

December 16, 2010

## Minimizing Liability for Forward-Looking Information

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### Introduction

Many issuers include forward-looking information (FLI) in press releases and other disclosure documents. The disclosure of FLI by a reporting issuer is subject to mandatory requirements under *National Instrument 51-102 Continuous Disclosure Obligations* (NI 51-102) and potentially exposes the issuer to risks of civil liability under the statutory civil liability regime contained in applicable securities laws if the anticipated event, condition, result, projection or forecast contained in the FLI is not achieved and the FLI did not satisfy certain requirements.

This bulletin discusses FLI disclosure requirements and ways to minimize the risks associated with the use of FLI. It also highlights the deficiencies identified by the Canadian Securities Administrators (CSA) in their review of FLI reported in CSA Staff Notice 51-330 *Guidance Regarding the Application of Forward-looking Information Requirements under National Instrument 51-102 Continuous Disclosure Obligations* (Staff Notice).

### What is FLI?

FLI is disclosure

- about possible events, conditions or results of operations
- that is based on assumptions about future economic conditions and courses of action.

It includes future-oriented financial information (FOFI) with respect to prospective results of operations, financial position or cash flow that is provided either as a forecast or a projection.

FLI would include guidance provided by an issuer about its anticipated future revenues and profits.

### Why Should an Issuer be Concerned With the Use of FLI?

#### Mandatory Requirements

NI 51-102 imposes mandatory requirements on issuers that disclose written FLI. Specifically, a reporting issuer must not disclose FLI unless the issuer has a reasonable basis for the FLI. In considering whether or not the basis for the FLI is reasonable, both the reasonableness of the assumptions and the process in preparing the FLI should be considered.

If a reporting issuer discloses material FLI in its disclosure documents it must include disclosure that:

- identifies the FLI as such;
- cautions users that the actual results may vary from the FLI and identifies the material risk factors that could cause actual results to differ materially from the FLI;
- states the material factors or assumptions used to develop FLI; and
- describes its policy for updating FLI in certain circumstances.

In addition, FOFI or a financial outlook may not be disclosed unless the FOFI and financial outlook is based on assumptions that are reasonable in the circumstances. In that regard, the FOFI or financial outlook disclosed by an issuer must:

- be limited to a period for which the information in the FOFI or financial outlook can be reasonably estimated; and
- use the accounting policies the reporting issuer expects to use to prepare its historical financial statements for the period covered by the FOFI or the financial outlook.

The issuer must also state the date management approved the FOFI or financial outlook if it is undated and must explain the purpose of the FOFI or financial outlook and caution readers that it may not be appropriate for other purposes.

Material FLI must also be updated in certain circumstances and a discussion included in the issuer's MD&A of the material differences between the actual results reported in the MD&A and any FOFI or financial outlook previously reported for the period covered by the MD&A.

Certain disclosure obligations also apply to a withdrawal of previously disclosed material FLI.

### **Statutory Civil Liability**

As with all disclosure, there are statutory civil liability provisions that apply to misrepresentations contained in FLI. Given the inherent uncertainty in FLI, FLI may attract the application of civil liability provisions more readily than other disclosure. To encourage such disclosure, the statutory civil liability regime under applicable Canadian securities laws include certain safe harbour provisions for FLI provided the FLI complies with certain requirements. Specifically, FLI (other than FLI contained in financial statements or that has been issued in connection with an initial public offering) is protected from statutory civil liability for misrepresentation:

- if it contains:
  - reasonable cautionary language identifying the FLI;
  - reasonable cautionary language identifying material factors that could cause actual results to differ materially from a conclusion, forecast or projection in the FLI; and
  - a statement of the material factors or assumptions that were applied in drawing a conclusion or in making a forecast or projection set out in the FLI;
- the cautionary language identifying the FLI and material factors and the statement of applied material factors or assumptions appear proximate to the FLI; and
- the person has a reasonable basis for drawing the conclusions or making the forecast or projection.

The disclosure requirements required above mirror the disclosure requirements under NI 51-102.

### **Identification of FLI**

As noted above, NI 51-102 requires reporting issuers to identify material FLI as such.

In the Staff Notice, CSA Staff encourage issuers that identify material FLI through a cautionary paragraph at the beginning or end of a disclosure document, to give readers an indication of the nature of the material FLI covered in the document. In Staff's view, this type of disclosure allows an investor to more readily identify material FLI when it is encountered in the document. On the other hand, CSA Staff noted that identifying FLI by referring to types of words would not enable a reader to readily identify the FLI.

The Staff Notice reported that some issuers stated that FLI was included in a particular disclosure document when in fact no FLI was included. In that regard, Staff encourages issuers to avoid including statements that a document contains FLI when to the issuer's knowledge that is not the case.

## **Disclosure Regarding Material Risk Factors and Material Factors or Assumptions**

### **Identification of Material Risk Factors and Material Factors or Assumptions**

Reporting issuers that disclose material FLI are required to include disclosure that identifies material risk factors that could cause actual results to differ materially from the FLI and to include material factors or assumptions used to develop material FLI. The Staff Notice warns issuers that either neglect to discuss these factors or assumptions or state that there are factors or assumptions without identifying them, would not, in Staff's view, comply with these requirements.

### **Incorporation by Reference of Relevant Material Risk Factors and Material Factors or Assumptions**

The Staff Notice indicates that although issuers are not precluded from incorporating by reference material risk factors and material factors or assumptions contained in another document, they should consider whether that practice, in the circumstances, enables a reader to readily inform himself or herself of the material risk factors, and material factors or assumptions, associated with the material FLI.

### **Avoiding "Boilerplate" Disclosure**

Based on their review, CSA Staff reported that issuers often included identical or nearly identical risk factor/factors and assumptions disclosure in each of their disclosure documents despite differences in the nature of the FLI contained in the particular document or

material. The Staff Notice warns issuers to avoid "boilerplate" disclosure and reminds issuers to disclose material risk factors and material factors and assumptions that are relevant to the FLI.

### **User-Friendly Presentation**

The Staff Notice encourages issuers to adopt a user-friendly presentation such as using tables that clearly link specific material risk factors and material factors and assumptions to the particular FLI.

### **Updating Practices**

The Staff Notice reminds issuers that they are required to update previously disclosed FLI in certain circumstances and that statements which indicate otherwise are inappropriate. Accordingly, FLI cautionary statements that include statements noting that the issuer will not update the disclosure are inappropriate.

### **Explanation of Purpose of, and Cautionary Language Related to, Financial Outlook or FOFI**

The Staff Notice reminds reporting issuers that disclose FOFI or a financial outlook, to also disclose the purpose of the information and caution readers that the information may not be appropriate for other purposes. In that regard CSA Staff notes that disclosure of material risk factors and material factors or assumptions contained in a cautionary paragraph at the beginning or end of a document generally will not satisfy this requirement.

### **Disclosure Regarding Goals or Targets**

The Staff Notice discusses whether disclosure regarding a goal or target constitutes FLI as defined in securities legislation.

The CSA Staff would generally expect a reporting issuer to disclose a target or goal only if it is "possible" to achieve and as a consequence, a disclosed target or goal can constitute FLI and, if material, the document containing the FLI should include disclosure regarding this goal or target that complies with the FLI requirements, including the requirements applicable to financial outlooks.

CSA Staff notes that if management determines that a material target or goal that is disclosed does not constitute material FLI, management should consider including additional disclosure explaining the purpose of the information.

### **Best Practices**

Issuers are reminded that the CSA will continue to select certain issuers for continuous disclosure reviews and as part of that review, will consider compliance with FLI requirements. Compliance with the FLI requirements is also important as a defence to statutory civil liability claims. If the anticipated event, condition, result, projection or forecast contained in the FLI is not achieved, careful drafting of an FLI cautionary note in compliance with the safe harbour provisions contained in the statutory civil liability regime under applicable Canadian securities law may provide protection to the issuer as well as others from that liability. In that regard, we recommend that reporting issuers review their current practice of addressing FLI requirements to ensure that the use of FLI complies with the mandatory requirements of NI 51-102 and is accompanied by a properly drafted FLI cautionary note to protect against potential liability for FLI that is not met. Specifically, when disclosing FLI, reporting issuers should:

- avoid boilerplate disclosure – it will generally not meet the disclosure requirements;
- identify the specific nature of FLI used in the disclosure document – do not just refer to types of words (e.g., "intends") as the means of identifying the FLI;
- consider whether targets or goals disclosed constitute FLI and if so, comply with the FLI requirements;
- identify the material risk factors and assumptions used in the specific FLI included in the disclosure in the document – do not just reference generic risk factors;
- use bullets or tables or other user friendly methods in disclosing FLI; and
- keep track of FLI on an ongoing basis, review and update previously disclosed FLI, as appropriate, and include procedures for reviewing the cautionary statements in the issuer's disclosure policy.

### **Conclusion**

Proper use of FLI cautionary statements can assist in addressing statutory civil liability concerns and complying with other regulatory requirements.

# BULLETIN

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