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Environmental Disclosure and Transparency in Public Company Disclosure Documents

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"Although it has still not been convincingly demonstrated that good environmental and social practices create value for shareholders, it is clear that bad ones can destroy it."

George Dallas, Standard & Poor's

Over the past 15 years, public companies have disclosed environmental liabilities in their financial statements. These companies have disseminated information about their environmental performance and risk factors in their annual reports and MD&A reports. As well, non-financial reports relating to their social and environmental performance are no longer exceptional.

Social pressures on companies to disclose more about their environmental performance and potential liabilities have, however, increased. Regulatory bodies have followed those social pressures to compel greater disclosure of such matters in their public documents.

Incentives that lend themselves to increased environmental disclosure include:

- stricter disclosure standards for public companies generally, as a result of the adoption of the *Sarbanes-Oxley Act* in the United States in 2002 and certain National Instruments in Canada (discussed in more detail below) since 2004;
- industrial and professional standards that encourage specific environmental disclosure, such as the MD&A Reporting Guidelines of the CICA and the ASTM Guides for quantification and disclose of environmental liability;
- the new ISO 14 063: 2006 standard on environmental management and communication that provides guidelines for internal and external communication of environmental performance;
- sectorial and voluntary environmental programs that include public information rules about environmental performance (e.g., the Responsible Care program of the American Chemistry Council);
- the Global Reporting Initiative set up in 1997 by CERES, a U.S.-based NGO, and UNEP, whose members adhere to a code of conduct providing for annual reporting on economic, social and environmental performance;
- non-financial reports that are being rated by UNEP and Standard & Poor's every two years;
- financial institutions that have adopted environmental policies requiring public dissemination of information on environmental impact of projects (e.g., EDC and the World Bank);
- insurance companies that are requesting more in-depth information from current and future policyholders about environmental issues, such as their green house gas emissions and emission reduction action plans;
- shareholders and investor groups that are requesting communication of environmental information and strategic planning through resolutions presented at annual shareholders' meetings and through the courts; and

- evolving provincial and federal environmental regulation that are requiring annual reporting on use and discharge of a broad range of contaminants (e.g., the Federal National Pollutants Release Inventory), environmental incident reporting, and reporting of environmental condition of land, most of this information then becoming available through access to information legislation.

In our view, these pressures favouring greater transparency for companies' environmental performance and liabilities will continue to increase.

In Canada, the standards for environmental disclosure by public companies have been articulated further in certain National Instruments adopted by the provincial securities commissions in 2004 and 2005. National Instrument 51-102 on continuous disclosure obligations, National Instrument 52-109 on certification of disclosure and National Instrument 58-101 on disclosure of corporate governance practices now set out in greater detail the extent of required environmental disclosure.

National Instrument 51-102, and more particularly its schedule, 51-102A1, provides that a public company's annual report must present information about the financial and operational impact of environmental requirements on capital expenditure, revenue, and competitive position in both the description and risk factor sections. The annual report must also set out the environmental policies of the public company and the means of implementing them, the environmental and health risk factors, the environmental litigation, and specific information pertaining to mining projects and oil and gas activities (if applicable).

National Instrument 51-102 further provides that a public company must, in its MD&A, discuss current and future material environmental issues that are not discussed at length in the financial report. More specifically, environmental issues that impact the value of a material project that has not yet generated operational revenue must be disclosed.

The personal certification requirements of the CEO and CFO provided for in National Instrument 52-109 as to the accuracy of financial and other information and as to internal information collection and analysis systems also extend to the public company's environmental performance and liabilities.

Finally, National Instrument 58-101 requires the description, in public companies' reports, of the existence and role of permanent committees of the board of directors, such as, for example, an environmental, health and safety committee.

McCarthy Tétrault Notes

We believe that standard environmental disclosure statements in annual reports and MD&A reports may prove to be insufficient for public companies to meet the disclosure requirements of these National Instruments. Environmental disclosure must now be the result of systematic information collection and careful analysis. Preparing such statements to meet these new, higher standards has become a more challenging task, and one that all public companies will need to review.

Every effort has been made to ensure the accuracy and timeliness of this publication, but the comments are necessarily of a general nature. Clients are urged to seek specific advice on matters of concern and not rely solely on the text of this publication.