

Canadian Securities Law News

June 2020
Number 317

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CANADIAN SECURITIES REGULATORS PROVIDE GUIDANCE ON PUBLIC DISCLOSURE IN TIME OF COVID-19

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With the COVID-19 outbreak still ongoing, many public issuers are fighting to keep their business alive, while others are trying to reinvent their *modus operandi* or simply seeking new business opportunities. Regardless of the situation, executive teams are attempting to make the right decisions in an environment where no playbook exists. In such circumstances, it is of vital importance to maintain proper disclosure as regulators expect more—not less—from public issuers as they look to protect investors and foster efficient financial markets.

In a [recent bulletin](#), we highlighted the guidance provided by the U.S. Securities and Exchange Commission relating to the disclosure public issuers ought to make in connection with the coronavirus disease pandemic.

On May 6, 2020, the Canadian Securities Regulators (“CSA”) issued their own set of [guidelines](#). The CSA’s statement came in the form of a PowerPoint presentation detailing its expectations in terms of the continuous disclosure obligations of reporting issuers in relation to the effects of the COVID-19 pandemic.

Takeaways From the CSA’s Presentation

From the outset, the CSA acknowledged that there is no one size fits-all approach for disclosing information and consequences relating to the coronavirus outbreak. However, in preparing the public disclosure materials, the CSA insists that reporting issuers carefully assess their operations and determine, to the extent possible, the impact of COVID-19 both within the context of the industry they operate in, as well as within the context of their particular business.

The CSA identified three key areas which deserve accrued attention from reporting issuers and which we expect will receive a proportionate level of scrutiny from the regulators: (1) Management’s Discussion & Analysis and disclosure relating to operations, liquidity and capital resources, forward-looking information and risk factors, (2) financial information and the use of significant judgements and estimates, as well as impairment considerations and non-GAAP measures, and (3) material change reporting of issuer-specific implications.

- **Management’s Discussion & Analysis (“MD&A”)**

In preparing their MD&As, reporting issuers will have to analyse and explain the consequences of COVID-19 on their operations and in particular:

- changes in total revenue from ordinary operations, cost of sales or gross profit;

- risks or uncertainties that are likely to have a material impact on future performance; and
- use of proceeds from any previous financing and ability to meet business objectives and milestones.

Impact on Operations

Identifying variances in financial performance metrics is not enough. The CSA expects issuers to quantify the impact of each item/factor that results in a variation in financial performance. For instance, issuers should quantify the impact on demand for products and decrease in sales, the number of employees it furloughed, the monetary value of cancelled or suspended contracts, the costs incurred in transforming or adapting the business model to COVID-19 operations, deferred capital expenses, etc.

Impact on Liquidity and Capital Resources

A key disclosure item for the MD&A will be a discussion of the issuer's access to cash in sufficient amounts to support its operations, planned investments and future development. On that front, the CSA expects issuers to discuss trends and expected fluctuations in their cash position, factoring in existing and future commitments and uncertainties.

Examples of disclosure items potentially impacted by the COVID-19 include the use of governmental subsidies and special programs, new lines of credit, revised debt covenants, increased cost of capital, rent deferral arrangements, deferred capital expenses, the reduction of operational expenses and the reduction or suspension of dividends and share buy-back programs. In particular, the CSA expects issuers to discuss defaults or potential defaults under financing arrangements and contemplated remedies and risk management measures.

Forward-Looking Information

Regarding forward-looking information ("FLI"), the CSA expects issuers to include in their MD&A a discussion of material differences between actual results and previously disclosed FLI. Issuers should consider if there still is a reasonable basis for previously disclosed FLI and if the relevant risks that could cause results to differ have been correctly identified. Withdrawn FLI such as an earnings guidance may be included in a press release filed ahead of the MD&A but should also be referred to in the MD&A. Issuers should discuss the events and circumstances that led to the decision to withdraw or change the guidance, including a discussion of the underlying assumptions that are no longer valid.

Risk Factors

With respect to risk factors, the CSA is asking issuers to avoid "boilerplate" language. Key risks and uncertainties include those likely to affect the issuer's future performance and cash position. For a more detailed discussion on risk factors stemming from the COVID-19, please refer to our bulletins published on [March 20](#) and [April 21, 2020](#).

- **Financial Information**

In its presentation, the CSA recognized that the financial disclosure of issuers became more complicated due to rapidly evolving circumstances. As such, in preparing their disclosure materials, the CSA is asking issuers to use the best available information for their judgments and estimates and disclose such significant judgements and estimates, including those relating to going concern assessment, impairment assessment, revenue recognition and fair value calculations. For instance, multiple issuers in similar situations may have different judgements and estimates, making such disclosure even more relevant. Regarding impairment, the CSA indicated that staff may request from issuers their analyses of impairment triggers and impairment tests. In particular, the CSA is concerned about the presence of triggers for impairment for non-financial assets such as goodwill, including market value declines, negative changes in markets or laws and assets unused, restructured or held for disposal.

On the disclosure of non-GAAP financial measures, the CSA reminded issuers of their obligations under Staff Notice 52-306 (revised)—*Non-GAAP Financial Measures*. Although the CSA recognizes that non-GAAP financial measures may provide investors with additional information, it cautioned issuers about describing losses or expenses as non-recurring, infrequent or unusual given that the uncertainty of the current environment may provide a limited basis for doing so. For instance, the CSA discourages issuers from linking a depreciation to the coronavirus when there were indicators of impairment prior and unrelated to the pandemic.

- **Material Change Reports**

Finally, the CSA reminded issuers of their obligations under National Instrument 51-102—*Continuous Disclosure Obligations* with respect to material occurrences resulting from the COVID-19 that are specific or more significant to them. Examples of such occurrences include significant disruptions to the issuer's personnel or operations, delays or disruptions in critical supply chains, material changes in credit agreements, suspension or ban of exports/imports. In such circumstances, issuers must issue a news release disclosing the nature and substance of the material change, followed by the filing of a material change report. For additional information on reporting material changes in the context of the COVID-19, please refer to our bulletin published on [March 20](#).

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The author wishes to thank [Jean-Pierre Chamberland](#) and [Gilles Leclerc](#) for their advice and contributions.

CLIENT-FOCUSED REGISTRANT REFORM DEADLINES POSTPONED DUE TO COVID-19

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In recognition of the disruption to business as usual for registrants due to COVID-19, the Canadian Securities Administrators (CSA) announced relief on April 16, 2020 that adjusts the implementation dates for certain aspects of the client-focused rule amendments to National Instrument 31-103, originally published in October 2019. [CSA Notice 31-357](#) provides notice of two blanket orders adopted by each applicable member of the CSA, which have the following effects:

- moving the effective date of the new conflicts of interest provisions provided for in the client-focused reforms from December 31, 2020 to June 30, 2021 ([view the OSC order here](#)); and
- moving the effective date for new disclosures in relationship disclosure documents (RDI), also required as part of the client-focused reform amendment package, from December 31, 2020 to December 31, 2021 ([view the OSC order here](#)).

The CSA reinforce in the Notice that all other deadlines remain the same. They also explain that in conjunction with the conflicts of interest provisions, firms will need to disclose material conflicts of interest to clients before opening an account, or in a timely manner after they are identified. This disclosure obligation is separate from the RDI and will be effective on June 30, 2021.

IIROC and the MFDA have agreed to these effective date changes. We expect that the amendments to their rules to give effect to the client-focused reforms will be published in June or later this summer.

We also note that IIROC has given its members notice that the plain language IIROC rulebook, which was to come into force by June 1, 2020, will become effective on December 31, 2021. This change in effective date is again in recognition of the disruption caused by the pandemic.

Finally, the CSA still encourages registrants to work on implementing the client-focused reforms within the original timing, notwithstanding the new implementation timelines. They also ask registrants to consider the reforms when interacting with clients given the increased reliance by clients on registrants during this challenging time.

CANADIAN SECURITIES ADMINISTRATORS

CSA Staff Notice 51-360 Updated

CSA Staff Notice 51-360 (Updated) *Frequently asked questions regarding filing extension relief granted by way of a blanket order in response to COVID-19*, was updated on May 13, 2020. For more information, please see CSA Staff Notice 51-360 (Updated), which will be reproduced in Volume 1A of the *Canadian Securities Law Reporter* at ¶ 5184e.