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CSCS

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Delivered by email

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Saskatchewan Financial Services Commission – Securities Division
Manitoba Securities Commission
Ontario Securities Commission
Autorité des marchés financiers
New Brunswick Securities Commission
Registrar of Securities, Prince Edward Island
Nova Scotia Securities Commission
Securities Commission of Newfoundland and Labrador
Registrar of Securities, Government of Yukon
Registrar of Securities, Department of Justice, Government of the Northwest Territories
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Re: Proposed Changes to Form 51-102F6 (51-102F6)

The *Canadian Society of Corporate Secretaries* (CSCS) engages with Canadian securities regulators to ensure our members' interests are represented. We are now responding on behalf of our members to the request for comments on the proposed revisions to 51-102F6 – Statement of Executive Compensation.

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We thank the Canadian securities regulators for continuing to ensure that the response to current governance issues is tailored to the realities of the Canadian marketplace and not merely a copy of the US response. We appreciate the opportunity to provide comments.

General Information

We surveyed our members to get their views on questions posed by the proposed changes to 51-102F6. This letter provides a summary and overview of the key comments and concerns of CSCS members who responded. Attached is a copy of the survey provided to members.

Respondent Type	Percentage
Issuer company (publicly traded on a stock exchange)	75%
Private company	11%
Co-operative	5%
Other (Consultants)	11%

Compensation Risk Disclosure

In regard to the proposed new disclosure regarding the risks associated with a company's compensation policies and practices, just over 60% of respondents indicated that the proposed disclosure provided meaningful information to investors. One respondent commented:

- "The proposals seem more intended to influence Board practice rather than clarity for the majority of investors. Most investors will not understand the carefully crafted disclosure by medium and large enterprises."

Over 65% of the respondents agreed that the commentary describing the issues that a company may consider to discuss and analyze was sufficient. However, one respondent noted:

- "Very theoretical without grounding in practical realities of compensation programs…"

Representative Respondents' Comments on Overall Compensation Risk Disclosure

- "It will be extremely confusing for both the companies trying to comply with this requirement and the people reading it to understand what is being required and what is being said. Frankly, I think it will be a lot of text that says nothing."

- "Many smaller companies simply don't have the manpower or resources to put in place every practice suggested or required by regulators. Should resources be spent hiring a consultant to compare and comment on executive compensation or should resources be spent building a viable company? There is a cost to increased disclosure and additional regulations that isn't being communicated to shareholders, and which is very significant. Unethical people will always find a way around rules and the burden is being borne by the shareholders of companies who valiantly try to comply with increasingly more demanding regulations."

- “Risk is not managed through compensation. Those monitoring and mitigation practices should be enterprise wide and stand alone. The compensation component is simply to the extent that practices contribute to risk taking by being overly generous on short term measures and so disclosure should be rather simple of how plan design does not encourage excessive risk taking so as to juice short term results.”
- “The new requirements will be marginally useful for directors of large and medium enterprises to consider in their oversight deliberations on compensation. For large institutional investors, the disclosure will likely be useful and for litigation oriented investors it will provide another avenue of attack. Most investors will not benefit from the disclosure but may benefit from more Board diligence.”

Fees Paid to Compensation Advisors

Only 26% of respondents felt that there should be a dollar value threshold over which fees paid to a compensation advisor would have to be disclosed. Those who wanted a threshold made suggestions ranging from 10% of total fees paid, up to $100,000.

Representative Respondents’ Comments

- “We have followed this practice for several years.”
- “It will not add much value to shareholder or investor knowledge of the compensation issue.”

Additional CD&A Disclosure

The proposal expands information required in the CD&A to include a discussion of the discretionary authority of the board in compensation decisions and whether the company will be making any significant changes to its compensation policies and practices in the next year.

Board Discretion

Overall, respondents were supportive of additional disclosure on board discretion.

Representative Respondents’ Comments

- “Discretion is important to ensure proper management of the business and subvert obscene results such as fabulous performance that still yields negative results due to a macro issue (like 2008 WFC).” [We take “WFC” to mean “world financial crisis”.]
- “The Board should have discretion and reporting on that requirement makes sense from a transparency perspective.”
- “It is the Board's responsibility to exercise discretion where necessary in many matters, including that of compensation and from time to time it may be required for attraction and retention of personnel, particularly personnel in the executive suite. I don't think it is appropriate that the Board should have to explain its decision. Directors are bound to exercise their fiduciary duty and if the shareholders elect and re-elect, directors to a company's board they obviously have confidence that the directors are taking their duties seriously and making the decisions that are best for the company and its shareholders in compensation matters.”

Discussing Upcoming Changes

Respondents were almost unanimously against required disclosure of upcoming changes to compensation programs, mainly indicating the "impossibility" of predicting the future and thereby giving disclosure about actions that may never come to fruition.

Representative Respondents' Comments

- "I think this is the stuff that crystal balls are made of. If we knew what was going to happen with the economy, the job market, and all the other nuances that go into making compensation policy we could all plan our compensation philosophies and policies far into the future. We don't have this insight and therefore making statements on future practices in such a changing environment will only lead to companies having to retract their statements or making forward looking statement disclaimers on their CD&A."
- "Unless a new compensation program, such as a redesigned long-term share-based incentive plan has already been approved and announced internally, this requirement could have a huge negative impact on a company's overall people strategy (read this, unhappy employees, who won't even know exactly what the change might be, because the board hasn't approved it yet). That being said, companies would, as always, have the ability to voluntarily disclose plan change information at an appropriate time. So those who may be concerned about investor response to an existing plan can announce its intention to change it during the year."
- "We already follow this practice. A downside would be if a disclosure is made about a change that does not actually come to fruition, then what would the company be obligated to disclose and at what potential negative ratings from governance advisory firms would occur? This would result in potential negative impact on say on pay vote."

CSCS Recommendation:

CSCS recommends that the CSA limit the required disclosure to amendments approved for implementation by the Board of Directors for the fiscal year immediately following the year for which disclosure is required to be provided in the CD&A (for example, a program approved in February for a December year-end company whose information circular is dated in March). We believe that this approach is a better than asking the company to speculate about whether any significant compensation changes may take place in the future.

Disclosure of Market Value of Vested Share-based Awards

CSCS respondents did not support the proposed requirement to disclose the aggregate market value or payout value of vested share-based awards that have not been paid or distributed for each executive. Key concerns included double counting that could occur and the limited value of the information.

Representative Respondents' Comments

- "Whatever needs to be disclosed should not produce a built in double counting mechanism. The method needs to provide further clarity not the other way around."
- "Snapshot of a moving value is interesting but likely of little relevance."

- “I don't think that there is any harm as long as the issuer is given an opportunity to address any perceived double-counting aspect clearly in the way the information is presented. The problem however is that unless the issuer is given some flexibility in the presentation in the table, the explanations might end up primarily in the notes to the table, which is arguably the least effective place for important information.”
- “Some companies voluntarily disclose the value of vested awards that are not paid out. The issue of double counting must, however, be addressed. Presumably the intent of the regulation is not to distort reality, but to provide a clear picture of it.”

CSCS Recommendation:

> ***CSCS recommends that the CSA remove the requirement in the proposed amendments for a company to the aggregate market value or payout value of vested share-based awards that have not been paid or distributed.***

Serious Prejudice Exemption

The CSA is proposing that companies be required to disclose if they are relying on the serious prejudice exemption in regard to specific performance goals.
CSCS respondents were generally supportive of the requirement to disclose when the exemption was being relied upon. Some respondents, however, were concerned with the additional “clarifications” that certain measures like, revenue growth, could not be exempted.

Representative Respondents’ Comments

- “…Our objectives are based on revenue growth and net earnings growth. Essentially our margins. If we are forced to publish our margins, our ability to negotiate effectively with our customers will be substantially impaired… Harming an issuer's ability to compete effectively in its industry sector is a consequence that securities regulators should avoid at all costs.”
- “Very dangerous proposal for competitive reasons and potential impact on ambulance chasing security litigation where projections can potentially be translated into some form of alleged guidance that if missed could give rise to nuisance litigation. Like much of the proposals there is a real question of cost benefit as the risks of such disclosure far outweigh the dubious value of the disclosure.”
- “Any specific disclosure of targets is problematic for the potential to be viewed as a forecast and so general parameters of comp plan design should suffice.”
- “If the performance measures are meaningful for NEOs, most of them should fall under the "serious prejudice" category so I would expect to see this disclosure used frequently.”

CSCS Recommendation:

> ***CSCS recommends that the CSA remove the “clarifying” language that disallows exemption on certain measures (unless, of course they are already publicly disclosed in another forum) and continue to require issuers to provide appropriate detail around the difficulty of meeting the undisclosed targets.***

Summary Compensation Table Format

The CSA is proposing that companies not be allowed to add columns to the SCT, **even if the additions support the objective of communicating the compensation paid** (emphasis added).

Clearly, sometimes it really is the little things that count. Respondents were divided on this issue, but almost half of those who commented had serious concerns with this proposal.

Representative Respondents' Comments

- "Further demonstration of the impracticality of regulatory approach in that one size clearly does not fit all and therefore effort to pigeon hole into a particular spreadsheet format will actually lead to less informed disclosure."
- "This could lead to poor disclosure as one size does not fit all and so companies should be permitted to modify columns so as to provide complete disclosure of comp."
- "…Allowing the issuer to add compensating disclosure elsewhere is simply not an appropriate response. Many investors and analysts don't go beyond the SCT so the correction will be missed by many. I doubt that the regulator would tolerate disclosure in a table that misrepresented the information provided to investors by more than 20%, but made up for it in a footnote to the table or in a subsequent table indicating that the previous amount was overstated. Why then provide for that result in the regulation itself?…"
- "This is, quite frankly, ridiculous. Companies need to be able to disclose a full picture, including appropriate context, particularly in a table that may be the only one looked at by an investor. Accordingly, it is imperative that, provided they meet the requirements, companies can add information to the table that gives appropriate context and ensures clarity of disclosure. There is no similar rule for any other table, or disclosure for that matter - which is appropriate unless the securities regulators are now encouraging "boilerplate" disclosure to "one-size-fits-all" regulations."

CSCS Recommendation:

> ***We recommend that the CSA remove the proposed prohibition on adding columns to the SCT.***

Additional Items Supported by Respondents

CSCS respondents had no concerns with the expanded disclosures required in the proposal in the following areas:

- Expanded disclosure of the process to grant share-based awards (the same as for current requirements for option-based awards)
- Removing the requirement to disclose non-compensatory amounts for defined contribution pension plans
- Clarification that the disclosure is required to communicate actual compensation paid or payable rather than amounts intended to be paid

Duplicating Existing Disclosure

CSCS respondents were less supportive of duplicating disclosure required in other documents or formats, citing additional burdens and cost, as well as potential confusion of investors. Comments along these lines were made in regard to:

- Methodology for determining grant date fair value of equity-based awards even if the same as the accounting fair value used in financial statements (already disclosed in financial statements)
- Executive officer and director hedging (which is reported on SEDI and for many issuers prohibited under the Canada *Business Corporations Act*)
- Additional disclosure regarding the compensation committee members (already provided in the director descriptions and particularly as there is no "designation" of a compensation expert)

CSCS Recommendation:

> ***We recommend that the CSA remove all proposals for duplicate disclosure.***

Appreciation

On behalf of our members, we thank the CSA for this opportunity to share our comments on the proposed changes to 51-102F6.

Contact Information

Please contact Sylvia Groves, Principal of GG Consulting and past Chair of CSCS at sylvia@grovegovernance.com for additional information or to answer any questions on the survey process or responses.

Sincerely,

/s/ Lynn Beauregard

Lynn Beauregard
President
Canadian Society of Corporate Secretaries