



CCH

a Wolters Kluwer business

Canadian Securities Law News

January 2007
Number 156

FORWARD-LOOKING INFORMATION: NEW RULES PUBLISHED FOR PUBLIC COMMENT

By: Glen Johnson, Torys LLP © 2007 Torys LLP. Reprinted with permission. Glen Johnson's practice focuses on securities regulation and corporate finance matters, particularly domestic and cross-border securities offerings. Glen has been involved in a wide range of public equity and debt offerings and private placements, with a particular emphasis on structured products, including income funds. He also advises Canadian issuers and securities industry participants on various regulatory compliance matters, including listings and disclosure issues, employee stock programs and U.S. dealer trading activities in Canada. This article is a general discussion of certain legal and related developments and should not be relied upon as legal advice. For permission to reprint Torys' articles, please contact Robyn Packard (rpackard@torys.com).

Since the mid-90s, there has been regulatory uncertainty over National Policy Statement No. 48 ("NP48"), which guides the use of future-oriented financial information ("FOFI") in offering documents, restricts the use of projections and requires an auditors' report and compliance with section 4250 of the Handbook of the Canadian Institute of Chartered Accountants. Canadian securities regulators have proposed new rules that cover all forward-looking information, which includes FOFI and a new category of forward-looking information called "financial outlook" (which itself includes earnings guidance). In general, the regulators propose to

- substantially maintain the requirements for FOFI under NP48, which will be rescinded and replaced with legally enforceable amendments to National Instrument 51-102, *Continuous Disclosure Obligations* ("NI 51-102"), and other securities rules and forms, and by substantially maintaining the requirements for FOFI in MD&A under NI 51-102;

Inside

Canadian Securities Administrators

Request for Comment: Proposed National Instrument 41-101, "General Prospectus Requirements"	5
---	---

Manitoba

Legislative Update	9
--------------------------	---

Ontario

Legislative Update	11
--------------------------	----

Investment Dealers Association

Handling Client Complaints	14
----------------------------------	----

Toronto Stock Exchange and TSX Venture Exchange

Trading Fee Change Notice	16
---------------------------------	----

Recent Cases

<i>Ontario Securities Commission v. Andrew Rankin</i>	17
---	----

- drop the requirement for an auditors' report on FOFI in a prospectus or circular, bringing Canadian requirements into line with U.S. requirements for FOFI;
- extend certain current NP48 requirements – to compare FOFI with actual results, to update FOFI and to withdraw FOFI – to financial outlook, including earnings guidance.

The comment period on the proposed new rules is open until March 1, 2007.

Meaning of Financial Outlook

Under the proposed rules “financial outlook” means “forward-looking information about prospective results of operations, financial position and/or cash flows, based on assumptions about future economic conditions and courses of action, and not presented in the format of a historical balance sheet, income statement or cash flow statement; examples include expected revenues, net income, earnings per share and R&D spending; a financial outlook relating to earnings is commonly referred to as ‘earnings guidance’.”

Proposed Rules for Forward-Looking Information

The proposed rules would expressly require issuers to have a reasonable basis for forward-looking information. When issuers initially publish material forward-looking

information, they would be required to comply with some general disclosure principles, as well as to

- identify forward-looking information as such;
- caution users that actual results will vary;
- disclose the material factors or assumptions used to develop the information; and
- disclose the issuer's policy for updating the information if it includes procedures in addition to those described under “Updating” below.

There are additional proposed requirements for assumptions used to prepare FOFI and financial outlook, and for disclosures when FOFI or financial outlook is initially published; these requirements are consistent with those in NP48 and section 4250 of the Handbook.

Updating

The proposed rules would require issuers to discuss in their MD&A events and circumstances that occurred during the period covered by the MD&A that are reasonably likely to cause actual results to differ materially from previously released material forward-looking information, including earnings guidance. This differs from the current requirement under NP48 to report material changes in the events or assumptions used to prepare FOFI in the same way they report a material change, but is generally consistent with the current MD&A form, which requires issuers to “discuss any forward-looking information disclosed in MD&A for a prior period which, in light of intervening events and absent further explanation, may be misleading.”

Comparing with Actual

Issuers would be required to disclose in their MD&A material differences between actual results and previously released FOFI or financial outlook for the period covered by the MD&A. This extends the approach in NP48 to financial outlook (including earnings guidance).

Withdrawal

As with NP48, issuers would be required to disclose in their MD&A a decision made during the period covered by the MD&A to withdraw previously released material forward-looking information. They would also be required to discuss the events and circumstances that led to the decision, including the assumptions underlying the information that are no longer valid.

No Audit Report on FOFI in an Offering Document

The regulators propose to abandon the requirement in NP48 that an auditors' report accompany any FOFI included in a prospectus or circular.

CANADIAN SECURITIES LAW NEWS

Published monthly as the newsletter complement to the CANADIAN SECURITIES LAW REPORTER and the CANADIAN STOCK EXCHANGES MANUAL by CCH Canadian Limited. For subscription information, contact your local CCH Account Manager, or call 1-800-268-4522 or (416) 224-2248 (Toronto).

For CCH Canadian Limited

JAMILA MATHER, B. Arts & Sci, LL.B., LL.M., Securities Writer
(416) 224-2224, ext. 6246
e-mail: Jamila.Mather@wolterskluwer.com

KATHLEEN JONES-LEPIDAS, B.A., Associate Editor
(416) 224-2224, ext. 6372
e-mail: Kathleen.Jones-Lepidas@wolterskluwer.com

SHARI ZINMAN, B.A., M.A., Editor
(416) 224-2224, ext. 6376
e-mail: Shari.Zinman@wolterskluwer.com

JAMIE SERRAN, B.A., Editor
(416) 224-2224, ext. 6438
e-mail: Jamie.Serran@wolterskluwer.com

CHERYL FINCH, B.A., LL.B., Director of Editorial
Legal and Business Markets
(416) 228-6128
e-mail: Cheryl.Finch@wolterskluwer.com

FARIDA KARIM, B.A., Marketing Manager
(416) 228-6138
e-mail: Farida.Karim@wolterskluwer.com

© 2007, CCH Canadian Limited
90 Sheppard Ave. East, Suite 300
Toronto, Ontario M2N 6X1

Oral Statements

The new rules, if adopted, will not apply to oral statements. Despite this, FOI and financial outlook in oral statements will continue to be subject to the new liability for disclosure laws, and so must be made with great care and only if accompanied by certain cautions.

A copy of the proposed new rules can be obtained from the OSC's website at www.osc.gov.on.ca/Regulation/

[Rulemaking/Current/Part5/csa_20061201_51-102_not-rfc-np48.pdf](http://www.osc.gov.on.ca/Regulation/Rulemaking/Current/Part5/csa_20061201_51-102_not-rfc-np48.pdf). We also remind issuers that some amendments to NI 51-102, including to the information circular, AIF, MD&A and other statutory forms, were made in October 2006. Blacklined copies of NI 51-102 and these forms can be obtained from the OSC's website at www.osc.gov.on.ca/Regulation/Rulemaking/Current/Part5/rule_20061013_51-102_supplement.pdf.
