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British Columbia Securities Commission  
Alberta Securities Commission  
Saskatchewan Financial Services Commission  
Manitoba Securities Commission  
Ontario Securities Commission  
Autorité des marchés financiers  
New Brunswick Securities Commission  
Registrar of Securities, Prince Edward Island  
Nova Scotia Securities Commission  
Superintendent of Securities, Newfoundland and Labrador  
Registrar of Securities, Northwest Territories  
Registrar of Securities, Yukon Territories  
Registrar of Securities, Nunavut

**To the attention of:**

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Dear Sirs/Mesdames:

**RE: Proposed Repeal and Replacement of Form 51-102F6**  
***Statement of Executive Compensation***

This letter is submitted in response to the Notice and Request for Comment made by the Canadian Securities Administrators (“CSA”) on the proposed repeal and substitution of Form 51-102F6 *Statement of Executive Compensation* (the “Proposed Rule”) and includes comments

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generated from consultations with certain clients having a combined market capitalization of more than \$150 billion. We appreciate the opportunity to comment on this important initiative to improve the quality and transparency of executive compensation disclosure. We have the following comments on the Proposed Rule:

**A. General**

We support the introduction of executive and director compensation disclosure rules that will provide investors with clear and comprehensive disclosure of all compensation paid to executive officers and directors of reporting issuers. We are of the view that it is not necessary to harmonize the Canadian disclosure rules with the U.S. rules introduced by the Securities and Exchange Commission last year. The primary motivation in designing the Proposed Rule should be to design a comprehensive and transparent system of disclosure rather than following the U.S. rules in their entirety.

As a general comment, we are concerned with the complexity of certain concepts described in the Proposed Rule. In many instances, one must be an expert to understand the Proposed Rule and the disclosure that will result from the Proposed Rule.

**B. Specific Requests for Comments**

1. *Will the proposed executive compensation form clearly capture all forms of compensation? Have we achieved our objective in drafting a document that will capture disclosure of compensation practices as they change over time?*

We have two main concerns with respect to the Proposed Rule. First we are concerned about the presentation of stock and option awards based on the dollar value of such awards for financial statement reporting purposes, as described in paragraph B.10 below. Second, we have concerns as to whether the reporting of changes in the value of defined benefit pension plans will provide meaningful information to investors, as described in paragraph B.11 below.

Furthermore, we are of the view that some of the definitions should be clarified to provide a better understanding of certain concepts. For instance, the definition of “option” should be amended to define what an option is, as opposed to merely providing examples of what can constitute an option and then concluding the definition by using the general language “similar instruments with option-like features”. The current Form 51-102F6 refers to options, share purchase warrants and rights granted by a company or its subsidiary as compensation for employment service or office. This provides a clearer definition of the term “option”.

2. *Do you agree with our proposal not to substantially change the criteria for determining the top five named executive officers? Should it be based on total compensation or some other measure, such as those with the greatest policy influence or decision-making power at the organization?*

We are of the view that the process for determining the top five named executive officers (“NEOs”) is appropriate as it is an objective standard which facilitates comparisons among issuers. Determining whether an individual is a NEO on the criteria of “greatest policy influence” or “decision making power” would result in different issuers applying this subjective standard differently. As a result, using this standard would not facilitate investors’ comparisons between issuers. We note that the definition of “executive officer” contained in National Instrument 51-102 *Continuous Disclosure* builds in a policy-making element in any event.

As outlined in paragraphs B.10 and B.11 below, the methodology for calculating the amounts to be included in the summary compensation table should be amended.

We also note the removal of section 1.4(c) of Form 51-102F6 which currently allows issuers to exclude disclosure of an individual as an NEO due to unusual compensation. We disagree with the removal of such exception which provides a safeguard in extraordinary compensation circumstances. For example, removing the exemption will mean that compensation of an unusually large amount that is not recurring and compensation for increased living expenses due to a foreign assignment would be included. The exclusion should be retained and should also cover special grants made upon the hiring of new officers and exceptional payouts from incentive plans. By not permitting an issuer to exclude one or more individuals who received exceptional compensation, the Proposed Rule will in fact require an issuer to exclude one or more officers who should qualify as an NEO. It would therefore not be in the interest of investors to exclude disclosure with respect to such individuals.

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?*

Given that investors currently receive separate information on the five NEOs individually, we are of the view that this level of disclosure should be maintained. Aggregating the remaining three NEOs would reduce the transparency of the disclosure and would not allow an investor to compare information regarding officers within the same issuer or the same industry or between industries.

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

We have concerns as to whether the proposed CD&A requirements will provide meaningful disclosure and whether such information can and will be presented in a manner which is clear and understandable to investors. Experience with a similar requirement in the U.S. rules has resulted in lengthy and sometimes complex disclosure. The instructions to the Proposed Rule should clarify the true purpose of the CD&A and that the disclosure should present the required information in a succinct and clear manner.

5. *Should we require companies to provide specific information on performance targets?*

Issuers should be entitled to exclude performance criteria if the disclosure of such performance criteria would result in confidential or competitively sensitive information being disclosed. Section 2.1(3) of the Proposed Rule should allow issuers to exclude any "confidential or competitively sensitive information" and not only "confidential information that would result in competitive harm" to the issuer.

Many issuers do not provide any guidance to the market on their anticipated performance. Requesting that performance related factors be disclosed means, in many instances, requiring disclosure of anticipated corporate performance. The Proposed Rule should not indirectly require the disclosure of forward-looking information that issuers have chosen not to provide to the market. For those issuers who do provide guidance, it is generally made on a consolidated basis, whereas bonuses are often dependent on the performance of a particular division or unit of the issuer. In our view, the objectives of such divisions and units should remain confidential. Furthermore, performance targets are not always quantitative and may be qualitative (eg. an acquisition, a reorganization, the integration of a business, etc.) thereby increasing the sensitivity of the information.

We are also concerned that if such targets are required to be disclosed, issuers and their compensation committees will not establish incentive plans based on performance criteria. Given that one purpose of the Proposed Rule is to demonstrate the link between executive compensation and performance, this would be counter-productive.

6. *Will moving the performance graph to the CD&A and requiring an analysis of the link between performance of the company's stock and executive compensation provide meaningful disclosure?*

We are uncertain whether requiring an analysis of the trend in performance of an issuer's stock price and the trend in executive compensation over the same period will provide meaningful disclosure. In many cases, compensation may not be linked to an issuer's share price and is dictated by competitive factors and other issues, such as the long-term strategic plan of the issuer which may not immediately reflect in an issuer's stock price. We note that the U.S. rules do not require a performance graph in Form 10-K.

Presumably they have concluded there is not necessarily a direct correlation between share price and executive compensation.

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?*

We are of the view that three years is an appropriate period and will allow the reader to see the history of each element of compensation. We do, however, note that in implementing the rules, no transition period is provided for. Is the intention of the CSA to require issuers to restate their compensation for the prior two years in order for such information to be comparable? We believe that such restatement could create some confusion. We are of the view that a transition period should be included in the Proposed Rule.

8. *Do you agree with the way bonuses and non-equity incentive plans will be disclosed in the summary compensation table?*

We are of the view that the Proposed Rule needs to be amended to clarify how the categories of "incentive plan" and "bonus" interrelate.

An incentive plan is defined under the Proposed Rule as "any compensation intended to serve as an incentive performance". Bonuses are defined as "discretionary payments that do not have predetermined performance conditions". The Proposed Rule does not distinguish between plans which are short or long-term and will only require disclosure in the bonus column of purely discretionary amounts. We are of the view that the current requirements whereby annual incentives are shown in the bonus column and long-term equity and non-equity incentives are separately disclosed under long-term compensation is a more appropriate manner of disclosure. It is commonly understood that a bonus is usually linked to pre-determined performance. We think that limiting the concept to purely discretionary amounts will be confusing. Consequently, we would favour retaining the current categories of "bonus" and "long-term compensation" rather than introducing the new concepts of "bonus" and "non-equity incentive plan compensation".

9. *Do you agree with the proposed disclosure of equity and non-equity awards? Are the distinctions between the types of awards and how they will be presented clearly explained?*

Further clarification should be provided to explain the differences between equity and non-equity awards by referring to the fundamental nature of each of those awards. Referring to the CICA Handbook in the definition of equity incentive plan and throughout the Proposed Rule makes it difficult for readers who do not have accounting backgrounds to understand.

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?*

We disagree with the proposed disclosure. We have particular concerns with using the compensation cost of the awards over the service period. It will make the summary compensation table confusing by blending slices of historical (multi-year) awards with current awards. It would be more relevant to shareholders to understand the value of compensation in the year that the relevant compensation decisions are made.

In addition, using this accounting methodology may result in a lower-level executive officer falling within the definition of an NEO simply because he or she is eligible for retirement, which could result in the acceleration of vesting of options. Similarly, a new senior executive would not qualify as a NEO until several tranches of long-term incentive plan vesting have occurred. A method based on the fair value of the award at the time it was granted would be more appropriate.

11. *Should the change in the actuarial value of defined benefit pension plans be attributed to executives as part of the summary compensation table?*

The Proposed Rule requires disclosure of the aggregate change in the actuarial present value of accumulated benefits under all defined benefit and actuarial pension plans. We are of the view that the actuarial value of defined benefit pension plans should not be included in the summary compensation table, unless such value is adjusted, as it may provide misleading information. While we support the disclosure of pension benefits, the change in value may be due to factors that are not based on compensation policies or decisions. Such factors would include interest rates, age, length of service and value of the portfolio investments in the plan. The compensatory and non-compensatory elements of the value of the plan should be separated so that the disclosure in the summary compensation table only shows the value of the increase in the pension plan benefit.

If the CSA intend to retain the requirement to include the increase in the actuarial value of the benefit, the CSA may wish to consider whether such pension disclosure would be best made in a separate table. This is because the determination of the value of such plans may change substantially from year to year and may distort the total compensation number and therefore not provide useful information.

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?*

In our opinion, neither should be used in the summary compensation table. See our response in paragraph B.11 above. If the service cost is to be disclosed, it should be in a separate table.

13. *Have we retained the appropriate threshold for perquisite disclosure given the changes to compensation amounts included in the bonus column of the summary compensation table?*

If, as described in paragraph B.8, the bonus column of the summary compensation table continues to include annual incentive awards, whether discretionary or not, there would, in our view, be no need to change the threshold for perquisites from its current proposal of 10% of annual salary and bonus. However, if the proposed concept of “bonus” is adopted, this will result in the decrease of the actual dollar value of bonuses disclosed. In order to keep an equivalent dollar value to that which exists today, we would suggest a threshold of 15% of the annual salary only.<sup>1</sup>

14. *Should we provide additional guidance on how to identify perquisites?*

The commentary related to perquisite disclosure should be clarified and expanded. In particular, the first and the second paragraph under item (ii) of the commentary provided after section 7 of the Proposed Rule seem to contradict each other to a certain extent.

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

We agree with the principle of reporting a total compensation number. We are nevertheless concerned that unless changes are made to the methodology used to compile the information contained in the table, the total compensation number will be misleading to investors. Please refer to the reasons set out in paragraphs B.10 and B.11 above regarding pension reporting and the valuation of stock and option awards based on their value for financial statement reporting purposes.

16. *Will the disclosure of the grant date fair value of stock and option awards, along with the disclosure provided in the summary compensation table, provide a complete picture of executive compensation?*

We believe the proposed reporting is unnecessarily confusing as the valuation methods may differ depending if one look at the summary compensation table or the other tables. It would be more appropriate to report in the summary compensation table based on the grant date fair value of stock and option awards, with supplementary tables showing details of grants using the same method.

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<sup>1</sup> Although annual incentive targets vary by company and level within the organization, if we assume a relatively standard target of 50% of salary, then 15% of salary alone equates to 10% of salary with a 50% target bonus.

17. *Is the information a company will provide in the tables required by item 4 the most relevant information for investors? Do you agree with our decision to take a different approach to the SEC? Could material information be missed by this approach?*

We support the CSA's decision to take a different approach from the SEC.

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?*

We would suggest that the CSA not require supplemental disclosure of defined contribution pension plans or other deferred compensation plans or a breakdown of the contributions and earnings under these plans. To the extent it is determined to be necessary, such information should be presented in tabular form as it will be easier to understand.

If contributions to defined contribution pension plans are to be reported in the summary compensation table, it should be disclosed in a "pension" column, not in the "All Other Compensation" column. With regard to deferred compensation, since most of it is voluntary deferral of already reported incentive-based earnings, we suggest that the reporting should only include the value not already reported.

19. *Should we require estimates of termination payments for all NEOs or just the CEO?*

We are of the view that extending the new requirements to all NEOs may result in a very lengthy discussion of termination payments and such information may result in inflated termination payments in the market. Should the CSA elect to extend the new requirement to all NEOs, we would recommend disclosure in a table with appropriate footnotes. We would caution that estimates of such termination payments may provide misleading disclosure. It is questionable whether an estimate which is prepared assuming that the triggering event occurs on the last day of the financial year-end will provide any meaningful disclosure as to the amount that will ultimately be received by a NEO.

20. *Will it be too difficult to provide estimates of potential payments under different termination scenarios? Should we only require an estimate for the largest potential payment to the particular NEO?*

We are of the view that there are certain limitations with respect to the nature of this proposed disclosure given that the estimates will be based on assumptions which may not, in and of themselves, be meaningful or be reflective of the amount that an NEO will receive. Requiring an estimate of the largest potential payment would not be very useful for the reader as circumstances in which such payment may be made vary widely between NEOs and issuers. To the extent potential payments must be disclosed, we would recommend that such information be included in a tabular form. In all cases, disclosed



payments should exclude already vested rights such as accumulated “in-the-money” value for stock options, which are already disclosed elsewhere.

21. *Will expanded disclosure of director compensation provide useful information?*

We are of the view that expanding the requirements with respect to disclosure of director compensation will provide useful information for investors and will allow such investors to compare the practices of different but similar issuers, provided that the approach used to value equity awards and pension benefits are revised in the same manner as for NEOs.

22. *Do you agree that executive compensation disclosure should remain in the management information circular? Would moving it to another disclosure document provide a clearer link between pay and performance?*

We are of the view that the management information circular is the appropriate disclosure document to include executive compensation disclosure. Executive compensation practices are fundamental to the good governance of an issuer and the information circular is the document which describes the corporate governance practices of the issuer. Disclosure related to executive compensation should not be split into different documents. We are further of the view that requiring executive compensation disclosure to be made in the MD&A to enforce the link between pay and performance is inappropriate as MD&A is often prepared and published in advance of the circular and compensation decisions being finalized.

23. *Are there elements of compensation disclosure that are not relevant to venture issuers and that they should not be required to provide? For example, should we allow venture issuers to disclose compensation for a smaller group of executives as the SEC has done?*

While venture issuers may have less complicated compensation practices and therefore, complying with the rules may not be as complex for them, the CSA should also recognize that such issuers do not have the same human resource and compensation experts as other reporting issuers. A cost benefit analysis should be made prior to imposing such disclosure requirements on these issuers.

24. *Are there other specific elements of the requirements that are not relevant for venture issuers?*

See paragraph B.23 above.

25. *Would the prescription of a performance measurement tool provide useful information on the link between pay and performance?*

We agree with the position of the CSA that it would be extremely difficult to create a single performance measurement tool that would provide relevant and meaningful information for all issuers.

26. *Do you think the suggested timeline will give companies enough time to implement these proposed disclosure requirements?*

We strongly believe that the current proposed timeline is not sufficient to allow issuers to implement these proposed disclosure requirements. The Notice states that the new executive compensation form will be in effect at the end of 2007 and that the CSA intend to require issuers to comply with the new form of disclosure for financial years ending on or after December 31, 2007. The CSA state that due to the length of the comment process, issuers would have had enough time to consider these changes and prepare the new executive compensation form.

We are of the view that finalizing these rules in December 2007 will make it extremely difficult for issuers to properly prepare for the implementation of the new rules before executive compensation decisions are made. The final form of the Rule may be published after such decisions are to be made and there is no guarantee that the final rule will not be materially different from the Proposed Rule. Therefore, we would strongly suggest that the CSA postpone the effectiveness of the new rule by one year (i.e. December 31, 2008) in order that issuers can consider the final form of the Rule. In addition, postponing the application of the Rule would allow the CSA to take into account potential changes to the U.S. rules.

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If you have any questions concerning these comments, please contact Tracey Kernahan (416) 216-2045 (direct line) or by e-mail at [tkernahan@ogilvyrenault.com](mailto:tkernahan@ogilvyrenault.com) or Thierry Dorval (514) 847-4528 (direct line) or by e-mail at [tdorval@ogilvyrenault.com](mailto:tdorval@ogilvyrenault.com).

Yours very truly,

*Ogilvy Renault LLP*