



CORPORATE GOVERNANCE REPORT

Volume 1 • Number 1

February 2006

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Welcome to the inaugural issue of the Corporate Governance Report. Corporate governance is a broad topic area that encompasses corporate and securities laws as well as regulatory and stock exchange rules and requirements. New and emerging initiatives continue to change the landscape for public companies and for those in charge of their direction and management. Audit committee requirements, board and committee functions and mandates, independence, certifications, proxy and continuous disclosure: compliance with these developments is becoming increasingly complicated as legislators and securities regulators continue to develop governance initiatives that are uniquely Canadian while many others are influenced by U.S. or international initiatives.

The Corporate Governance Report will seek to bring you practical and comprehensive information on corporate and securities law developments, securities regulatory initiatives and stock exchange rules. We expect that each issue will include analysis of new and emerging developments to help you keep track of compliance requirements. Along with practical information we expect to also bring you in-depth analysis of contentious and difficult issues as well as related judicial and regulatory developments. Guiding this quarterly publication is a distinguished collection of legal practitioners with a variety of in-depth securities, corporate and litigation experience as well as leading authors and commentators.

We have chosen to focus the very first issue of the Corporate Governance Report on the recently enacted amendments to the Securities Act (Ontario) that now allow secondary market purchasers to sue public issuers for certain continuous disclosure violations. This is a new development in Canadian securities law that will influence all facets of Canadian capital markets. Our first issue summarizes some important elements of this new regime and offers practical tips and advice on how boards and senior management might approach their disclosure responsibilities in light of these developments. The Corporate Governance Report will also continue to bring you up-to-date information and analysis as this new legislation is applied and interpreted.



Corporate Governance Report

The **Corporate Governance Report** is published quarterly by LexisNexis Canada Inc., 123 Commerce Valley Drive East, Suite 700, Markham, Ont., L3T 7W8, and is available by subscription only.

Web site: www.lexisnexis.ca

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ISBN 0-433-45174-2 **ISSN 1718-2476**

ISBN 0-433-45172-6 (print & PDF)

ISBN 0-433-45173-4 (PDF)

ISSN 1718-2581 (PDF)

Subscription rates: \$220.00 plus GST (print or PDF)
\$295.00 plus GST (print & PDF)

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CIVIL LIABILITY

Secondary Market Statutory Civil Liability Is in Force in Ontario: What You Need to Know

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Introduction

Effective, December 31, 2005, Ontario is the first jurisdiction in Canada to allow secondary market purchasers to sue issuers and others for certain prescribed disclosure violations. These new amendments (the "Amendments") to the *Securities Act*, R.S.O. 1990, c. S.5, as amended (the "Act") are a result of Bill 198, passed on December 9, 2002 and Bill 149, passed on December 16, 2004, which primarily form the new Part XXIII.1 of the Act entitled 'Civil Liability for Secondary Market Disclosure'. In addition to introducing a new statutory regime for secondary market civil liability, the Amendments also give the Ontario Securities Commission (the "OSC") the ability to prosecute based on newly created fraud and market manipulation offences. According to the OSC, these Amendments are aimed at improving transparency and disclosure, strengthening corporate governance and broadening the sanctions and remedies available to the OSC and investors for violations of securities laws. While many of the Amendments are based on recommendations made in the draft report released in May 2002 by the Five Year Review Committee (appointed by the Minister of Finance), the civil liability aspects of the Amendments can be traced back to the report issued in March 1997 by the Toronto Stock Exchange Committee on Corporate Disclosure, also known as the "Allen Committee".

The Amendments have essentially created three new causes of action for continuous disclosure violations for which secondary market participants can assert claims: (i) misrepresentations in public documents, (ii) misrepresentations in public oral statements, and (iii) failures to make timely disclosure of material changes. While in some respects these causes of action are not new, the most notable change is that now a much larger group of potential plaintiffs (i.e., all those who acquire or dispose of the issuer's securities during the time of a disclosure violation) have the right to assert a claim. Historically, issuers have been concerned with primary market liability for misrepresentations made in offering documents, such as prospectuses and offering memoranda. Outside of offering periods, continuous and timely disclosure matters were dealt with largely as compliance issues unrelated to liability to investors. While it has been an offence under the Act to file a

misleading document with the OSC even prior to the Amendments, the new regime puts greater pressure on issuers to be in an ongoing continuous disclosure review mode as secondary market purchasers are now able to make a claim for a violation of the specified continuous and timely disclosure requirements. While the potential for liability is now broader, liability is only triggered under the Amendments if the misrepresentation relates to material information or the failure to disclose relates to material changes.

The purpose of this article is to provide a review of the causes of action and defences now available under the Amendments, to summarize who may be a potential defendant and to provide some practical tips that issuers may want to consider in reviewing their disclosure procedures. The Amendments also include mechanisms for calculating damages and procedural provisions governing how claims may be asserted and pursued. These latter provisions are beyond the scope of this article but we expect to address these matters in future issues. As the new regime introduced some novel concepts, it also has its fair share of critics and proponents and raises some interesting questions on how certain provisions will be interpreted and applied by the courts. As such, Ontario's new statutory civil liability regime will likely generate an abundance of future commentary and critique as it is developed and applied.

The regime implemented under the new Amendments is complex and includes many concepts that are new to securities legislation in Ontario and Canada. The Amendments create new causes of action and set out details about how, when and against whom these causes of action may be asserted, what statutory defences are available, procedural pre-conditions for bringing and prosecuting claims, and mechanisms for calculating and allocating damages. This is new territory for investors and issuers, as well as their counsel. In consequence, the real impact of these Amendments will only be known after courts have had an opportunity to interpret and apply the new legislation. Similarly, while much can be said about how issuers, directors, officers and others should prepare to avoid liability and potentially defend against these claims, the true effectiveness of preventative measures can also only be assessed after the first few plaintiffs and defendants have had their day in court.

Who Can be Sued?

The primary defendant under the Amendments is the “responsible issuer” which is defined as a reporting issuer or any other issuer with a “real and substantial connection to Ontario” that has publicly-traded securities, and includes publicly-offered investment funds. In addition to responsible issuers, liability may also extend to officers and directors of responsible issuers, as well as to any person with actual, implied or apparent authority to act on the responsible issuer's behalf. The Amendments also allow for claims against an “influential person”, defined as a control person, promoter or insider (that is not a director or officer of the responsible issuer) or an investment fund manager if the responsible issuer is an investment fund, as well as directors and officers of the influential person and any person who had actual, implied or apparent authority to act on the influential person's behalf. Liability under the Amendments can also extend to experts which includes any person or company whose profession gives authority to a statement made in a professional capacity by the person or company, such as an auditor or lawyer.

Asserting liability against these different classes of defendants differs based on the nature of the document, type of misrepresentation, the class of defendant and, in some cases, the knowledge of the defendant with respect to the misrepresentation or failure to make timely disclosure. In the case of experts, liability only attaches where: (i) a misrepresentation contained in a document or public oral statement is also contained in a report, statement or opinion made by the expert; (ii) the document or statement includes, summarizes or quotes from the report, statement or opinion of the expert; and (iii) if the document is released or statement is made by someone other than the expert, the expert has consented in writing to the use of the report, statement or opinion in the document or statement. In addition, the expert must not have withdrawn the consent in writing prior to the release of the document or making of the statement.

For a breakdown of this issue, see Table I.

Misrepresentations in Public Documents

Under the Amendments, responsible issuers, directors and officers, experts and influential persons and their directors and officers can be responsible for

misrepresentations contained in public documents. The range of documents that can attract liability is very broad and includes any written communication, including a communication prepared and transmitted only in electronic form, that: (i) is required to be filed with the OSC; or (ii) is not required to be filed with the OSC and is filed with the OSC, is filed with a government or governmental agency under applicable securities or corporate law or with any stock exchange or quotation and trade reporting system under its rules; or (iii) is any other communication the content of which would reasonably be expected to affect the market price or value of a security of the responsible issuer. This third category of documents may prove to be very broad, especially given that for documentary disclosure liability attaches upon the “release” of a document, which, under the Amendments, means to file with the OSC or any other securities regulatory authority in Canada or stock exchange or to “otherwise make available to the public”. Public documents that can form the basis of liability for misrepresentations are classified under the Amendments as either “core documents” or “non-core documents”. The primary reason for this classification is to differentiate the burden of proof required to bring a claim. For non-core documents, the plaintiff must prove that the defendant either knew of the misrepresentation, deliberately avoided the knowledge or, through an action or failure to act, was guilty of gross misconduct in the release of the document (although the standard for experts differs). For core documents, the plaintiff need not prove any knowledge, deliberate avoidance or gross misconduct: once the misrepresentation is asserted, the onus shifts to the defendant. Core documents include:

- prospectuses,
- takeover bid, issuer bid and directors’ circulars,
- rights offering circulars,
- management’s discussion and analysis,
- annual information forms,
- annual and interim financial statements, and
- any other documents that may be prescribed under the Act.

With respect to claims against the issuer and officers of the issuer (who authorize, permit or acquiesce in the

disclosure), material change reports are also classified as core documents. In other words, the plaintiff does not need to prove any knowledge, deliberate avoidance or gross misconduct in order to assert a claim against such an officer or the reporting issuer where the misrepresentation is contained in a material change report. With respect to directors of the responsible issuer (who are also not officers), material change reports are classified as non-core documents. Other non-core documents may include the following types of documents provided the content of the document would reasonably be expected to affect the market price or value of a security of the responsible issuer:

- Press releases;
- Announcements;
- Web site postings;
- Brochures, such as product or sales brochures or company updates;
- Marketing materials, such as road show materials or materials disseminated at security holder meetings;
- General public communications with investors, customers, suppliers, employees or others; and
- E-mail transmissions intended for general disclosure.

Public Oral Statements

In addition to creating causes of action for misrepresentations contained in public documents, the Amendments also extend liability for misrepresentations contained in public oral statements. Public oral statements are defined as oral statements made “in circumstances in which a reasonable person would believe that information contained in the statement will become generally disclosed” (s. 138.1). A cause of action exists where a public oral statement, relating to the business or affairs of the issuer, made by a person with actual implied or apparent authority to speak on behalf of a responsible issuer, or by an influential person or a person with actual, implied or apparent authority to speak on behalf of the influential person, contains a misrepresentation. For public oral statements, similar to non-core documents, the plaintiff must prove that the defendant (other than a defendant who is an expert) either knew of the misrepresentation, deliberately

avoided knowledge of it or was guilty, through an action or failure to act, of gross misconduct in connection with the making of the public oral statement. If the person who made the public oral statement had apparent authority to speak on behalf of the responsible issuer, but not implied or actual authority, no other person is liable for a misrepresentation made in such public oral statement until such other person becomes aware, or should reasonably have become aware of the misrepresentation.

Failure to Make Timely Disclosure

The Amendments extend secondary market liability beyond misrepresentations to failures to make timely disclosure of material changes. Specifically, a cause of action exists where the responsible issuer has failed “to disclose a material change in the manner and at the time required under [the] Act” (s. 138.1). In order to assert a claim on this basis, the plaintiff must prove that the defendant knew of the change and that it was material or that the defendant deliberately avoided that knowledge or was guilty of gross misconduct in connection with the failure to disclose. However, where the defendant is the responsible issuer or an officer of the responsible issuer who authorized, permitted or acquiesced in the failure to make timely disclosure, (or the investment fund manager or officer of an investment fund), the plaintiff is not required to sustain any such burden of proof.

Who Can Sue?

The statutory right of action for a misrepresentation is available to a person who acquired or disposed of the issuer’s securities on the secondary market from the time that the document or statement containing the misrepresentation was released or made up to the time that the misrepresentation was publicly-corrected, subject to certain exceptions. Similarly, for a failure to make timely disclosure, any person who acquires or disposes of the issuer’s securities between the time that the material change was required to be disclosed and its subsequent public disclosure is entitled to assert a claim. The Amendments do not require the plaintiff to prove reliance on either the misrepresentation or the failure to make timely-disclosure as is required under the common law.

Defences

Where the burden of proof required to establish a claim is satisfied (which, as discussed above, may differ

depending upon the claim asserted and the class of defendant), the defendant’s primary recourse is to the statutory defences set out under the Amendments. The availability of these defences also differs depending upon the class of defendant and the cause of action. One statutory defence is that the plaintiff had knowledge of the misrepresentation contained in the public document or public oral statement or of the material change that was required to be disclosed. As discussed above, while the plaintiff’s knowledge may satisfy the statutory defence, unlike common law liability, reliance of the plaintiff on the misrepresentation or failure to disclose is not relevant.

Reasonable Investigation

The Amendments also provide a statutory defence that the defendant conducted a “reasonable investigation” and had no reasonable grounds to believe the document or statement contained a misrepresentation or that a failure to make timely disclosure would occur. While it remains to be seen how the courts will interpret what a “reasonable investigation” is in particular circumstances, the Amendments themselves provide some guidance in the form of factors for a court to consider in making such determination. These factors include:

- the nature of the issuer;
- the knowledge, experience and function of the person or company who is the defendant;
- for officers, the office held;
- for directors, the presence or absence of other relationships with the issuer;
- the existence, if any, and the nature of any system designed to ensure that the responsible issuer meets its continuous disclosure obligations;
- the reasonableness of reliance on the disclosure compliance system and on officers, employees and others;
- the period within which the disclosure was required;
- professional standards applicable to experts;
- the extent to which the person knew or should have known of the content of medium of the dissemination of the document or statement;

- for misrepresentations, the role or responsibility of the person in the preparation or release of the document or statement or in ascertaining of the facts contained in it; and
- for failures to make timely disclosure, the role or responsibility of the person in making the decision not to disclose the material change.

There are also a number of other statutory defences that relate specifically to the type of disclosure or the types of action taken by the defendant which are summarized below.

Confidential Disclosure

The defendant will not be liable for the failure to make timely disclosure if the defendant can prove: (i) the material change was disclosed to the OSC by the responsible issuer on a confidential basis; (ii) the responsible issuer had a reasonable basis for making the disclosure on a confidential basis; (iii) if the information contained in the confidential report was material, disclosure of the material change was made public promptly when the basis for confidentiality ceased to exist; (iv) neither the defendant nor the responsible issuer released a document or made a public oral statement that, due to the undisclosed material change, contained a misrepresentation; and (v) where the material change became publicly-known in a manner other than as required under the Act, the responsible issuer promptly disclosed the material change as required by the Act. While issuers have been required to disclose material changes under the Act prior to the implementation of the Amendments, elements of the cause of action and the defence under the Amendments expand the responsibility on issuers and others with respect to disclosure of material changes. In addition to ensuring adequate and timely disclosure, to satisfy the defence, issuers must also be mindful of a variety of actions relating to a confidential material change.

Forward-looking Information Safe-Harbour

The Amendments also provide a statutory defence where a misrepresentation in a public document or public oral statement is contained in forward-looking information. Forward-looking information is defined as “disclosure regarding possible events, conditions or results of operations that is based on assumptions about future economic conditions and courses of action and

includes future-oriented financial information with respect to prospective results of operations, financial position or cash flows that is presented as either a forecast or a projection” (s. 1).

The defendant will not be liable for a misrepresentation contained in forward-looking information if the defendant: (i) had a reasonable basis for drawing the conclusions or making the forecasts and projections set out in the forward-looking information; and (ii) can prove that the document or public oral statement containing the forward-looking information contained, proximate to that information:

- reasonable cautionary language identifying the forward-looking information as such, and identifying material factors that could cause actual results to differ materially from a conclusion, forecast or projection in the forward-looking information; and
- a statement of the material factors or assumptions that were applied in drawing a conclusion or making a forecast or projection set out in the forward-looking information.

While there is some debate on this matter, at the time of writing it does not appear that the defendant is entitled to rely on a cross-reference to another document where this type of cautionary language is provided. In contrast to how forward-looking safe-harbour provisions work in the United States, in order to rely on this defence under the Amendments it appears that the disclaimer must be expressly set out in the document that contains forward-looking information.

Such cautionary language can also serve as a defence for misrepresentations contained in forward-looking information in public oral statements. However, the defendant will be deemed to satisfy the requirements set out above with respect to a public oral statement if the person making the public oral statement:

- made a cautionary statement that the oral statement contains forward-looking information;
- stated that the actual results could differ materially from a conclusion, forecast or projection in the forward-looking information, and that certain material factors or assumptions were applied in drawing a conclusion or making a forecast or

projection as reflected in the forward-looking information; and

- stated that additional information about (A) the material factors that could cause actual results to differ materially from the conclusion, forecast or projection in the forward-looking information; and (B) the material factors or assumptions that were applied in drawing a conclusion or making a forecast or projection as reflected in the forward-looking information, is contained in a readily-available document or in a portion of such a document and has identified that document or that portion of the document.

Under the Amendments a document is deemed to be readily available if it is filed with the OSC or is otherwise generally disclosed.

Reliance on Experts

Where the misrepresentation giving rise to a cause of action is contained in part of a document or public oral statement that includes, summarizes or quotes from a report, statement or opinion made by an expert, a defendant (other than the expert) will not be liable provided the responsible issuer obtains the written-consent of the expert to use the report, statement or opinion and the consent has not been withdrawn in writing before the document is released or the public oral statement is made. In addition, it must be proven that the defendant did not know and had no reasonable grounds to believe that there had been a misrepresentation in the part of the document or statement made on the authority of the expert and that the part of the document or statement in question fairly represented the report, statement or opinion made by the expert.

No Knowledge of Release of Documents

The Amendments also provide defendants with a statutory defence for misrepresentations contained in documents on the basis that the defendant was not aware the document would be released. As discussed above, a wide range of potential defendants may be liable for misrepresentations contained in documents released or statements made by influential persons, in addition to those released or made by the responsible issuer itself or by those with authority to act on its behalf. However, this defence only relates to documents that are not

required to be filed with the OSC (in other words, the defence is not available for core documents, such as financial statements, management's discussion and analysis, annual information forms, etc.) and requires the defendant to prove that at the time of the release of the document the defendant did not know and had no reasonable grounds to believe that the document would be released.

Reliance on Derivative Information

The Amendments also allow for a defendant to avoid liability where the defendant can prove that the misrepresentation in question stems from a misrepresentation contained in another document filed by or on behalf of another person or company with the OSC, or with any other securities regulatory authority in Canada or any stock exchange. In order to rely on this defence, the misrepresentation must be contained in that other document and must not have been corrected in another document that has been filed with such regulatory authorities or stock exchange before the release of the document or making of the public oral statement by the responsible issuer. In addition, the defendant must also prove the document or public oral statement in question contained a cross-reference identifying the document that was the source of the misrepresentation and that, at the time the document was released or public oral statement was made by the reporting issuer, the defendant did not know and had no reasonable grounds to believe the document or public oral statement contained a misrepresentation.

Corrective Action Taken

For all defendants other than the responsible issuer, the Amendments also provide a statutory defence where the defendant has taken the proper corrective action. This defence applies where a misrepresentation or failure to make timely disclosure is made without the knowledge or consent of the defendant and, after the defendant becomes aware of the misrepresentation (before it is corrected), or the failure to make timely disclosure (before it is disclosed as required under the Act), the defendant promptly notifies the responsible issuer's board of directors of the misrepresentation or failure. If no correction or disclosure is made by the responsible issuer within two business days of such notification, the defendant is required to have promptly notified the OSC in writing of the misrepresentation or

failure to make timely disclosure, provided the defendant is not prohibited by law or professional confidentiality rules from making such disclosure.

Damages and Procedural Matters

The Amendments to the Act create a somewhat complex and elaborate regime of actions that potentially expose a number of different capital market participants to a potentially broad scope of liability. Given this seemingly open-ended opportunity for claimants to make claims based on a wide variety of disclosures, or lack thereof, the Amendments also contain certain built-in safeguards to limit the number and scope of claims that can be asserted as well as the amount of damages that can be recovered.

In the United States, secondary market investors are able to claim against issuers and others in class proceedings. The proliferation of class action lawsuits initiated by a drop in the price of an issuer's stock (allegedly in order primarily to intimidate issuers and force settlements) has been the subject of much criticism and concern in the United States. In order to minimize such "strike suits" the Amendments contain mechanisms to limit the types of claims that can be asserted and provide for the oversight of claims as they proceed. These include a mandatory "loser pays" costs requirement and the requirement that the plaintiff first obtain leave of the court to bring an action, where the action is screened to ensure it is brought in good faith and there is a reasonable possibility of success. In addition, no proceedings can be discontinued, abandoned or settled without court approval. The plaintiff is also required to notify the OSC at each stage of the suit and the OSC has an opportunity to intervene if desired.

With respect to damages, the Amendments include a number of mechanisms to limit the amount of damages that can be claimed through maximum liability limits for different classes of defendants, prescribed formulae for calculating damages and proportionate liability among defendants. Notably, however, liability limits do not apply if the plaintiff can prove that the defendant authorized, permitted or acquiesced in the making of the misrepresentation or failure to make timely disclosure while knowing it was a misrepresentation or failure to make timely disclosure. In such cases, liability will also be imposed on a joint and several, and not proportionate, basis.

Practical Tips

The Amendments to the Act create a number of new causes of action relating to a wide variety of disclosure documents. There are a number of practical measures that can be taken by issuers now in order to avoid or at least minimize their exposure to liability under the Amendments. Many issuers have already begun the process of reviewing and revising their disclosure policies and procedures to conform to the new regime. Most disclosure compliance systems will have to be amended to apply to a broader range of disclosure documents and to apply to documents and statements that previously might have received little attention from the management and board of the issuer.

Documentary Checklist and Road Maps

As the Amendments expose issuers to liability based on a wide variety of documents; issuers may want to first develop an accurate and up-to-date inventory of the types of documents that are produced and disseminated on a periodic or timely basis. These documents can then be classified as core and non-core documents and then further sub-classified in appropriate categories. For example, core documents will include all documents that are required to be filed with regulatory authorities, and can be further sub-classified as those that are period disclosure documents prepared on a periodic and regular basis (such as financial statements, management's discussion and analysis, and annual information forms), offering documents (such as prospectuses and circulars) and timely disclosure documents (such as material change reports). Non-core documents may perhaps be more difficult to identify and classify. Depending upon the sophistication and complexity of the issuer's business, it is possible that many different business units and divisions produce a variety of documents for general dissemination that may be caught by the Amendments (where such documents are made available to the public and contain content that would reasonably be expected to affect the market price or value of the issuer's securities).

Once these documents have been classified, a checklist should be developed for each class of document. This checklist should document all material steps in the drafting, review and revision of all material information and the eventual dissemination of the document. The checklist should indicate with whom the document

originates, those responsible for review and revisions, proper due diligence procedures for the review and updating of material information, the types of confirmations required from various parties (such as a directors' questionnaires for information about directors contained in a circular), the types of consents required from other parties (such as experts), review and confirmation of any information that is incorporated by reference, and ultimately, the approval required before dissemination. Many documents will require approval by the board of directors or appropriate sub-committee of the board, whereas others may be disseminated upon final sign-off from the chief financial officer or other member of senior management. Some types of disclosure documents, such as financial statements, will also require specific confirmations for information that is contained in the document itself, in the form of sub-certifications from those who prepare the relevant portions of the document. The checklist can then serve as a paper-trail that evidences the drafting and ultimate release of each document and should be retained along with all underlying or supporting documents for future reference.

Whether classifying core or non-core documents, the categories should be specific enough so that the checklist for that category of documents is effective without being overly complicated. Once again, depending upon the nature and size of the issuer, the number of required "checklists" may differ. Some issuers may only need two (one for core and the other for non-core documents); whereas other issuers may require several different checklists to ensure proper review and dissemination of the types of documents that are issued by or on behalf of such issuers. Many issuers may already have well-developed procedures for the review of documents filed with securities regulatory authorities. For example, documents covered by certifications required under Multilateral Instrument 52-109 *Certification of Disclosure in Issuers' Annual and Interim Filings* may already be supported by sub-certifications that are prepared at regular, periodic intervals. These procedures must be integrated with appropriate procedures for the review and confirmation of other types of documents. These other types of documents include timely disclosure documents such as press releases, which are event-specific and will require an abridged review and certification process. Classification of other documents, especially non-core

documents, may also help to highlight deficiencies in the drafting and review of documents that may previously have received little attention. Developing even a loose framework governing who is responsible for drafting, verifying and ultimately approving these documents will also help to promote better disclosure practices in all areas of the issuer's business.

Public Oral Statements

Policies and procedures should also be developed for the drafting, review and documentation of public oral statements that are made by or on behalf of the issuer. The issuer may want to begin by identifying "authorized spokespeople" who have authority to speak on behalf of the issuer. Public oral statements should be drafted in advance and reviewed under the proper procedure (similar to the documentary procedure identified above) prior to being publicly-made. All material information should be verified and the text of the statement that is delivered, including responses to unscripted questions or other matters, should be retained for future reference. The text should also be reviewed as soon as possible after delivery to ensure that any material non-public information that was discussed is properly disclosed as required under the Act.

A Word about Policies

It is often the case that issuers will first develop complex disclosure policies and then attempt to modify their procedures to comply with these policies. With the implementation of these Amendments, it is even more important for issuers to first assess what types of procedures and practices are in fact required to meet the specific situation and business of the issuer. Once these procedures are properly identified it may be more prudent to then reflect these in the disclosure policy in broad and general terms, as well as in board or committee charters. While documentary or public oral disclosure may be dealt with to a large extent, although not entirely, through procedures and checklists, ensuring effective timely disclosure requires those in charge of governance to properly communicate and instill a culture of disclosure compliance throughout the entity. This is perhaps best accomplished through identified and specified objectives and goals set out in disclosure policies, the attainment of which is then periodically reviewed and assessed by the board or appropriate board committee as part of its mandate.

As discussed above, factors to be considered in determining whether the reasonable investigation defence is available include the reasonableness of reliance by the person or company on the responsible issuer’s disclosure compliance system. Board and committee charters and mandates should be drafted with this in mind. These charters and mandates should reflect how the policy has been implemented and how its efficacy is being monitored to ensure that the disclosure compliance system is reliable. This may be of particular importance to non-management directors who are not involved in the preparation or review of certain types of documents, particularly non-core documents.

Conclusion

The practice measures canvassed here are very general and broad based. In order to be truly effective in ensuring accurate and timely disclosure, and to provide adequate protection under the Act, a disclosure

compliance system must be specifically tailored to suit the business, size, industry and culture of each entity. Adopting policies and procedures that are too complex and resource-intensive potentially exposes the issuer to greater liability for failure to comply with the issuer’s own procedures. Policies and procedures must be applied as contemplated in order to provide an adequate basis for a defence. Ultimately, each issuer must assess the nature and scope of disclosures made, and the complexity and pace of change in the issuer’s business, in order to determine whether a ‘Cadillac’ compliance system is required where perhaps a properly executed ‘Pontiac’ will do. As Ontario is the first Canadian jurisdiction to adopt secondary market statutory civil liability (with others expected to follow), it remains to be seen how the new Amendments will be applied and interpreted by the courts. Ultimately, it is the development and evolution of case law that will provide the best indication of the types of procedures and practices that will be most effective.

Table I

TYPE OF VIOLATION	WHO CAN BE SUED
<p>Misrepresentation contained in a document released by a responsible issuer or person or company with authority to act on its behalf</p>	<ul style="list-style-type: none"> • responsible issuer • each director of the responsible issuer at the time the document was released • each officer of the responsible issuer who authorized, permitted, or acquiesced in the release of the document • each influential person and each director and officer of the influential person who knowingly influenced the responsible issuer or any other person or company to release the document or a director or officer of the responsible issuer to authorize, permit or acquiesce in the release of the document • each expert where the misrepresentation is contained in and includes, summarizes or quotes from, a report, statement or opinion of the expert provided the expert has consented in writing to its use
<p>Misrepresentation contained in a public oral statement relating to the business or affairs of the responsible issuer made by a person with actual, implied or apparent authority to speak on behalf of the responsible issuer</p>	<ul style="list-style-type: none"> • responsible issuer • the person who made the public oral statement • each director or officer of the responsible issuer who authorized, permitted, or acquiesced in the making of the public oral statement • each influential person and each director and officer of the influential person who knowingly influenced the person who made the public oral statement to make the statement or a director or officer to authorize, permit or acquiesce in the making of the public oral statement • each expert where the misrepresentation is contained in and includes, summarizes or quotes from, a report, statement or opinion of the expert provided the expert has consented in writing to its use

TYPE OF VIOLATION	WHO CAN BE SUED
<p>Misrepresentation contained in a document or public oral statement that relates to the responsible issuer and is released or made by an influential person or a person or company with actual, implied or apparent authority to act or speak on behalf of the influential person</p>	<ul style="list-style-type: none"> • responsible issuer, if a director or officer of the responsible issuer (or investment fund manager) authorized, permitted or acquiesced in the release of the document or making of the statement • the person who made the public oral statement • each director and officer of the responsible issuer who authorized, permitted, or acquiesced to the release of the document or the making of the statement • the influential person • each director and officer of the influential person who authorized, permitted or acquiesced in the release of the document or making of the statement • each expert where the misrepresentation is contained in and includes, summarizes or quotes from, a report, statement or opinion of the expert provided the expert has consented in writing to its use
<p>Failure to Make Timely Disclosure</p>	<ul style="list-style-type: none"> • responsible issuer • each director or officer of the responsible issuer who authorized, permitted, or acquiesced in the failure to make timely disclosure, • each influential person and each director and officer of an influential person who knowingly influenced the responsible issuer or other person acting on the responsible issuer's behalf in the failure to make timely disclosure or a director or officer of the responsible issuer to authorize, permit or acquiesce in the failure to make timely disclosure

MEET THE ADVISORY BOARD AND EDITORS-IN-CHIEF

Members of the Advisory Board

Philip Anisman practises corporate and securities law in Toronto. He is a former professor of law at Osgoode Hall Law School, York University, and was a member of The Toronto Stock Exchange Committee on Corporate Disclosure. He has written books and articles on corporation, constitutional and administrative law, corporate governance and securities regulation. His practice includes corporate governance, corporate and securities litigation and regulatory enforcement.

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Stephen Halperin is a partner and co-chair of the corporate securities practice group at Goodmans LLP and has extensive experience in transactional corporate and securities law, with a particular expertise in domestic and international corporate finance, mergers and acquisitions and corporate governance. He has held several directorships, taught Advanced Corporate and Securities Law at the University of Toronto Law School for seven years and has lectured at several other Canadian law schools.

Carol Hansell is a partner with Davies Ward Phillips & Vineberg LLP practising corporate, commercial and securities law. She is the author of two authoritative publications on the subject of Corporate Governance and sits on the boards of directors of a number of companies and organizations. She is an adjunct professor at Osgoode Hall Law School and an instructor in the Directors' Education Program at the Rotman School of Management.

Sheila Murray is a member of the Securities Group at Blake, Cassels & Graydon LLP with a practice emphasis on mergers and acquisitions, corporate finance and

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Simon A. Romano is a partner at Stikeman Elliott LLP who practices principally in the area of securities, mergers & acquisitions, finance and corporate governance matters, as well as acting for private equity funds, income trusts and ATs. During 1995 and 1996, he was Special Counsel to the Ontario Securities Commission where he dealt with takeover bids as well as other projects. He has written a number of articles, and is a frequent speaker at seminars, and was a member of the Ontario Securities Commission's Securities Advisory Committee. He co-authored the first book on Canadian income funds, which was released by Wiley in November, 2004.

Rene Sorell is a partner in the Corporate Finance and Mergers and Acquisitions Group at McCarthy Tétrault LLP and practises almost exclusively in the area of securities law. He has taught securities regulation as a special lecturer and has been an invited speaker at a number of law schools. He is also a member of the

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Andrew Grossman is a senior associate with Stikeman Elliott LLP's Corporate Group, whose legal practice focuses principally on mergers and acquisitions, corporate financings and securities regulation. Mr. Grossman frequently acts as counsel to public and private corporations, financial institutions and investment dealers in Canada and abroad and has published various articles on corporate and securities law matters.

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