*12. Should we include the service cost to the company in the summary compensation table instead of the change in actuarial value or in addition to it?*

Service cost to the company relating to a pension plan better reflects the compensation-related components of a change in pension liability and should be used in the table instead of actuarial value. Also, the change in the actuarial value of a pension plan can be very volatile from year to year which makes this a poor measure for comparison.

In addition, it would be more informative to a reader if the summary compensation table included disclosure of service cost for both defined benefit and defined contribution plans under the pension column. Defined contribution plans are becoming more popular in Canada and some issuers are discontinuing their defined benefit plans, so it is possible to have some NEOs who participate in a defined benefit plan and some who participate in a defined contribution plan.

*15. Will a total compensation number calculated as proposed provide investors with meaningful information about compensation?*

The total compensation number as calculated will in certain cases not provide investors with meaningful information since, as noted above, it may be a negative number and will therefore not be indicative of the amount the compensation committee intended to award the executive. We believe that the values in the summary compensation table should be the same numbers upon which the compensation committee bases its decision. The total compensation number will be

meaningful to investors if it provides them with the Board's intended compensation value.

***Retirement plan benefits***

*18. Should we require supplemental tabular disclosure of defined contribution pension plans or other deferred compensation plans? Is a breakdown of the contributions and earnings under these plans necessary to understand the complete compensation picture?*

It would be appropriate to require disclosure of both defined benefit and defined contribution plans. We therefore submit that the CSA should require supplemental tabular disclosure, as applicable, of defined contribution pension plans or other deferred compensation plans.

\* \* \* \*

The members of the Subcommittee are listed in the attached appendix. Please note that not all of the members of the Subcommittee participated in or reviewed this submission, and that the views expressed are not necessarily those of the firms and organizations represented by members of the Subcommittee.

Thank you for this opportunity to comment. If you have any questions, please direct them to Eleanor Farrell (416-868-6377, [efarrell@cppib.ca](mailto:efarrell@cppib.ca)) or Kay Song (416-926-3427, [kay\\_song@manulife.com](mailto:kay_song@manulife.com)).

Yours truly,

Securities Law Subcommittee  
Business Law Section  
Ontario Bar Association

## Appendix

### OBA SECURITIES LAW SUBCOMMITTEE

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Aaron J. Atkinson/Janne M. Duncan/Nancy Eastman, *Fasken Martineau DuMoulin LLP*  
Timothy S. Baikie, *Canadian Trading and Quotation System Inc.*  
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D. Grant Vingoe, *Arnold & Porter LLP*

#### **Liaison:**

Erez Blumberger, *Ontario Securities Commission*  
Luana DiCandia/Julie K. Shin, *Toronto Stock Exchange*  
Nancy N. Mehrad, *Investment Dealers Association of Canada*