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DECEMBER 2011

Amendments to the *Statement of Executive Compensation* Form

By Daniel Katzin and Sam Khajeei

On October 31, 2011, various amendments to Form 51-102F6 – *Statement of Executive Compensation* ("**Form 51-102F6**") applying to financial years ending on or after October 31, 2011, came into force. The amendments are intended to improve the information issuers provide investors relating to key risks, governance and compensation matters. This article highlights three of the material amendments to the compensation discussion and analysis disclosure required by Form 51-102F6.

Form 51-102F6 requires that an issuer disclose performance goals or similar conditions of compensation paid to a named executive officer (an "**NEO**") that are based on objective, identifiable measures such as the issuer's share price or earnings per share. Form 51-102F6 exempts an issuer from disclosing this information if such disclosure would seriously prejudice the issuer's interests. However, the recent amendments provide that the disclosure of goals or conditions based on broad corporate-level financial performance metrics such as earnings per share and revenue growth does not constitute serious prejudice and therefore must be disclosed by an issuer. Further, if an issuer intends to rely on this exemption, the issuer must explicitly state this and explain the serious prejudice that would result from such disclosure. Consequently, the amendments are likely to make the financial planning processes, future expectations and compensation strategies of an issuer more transparent, which may provide some undesirable insight to competitors about an issuer.

Form 51-102F6 now also requires an issuer to disclose whether its board of directors, or a committee of the board, considered the implications of the risks associated with its compensation policies and practices. If so, disclosure must include (a) the extent and nature of the board of directors' or committee's role in the risk oversight of the issuer's compensation policies and practices; (b) any practices the issuer uses to identify and mitigate compensation policies and practices that could encourage an NEO or individual at a principal business unit or division to take inappropriate or excessive risks; and (c) any identified risks arising from the issuer's compensation policies and practices that are reasonably likely to have a material adverse effect on the issuer. As a result of these new requirements, issuers should consider implementing mechanisms to address risks associated with their compensation policies and practices.

Moreover, Form 51 102F6 now requires an issuer to disclose whether or not an NEO or director is permitted to purchase financial instruments designed to hedge or offset a decrease in market value of equity securities held by or granted as compensation to the NEO or director. As a result, issuers may wish to consider introducing policies addressing hedging by executives and directors of the issuer's securities.

It is recommended that issuers engage in some advanced planning to ensure compliance with the new Form 51-102F6 disclosure requirements. If you have any questions regarding the requirements or this publication, please contact Daniel Katzin at 604-691-6450 (daniel.katzin@fmc-law.com) or Sam Khajeei at 604-622-5189 (sam.khajeei@fmc-law.com).

British Columbia Court of Appeal Upholds Jurisdiction of the British Columbia Securities Commission

By Carrie Schroeder

The British Columbia Court of Appeal (the "**Court**") has ruled that the British Columbia Securities Commission (the "**BCSC**") has the jurisdiction to adjudicate enforcement proceedings against a person who trades on the TSX Venture Exchange (the "**Exchange**") regardless of their location. This decision provides an appellate level court precedent upholding a broad approach to the jurisdictional scope of the BCSC's enforcement activities and could have wide ranging impacts on extraterritorial securities regulatory enforcement actions in Canada.

In *Torudag v. British Columbia (Securities Commission)* ("**Torudag**")[1], the Court dismissed an appeal of a decision of the BCSC[2]. The BCSC had found that Kegam Kevin Torudag contravened the insider trading provisions of the *Securities Act* (British Columbia) (the "**Securities Act**") by purchasing, through the facilities of the Exchange, shares in a reporting British Columbia company listed on the Exchange while he was in a special relationship with the issuer and in possession of material facts that had not been generally disclosed to the public. The appellant purchased his shares through an online trading account held by an off-shore company that he controlled. The online trading account was with a dealer based in Connecticut that had a Canadian office in Montreal. The trades were processed on the Exchange's server in Toronto. At the time of the trades, the appellant was in the process of moving from Ontario to Quebec and at no time was a resident of British Columbia.

The appellant challenged the authority of the BCSC to adjudicate the proceeding on the basis that the impugned conduct had taken place

[1] 2011 BCCA 458.

[2] Torudag and Chan, 2009 BCSECCOM 1.

outside of British Columbia. The BCSC disagreed, holding that the test to determine whether the BCSC has jurisdiction is whether the subject matter has a "real and substantial connection with British Columbia"[3], and on this basis found that participation in British Columbia capital markets by making trades through the facilities of the Exchange was sufficient grounds to establish such a connection. On appeal, the Court affirmed this test and found that the BCSC properly asserted jurisdiction over the appellant, in consideration of two significant factors: (i) the regulatory functions of the BCSC with respect to the Exchange, and (ii) the fact that the company involved was a reporting issuer in British Columbia.

Both the BCSC and the Court emphasized the importance of the Exchange to British Columbia's capital markets and found it significant that the securities legislation in British Columbia and Alberta delegated authority for the regulation of the Exchange to the BCSC and the Alberta Securities Commission. As the underlying purpose of the BCSC's regulatory oversight of the Exchange is to provide investor protection, the Court concluded that the enforcement of insider trading provisions is part of the BCSC's duty to ensure a "level playing field"[4] for investors in companies listed on the Exchange. The effect of Torudag is to uphold a broad scope of jurisdiction for the BCSC in the discharge of this duty.

The Court explicitly adopted an ethical approach to interpretation of the Securities Act, as set out in *Bennett v. British Columbia (Securities Commission)*[5]. This approach holds that that the "dominant aspects" of the Securities Act, with particular regard to its insider trading provisions, are to set out ethical standards governing trading of securities of a reporting issuer. A focus on mechanical aspects, for example those relating to the specifics of a trading platform or server location, does not align with the pith and substance of the insider trading provisions of the Securities Act. In recognition of the impact of electronic trading systems on extraterritoriality considerations, the Court referenced several cases in support of the proposition that the physical location of a server or even a defendant were not conclusive factors in determining jurisdiction and that other factors, such as whether the impugned trades were conducted on the Exchange, should be given more importance. The Court assigned some weight to the fact that most of the shares purchased by the appellant were sold by residents of British Columbia, but indicated that this connection was not necessary for the BCSC to properly assert jurisdiction.

The Court's decision in Torudag suggests that the BCSC and the ASC have a broad jurisdiction to regulate trading on the TSXV regardless of the location of the impugned conduct and that, analogously, the OSC would have a similar extraterritorial jurisdiction with respect to trades conducted on the Toronto Stock Exchange. The Court restricted its comments to the insider trading provisions of the Securities Act. It remains open as to whether courts in other provinces would adopt a similar approach, and whether this same analysis would apply to other provisions of securities legislation, such as enforcement actions relating to illegal distributions or unregistered trades. Absent subsequent case law to the contrary, however, the Torudag decision means that any person who conducts trades on a Canadian stock exchange should be aware that their conduct may be subject to review by Canadian securities regulatory authorities, regardless of their residency and the location of their trading activity.

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[3] Ibid., at paragraph 27.

[4] Supra note 1, at paragraph 27.

[5] [1992] BCJ No 1021.