Continuous Disclosure Obligations:
Increasing Investor's Confidence or Information Overload?

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Where is the wisdom we have lost in knowledge?
Where is the knowledge we have lost in information?

T.S. Eliot, 'The Rock'

That disclosure, in all of its guises – full, true and plain; timely, accurate and efficient; material; continuous; periodic; and general (just to name a few) – has long played an integral part in the operation of our capital markets goes without saying. Indeed, it's fair to say there's nary a problem in market history (real or perceived) that doesn't trace its origins, at least in the public mind, to some shortcoming on the disclosure front. It's no surprise, then, that in Ontario the requirement for timely, accurate and efficient disclosure of information is identified in our *Securities Act* (the 'Act') as a fundamental principle in achieving the purposes of the Act.[1] It is also not surprising that the renewed emphasis on disclosure that has followed on the heels of the corporate scandals that have plagued our markets in the new millennium has focused on its ability to enhance investor confidence and investor protection.

However, in addition to its obvious benefits in keeping investors up-to-date, there are a multitude of other reasons for playing the disclosure card. Among them, the benefits derived from the institution of more streamlined processes (which arguably benefit both the investor and the company by strengthening investor protection while imposing the minimum burden necessary on business); the information disclosed enables both investors and the market to better assess the value of the security; and, from a corporate governance perspective, the information allows the investing public to be both judge and prosecutor of companies that do not (or do not appear to) conform to good corporate governance practices.

Interestingly, neither the calls, nor the reasons, for enhanced disclosure are new. Rather, it is the circumstances of the market, its participants, and the much-changed world it operates in, that makes this round of reform unique. In the markets of 2006, it is neither a shortfall of information in the market, nor an inability to access it, that is at issue. This time around, it is about too much information and policing the quality of that information. And while the changes impacting the markets over the last few decades are many, to be sure, there are it would seem two principal reasons for this particular change to the informational landscape.

Access to Information: Democratization and the Internet

In September 2000, David Brown, then-Chair of the Ontario Securities Commission, made a speech to the Financial Services Institute, in which he observed that '[i]t used to be that one of the most important distinctions between a broker and a client was that one

[1] *Securities Act* (Ontario), R.S.O. 1990, c. S.5, s.2.1.

of them had access to a wealth of information, and the other one didn't. Today, that distinction is fading rapidly.'[2]

Mr. Brown's comment on the global economy aptly captures two of the greatest changes to impact the capital markets in the last twenty or so years: the first, is the larger and broader investor base that has resulted from the virtual explosion in access to the markets in North America often referred to as the democratization of investing; the second is, of course, the advent of the internet. The former having given rise to a pressing need to ensure that the information in the markets is tailored to this broader investor base; the later giving rise to concerns about unprecedented and largely uncontrollable access to information.

In response, the legislature, the securities commissions, the Canadian Securities Administrators (CSA), the self-regulatory organizations (SROs) and the exchanges have all been actively engaged in the disclosure debate and churning out disclosure-related material hand over fist.

Canada's Continuous Disclosure Regime

For Canadian reporting issuers the continuous disclosure requirements can be divided into two types: the first is commonly referred to as regular or periodic disclosure, whereby the issuer maintains and updates its public record; the second is timely disclosure whereby an issuer is required to disclose a 'material change' in its affairs. The purpose of this little paper is to deal with the recent and substantial changes to the first of these obligations, that is, periodic disclosure.

Though there are differences, and in some cases, substantial differences, between the provinces and territories, generally speaking the continuous disclosure documents statutorily prescribed by the various Securities Acts include: annual audited financial statements, interim financial statements, annual information forms (AIFs), management's discussion and analysis (MD&A), proxy circulars for shareholders meetings, press releases of material events and material change reports.

Historically, issuers reporting in more than one province were forced to comply with a different set of disclosure rules in each. The recent changes brought about by National Instruments 51-102 – Continuous Disclosure Obligations, 71-102 – Continuous Disclosure and other Exemptions Relating to Foreign Issuers, and 81-106 – Investment Fund Continuous Disclosure, were designed to harmonize Canada's system of continuous disclosure.

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[2] *'Relevant Regulation in a Global Economy', speech by David Brown, Chair of the Ontario Securities Commission to the Financial Services Institute, September 27, 2000.*

National Instrument 51-102 Continuous Disclosure Obligations

In March 2004, National Instrument 51-102 replaced all local continuous disclosure legislation with one set of national, harmonized rules, for all reporting issuers. The instrument does not apply to investment funds.

The instrument makes a distinction between reporting issuers depending on where their securities are listed, such that the instrument distinguishes between non-venture reporting issuers, venture issuers (a reporting issuer that does not have any of its securities listed or quoted on any of the TSE, a US marketplace or a marketplace outside of Canada and the US) and SEC issuers (a reporting issuer that has a class of securities registered under section 12 of the 1934 Act or is required to file reports under section 15(d) of the 1934 Act and is not registered or required to be registered as an investment company under the US *Investment Company Act of 1940*). The issuer distinction is significant because in some cases the requirements differ depending on what marketplace the issuer's securities are listed on.

Filing Requirements

Annual Financial Statements: Pursuant to the instrument, a reporting issuer is required to file its financial statements, including the auditor's report and the MD&A, at the latest 90 days following the end of the most recently completed financial year. Venture issuers must file at the latest 120 days following the end of its most recently completed financial year. However, if the issuer is also required to file annual financial statements in a foreign jurisdiction at a date earlier than the date prescribed by NI 51-102, then such earlier date is applicable for the Canadian filing of the annual financial statements.

Interim financial statements: Reporting issuer must file its interim financial statements within 45 days of the interim period; a venture issuer must file within 60 days. As with the annual financials, if the reporting issuer is required to file interim financial statements in a foreign jurisdiction at an earlier date then such earlier date is applicable for the filing of the interim financial statements.

Management's Discussion & Analysis: Reporting issuer must file its MD&A relating to its annual and interim financial statements, within 90 days of its financial year and 45 days of the interim period.

Annual Information Form: Reporting issuers must file an AIF within 90 days after the end of its financial year. This requirement does not apply to venture issuers.

Material Change Reports: If a material change occurs in the affairs of a reporting issuer, the reporting issuer must immediately issue and file a news release and file a material change report within 10 days of the date on which the change occurs. It should be noted that where the reporting issuer is of the opinion, and that opinion is arrived at in a *reasonable manner*, that the required disclosure would be unduly detrimental to the

interests of the reporting issuer, a confidential MCR may be filed.[3] However, where a confidential MCR is filed the reporting issuer must advise the regulator in writing within 10 days (and every 10 days thereafter) if it believes the report should remain confidential. Moreover, where a reporting issuer files a confidential MCR, the reporting issuer is required to promptly disclose a material change if it becomes aware, or has reasonable grounds to believe, that trading is occurring with knowledge of the material change that has not been generally disclosed.

Proxy Solicitation and Information Circulars: Where an information circular or form of proxy is required under the instrument to be sent to securityholders, a copy of the information circular, form of proxy and all other material required to be sent in connection with the meeting must be *promptly* filed.

Additional Filing Requirements

A reporting issuer must file, on the same date as, or as soon as practicable thereafter, a copy of any disclosure material that it sends to its securityholders or in the case of an SEC issuer, that it files with or furnishes to the SEC, if the material contains information that has not been included in disclosure already filed in Canada.[4]

Voting Results

Promptly following a meeting of securityholders, a reporting issuer must file a report with a brief description of the matter voted upon, the outcome of the vote and, where the vote was conducted by ballot, the number or percentage of votes cast for, against or withheld from the vote, for each matter voted upon.[5]

Delivery

A reporting issuer is no longer required to send its financial statements to each holder of its securities. Instead, a reporting issuer must annually send a request form to the registered holder and beneficial owners of its securities. The form may be used to request a copy of the reporting issuer's annual financial statements and MD&A and/or the interim financial statements and MD&A.[6]

Board Approval

Pursuant to the instrument, Board approval is required for a reporting issuer's annual and interim financial statements and annual, interim and any supplemental MD&A. However, the Board may delegate the approval of the interim financial statements, interim MD&A and any supplement to the interim MD&A to the audit committee.[7]

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[3] NI 51-102, Part 7, 7.1(2).
[4] NI 51-102, Part 11, 11.1.
[5] NI 51-102, Part 11, 11.3.
[6] NI 51-102, Part 4, 4.6.
[7] NI 51-102, Part 4, 4.5 & Part 5, 5.5

Auditor Review

If an auditor has not performed a review of the interim financial statements the interim financial statements must be accompanied by a notice indicating that such review had not taken place. Moreover, if the issuer did engage an auditor but the auditor was unable to complete the review or if the auditor expressed a reservation in it's interim review report, such must be disclosed with the interim financial statements.[8]

Business Acquisition Report

Pursuant to the instrument, a reporting issuer who completes a 'significant acquisition' is required to file a business acquisition report ("BAR") within 75 days after the completion of the acquisition. According to the instrument, an acquisition is significant if the reporting issuer's proportionate share of the consolidated assets of the acquired business or the issuer's consolidated investments in and advances to the acquired business exceeds 20% of the assets of the reporting issuer or if the reporting issuer's proportionate share of the consolidated income of the acquired business exceeds 20% of the income of the reporting issuer. The threshold is 40% for venture issuers.[9]

Compliance with the BAR requirements does not relieve the issuer from any material change reporting obligations. It should be noted, however, that exemptions are available.

National Instrument 71-102 Continuous Disclosure and other Exemptions Relating to Foreign Issuers

National Instrument 71-102 is intended to provide relief for many non-Canadian issuers from most of the requirements of NI 51-102 by permitting certain foreign issuers to satisfy Canadian disclosure requirements by filing foreign documents of a like nature.

To qualify for the exemptions the issuer must be a 'foreign reporting issuer', defined as a reporting issuer, other than an investment fund, that is incorporated or organized under the laws of a foreign jurisdiction, unless outstanding voting securities carrying more than 50% of the votes for the election of directors are owned, directly or indirectly, by residents of Canada *and* the majority of the executive officers or directors are residents of Canada, more than 50% of the assets of the issuer are located in Canada, or the business of the issuer is administered principally in Canada.[10]

The instrument enumerates two sub-categories of foreign reporting issuers – 'SEC foreign issuers' (that is, those issuers that are subject to the rules of the SEC) and 'designated foreign issuers' (those issuers that are subject to the foreign disclosure requirements in Australia, France, Germany, Hong Kong, Italy, Japan, Mexico, the

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[8] NI 51-102, Part 4, 4.3(3).
[9] NI 51-102, Part 8, 8.3.
[10] NI 71-102, Part 1, 1.1 Definitions and Interpretation.

Netherlands, New Zealand, Singapore, South Africa, Spain, Sweden, Switzerland, or the United Kingdom of Great Britain and Northern Ireland.[11] The exemptions of the instrument are subject to the issuer's compliance in their respective jurisdiction. In addition, documents filed or furnished to the SEC or to a foreign securities regulator must also be filed in Canada at the same time or as soon as practicable thereafter. Finally, any documents required to be sent to securityholders under US securities law or the laws or requirements of a designated foreign jurisdiction, must, at the same time or as soon thereafter as practicable, be sent to securityholders resident in Canada.[12]

Pursuant to the instrument, SEC foreign issuers and designated foreign issuers are exempt from the Canadian requirements relating to, among other things:

- MCRs;
- annual financial statements (including the auditor's report);
- AIFs and MD&A;
- BARs;
- the requirements relating to information circulars, proxies and proxy solicitation;
- the disclosure of voting results; and
- the filing of news releases that disclose information regarding its results of operations or financial conditions.

The Instrument also provides for exemptions from certain other provincial reporting requirements that are not contained in NI 51-102.

It should be noted that the Multijurisdictional System (MJDS) and NI 71-101 continue to apply.

National Instrument 81-106 Investment Fund Continuous Disclosure

In June 2005, NI 81-106 came into force, providing a nationally harmonized set of continuous disclosure requirements for investment funds. Except where specifically provided otherwise, the instrument applies to an investment fund that is a reporting issuer and, in Ontario, to a mutual fund. 'Investment fund' is defined as a mutual fund or a non-redeemable investment fund.

Filing

Annual and Interim Financial Statements: An investment fund that is a reporting issuer must file annual financial statements (including an auditor's report) within 90 days of its financial year end and interim financial statements must be filed within 60 days of its most recent interim period. It should be noted that where the investment fund has a

[11] See the definitions of 'designated foreign issuer', 'designated foreign jurisdiction', 'foreign reporting issuer' and 'SEC foreign issuer' in NI 71-102.
[12] NI 71-102, Part 3.

website it must also post its annual and interim financial statements and management report of fund performance (below) to the website *no later than the date that those documents are filed.*[13]

Management Report of Fund Performance: An investment fund, other than an investment fund that is a scholarship plan, must file an annual MRFP for each financial year and an interim MRFP for each interim period at the same time that it files its annual financial statements or its interim financial statements. A group scholarship plan only has to file an annual management report of fund performance.

Annual Information Form: If an investment fund that is a reporting issuer does not have a current prospectus as at its financial year end it must file an AIF (including all material incorporated by reference that has not already been filed) within 90 days after the end of its most recently completed financial year.

Material Change Reports: If a material change occurs in the affairs of an investment fund, that is a reporting issuer, the investment fund must *promptly* issue and file a news release that is authorized by an executive officer of the manager of the fund and that discloses the nature and substance of the material change. In addition, all disclosure made in the news release must be posted on the funds website and a report must be filed[14] within 10 days of the date on which the change occurs. The investment fund must also file an amendment to its prospectus or simplified prospectus that discloses the material change.

It should be noted that there is provision for a confidential MCR akin to that in NI 51-102.

Proxy Voting Disclosure, Proxy Solicitation and Information Circulars: Pursuant to the instrument, an investment fund that is a reporting issuer, must establish policies and procedures to be followed by it in determining how to vote any proxies it receives; and the policies and procedures must be disclosed in its prospectus or AIF. In addition, an investment fund that is a reporting issuer must prepare and maintain a proxy voting record on an annual basis for the period ending June 30 of each year. An investment fund that has a website must also post the proxy voting record to the website no later than August 31 of each year. Moreover, upon request, the investment fund must send the most recent copy of its proxy voting policies and procedures and proxy voting record, to any securityholder.

If management of an investment fund or the manager of an investment fund gives or intends to give notice of a meeting to registered holders of the investment fund, management or the manager must send a form of proxy to every registered holder who is entitled to notice of the meeting. The form of proxy must be sent at the same time as or before the notice. Where an information circular or form of proxy is required under the instrument to be sent to securityholders a copy of the information circular, form of proxy

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[13] NI 81-106, Part 5, 5.5.

[14] NI 81-106, Part 11, 11.2(c) requires that the report contain, with the necessary modifications, the information required by Form 51-102F3.

and all other material required to be sent in connection with the meeting must be promptly filed.

Additional Filing Requirements

Where an investment fund that is a reporting issuer sends to its securityholders any disclosure document other than those required by the instrument, the investment fund must file a copy of the document on the same date as, or as soon as practicable after, the date on which the document is sent to its securityholders.[15]

Voting Results

Promptly following a meeting of securityholders, at which a matter was submitted to vote, an investment fund that is a reporting issuer must file a report with a brief description of the matter voted upon, the outcome of the vote and, where the vote was conducted by ballot, the number or percentage of votes cast for, against or withheld from the vote, for each matter voted upon.[16]

Delivery

The financial statements (both annual and interim) and MRFPs (again, both annual and interim) must be sent to the investment fund's securityholders within 10 days of the filing deadlines unless the investment fund is relying on standing or annual instructions. The former allows an investment fund to furnish its securityholders with a document explaining the choices the securityholder has to receive the documents and to solicit instructions from the securityholder about the delivery of those documents. The fund must also advise the securityholder that it will continue to follow those instructions until they are changed by the securityholder, hence they are obtaining standing instructions. In addition, the investment fund must send a reminder (no less than annually) to the securityholder of its standing instructions. Alternatively, annual instructions permit an investment fund to request annual instructions from its securityholders as to receipt of the fund's financial statements and MRFPs.

Board/Trustee Approval

The financial statements of the investment fund must be approved by the Board of Directors (or the trustee or trustees where the investment fund is a trust) of the investment fund before they are filed or made available to securityholders or potential purchasers of securities of the investment fund.[17] Likewise, the instrument requires Board (or Trustee, as the case may be) approval of the MRFP before the report is filed or made available to a securityholder or potential purchaser of securities of the investment fund.[18]

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[15] NI 81-106, Part 16, 16.2.
[16] NI 81-106, Part 16, 16.3.
[17] NI 81-106, Part 2, 2.5.
[18] NI 81-106, Part 4, 4.5.

Auditor Review

If an auditor has not performed a review of the interim financial statements the interim financial statements must be accompanied by a notice indicating that such review has not taken place. Moreover, if the investment fund engaged an auditor to perform a review of the interim financial statements and the auditor was unable to complete the review or if the auditor expressed a reservation in its interim review report, such must be disclosed with the interim financial statements.[19]

Quarterly Portfolio Disclosure

An investment fund that is a reporting issuer must prepare quarterly portfolio disclosure and, where the investment fund has a website, must post to the website the quarterly portfolio disclosure within 60 days. This requirement does not apply to a scholarship plan or a labour sponsored or venture capital fund.

Transition

The instrument came into force on June 1, 2005, however the transition dates differ slightly depending on the document at issue. For those investment funds that were in existence on June 1, 2005, the first annual financial statements and MRFP that are required by the instrument, must be filed within 120 days of completion of the funds first financial year that occurs after June 1, 2005.

Conclusion

The continuous disclosure requirements of these National Instruments are but one part of Canada's continuous disclosure regime and the confines of this paper do not allow for a review of the regime in its entirety. Moreover, the continuous disclosure regime as a whole is but one small part of a corporate governance initiative that has and is continuing to make big changes to the way companies do business in the Canadian markets. It remains to be seen if the recent continuous disclosure requirements will increase investor confidence but if they don't, it surely won't be for a lack of information in the market.

[19] NI 81-106, Part 2, 2.12.