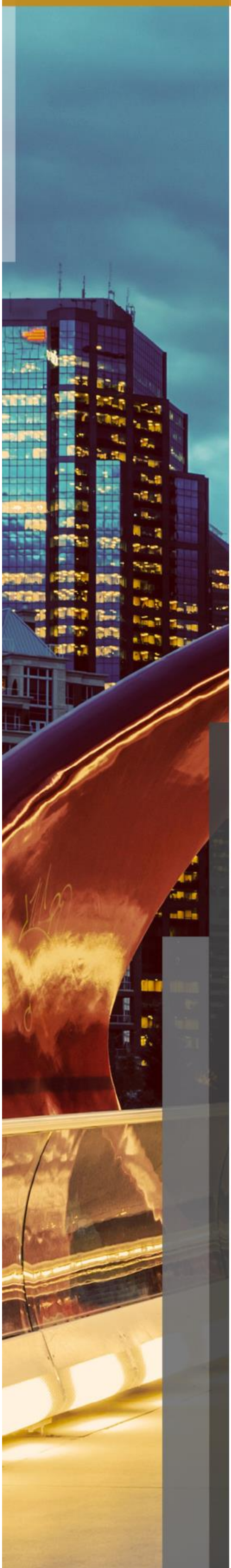

CSA notes common deficiencies in continuous disclosure review report and provides guidance on COVID-19 disclosure

By Jessica Brown and Katy Josephs

On October 29, 2020, the Canadian Securities Administrator (**CSA**) published Staff Notice 51-361 – *Continuous Disclosure Review Program Activities for the fiscal years ended March 31, 2020 and March 31, 2019* (the **Notice**) announcing the results of the reviews conducted by the CSA under its Continuous Disclosure Review Program (the **CD Review Program**). The CD Review Program was implemented to improve the completeness, quality and timeliness of continuous disclosure (**CD**) provided by reporting issuers in Canada and to increase the quality of information available to investors to assist them in making informed decisions.

The Notice summarizes the key findings of the CSA from the CD Review Program, outlines common deficiencies the CSA found throughout its review and provides guidance on how to correctly report the impact of the COVID-19 pandemic (**COVID-19**).

The full Notice is available here.

Review process

The CSA conducted 583 CD reviews for the 2020 fiscal year and 514 reviews for the 2019 fiscal year. The issuers selected for review were identified based on a "risk-based and outcomes focused" approach that identified issuers that posed or appeared to pose a higher risk to investors. In addition, some reviews were conducted based on a general monitoring of issuers.

Approximately 70% of the issuers were reviewed on an issue-oriented basis. The focus areas of these reviews included, among other things: (i) material change reports; (ii) news releases; (iii) financial statements and management's discussion and analysis (**MD&A**); and (iv) technical mineral project disclosure.

Key findings

Overall, the CSA discovered that of the CD reviewed, 55% required issuers to improve or amend their CD in 2020 when compared to 67% in 2019. Further, some of the reviews resulted in additional action such as issuers being referred to enforcement, required to be cease traded or placed on a default list, required to refile their CD, provided with suggested changes, made aware of potential issues or deficiencies, or any combination of the above.

Common deficiencies

The Notice outlines a number of recurring deficiencies in the CD that the CSA reviewed. The main deficiencies identified were in the categories of financial statements, MD&A and other regulatory matters.

Deficiencies identified within the financial statements category included: (i) incorrectly measuring the fair value of intangible assets in accordance with the applicable IFRS; (ii) not accounting for impairment of non-financial assets at the end of each interim period; (iii) failing to provide entity-wide disclosures related to products and services, geography, and major customers; and (iv) failing to incorporate new judgements and estimates as a result of the impact of COVID-19.

Another area that the CSA identified issues was in issuers' MD&A. Particularly, it found that issuers continue to provide boilerplate forward-looking information (**FLI**), fail to update their FLI appropriately, and fail to disclose their policies for updating such FLI. In addition, the CSA noted that stating that an issuer is not obligated to publicly release revisions to any FLI is not compliant with disclosure rules and that issuers must present FLI in a manner that allows investors to readily identify it. Other deficiencies with MD&A included incomplete or boilerplate discussions of liquidity and capital resources, an insufficient analysis of negative cash flows from operations or a material risk related to their ability to continue as a going concern, and providing insufficient quantitative and qualitative information in respect of related-party transactions.

The CSA expressed general concern over the prominence and labelling of non-GAAP financial measures (**NGM**). To avoid being misleading, issuers are reminded that the most directly comparable GAAP measure should be presented with equal or greater prominence to any NGM and that all NGM must be correctly labelled as such. Issuers must ensure that any NGM are accompanied with the appropriate explanatory notes and otherwise comply with CSA Staff Notice 52-306 (Revised) – *Non-GAAP Financial Measures.*

Other areas of concern dealt with over-promotional, untrue or unbalanced disclosure, deficiencies in reporting insider disclosure, failing to fulfill early warning reporting requirements, failing to issue material change reports in a timely manner, and deficiencies related to inadequate disclosure of information relied upon by "qualified persons" and other shortfalls of disclosure in technical reports filed in respect of mineral projects.

COVID-19 specific disclosure

The CSA suggests that, in their MD&A, reporting issuers should provide transparent and entity-specific disclosure in respect of the effects of COVID-19. This includes "information about the impact of COVID-19 on their operating performance, financial position, liquidity, and future prospects" with "detailed disclosures regarding the methodology used to determine the impact."

The CSA notes that disclosure concerning the impact of COVID-19 on revenues, net earnings and earning per shares should include the methodology used to determine such impact and other factors that have contributed to the period over period variances. It should also avoid the use of boilerplate language that is readily available in the issuer's financial statements. Due to the difficulty in attributing numerical values to the impact of COVID-19, increased specificity in an issuer's MD&A will enhance accuracy and will prevent issuers from accidentally misleading investors.

Further, the CSA cautions investors about including adjustments or alternative profit measures in their NGM that are defined as "COVID-related". It notes, "[n]ot all COVID-19 effects are non-recurring and there may be a limited basis for management to conclude that a loss or expense is non-recurring, infrequent or unusual... It could be misleading to describe an adjustment as COVID-19 related if management does not explain how the adjusted amount was specifically associated with COVID-19."

Finally, the CSA noted that issuers should consider the impact of COVID-19 on an issuer's material change reporting, including as a result of changing governmental and/or regulatory policies that may be particularly significant to, or uniquely affect, the issuer. The reporting of any material change should be completed in a timely manner in accordance with the timing requirements under National Instrument 51-102 – *Continuous Disclosure Obligations.*

Further information and guidance on CSA's expectations in light of COVID-19 is available here.

Takeaways

The above deficiencies highlight common problems in reporting issuers' CD. It is important for such issuers to be aware of these deficiencies and common problems, especially in the light of COVID-19, to ensure that they are providing adequate information and are compliant with the CD rules.

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