

Final Changes to Canada's Insider Reporting Regime Published by CSA

March 8, 2010

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On January 22, 2010, the Canadian Securities Administrators ("CSA") released the final form of National Instrument 55-104 *Insider Reporting Requirements and Exemptions* ("NI 55-104") and its Companion Policy 55-104CP. This new instrument will bring changes to Canada's insider reporting regime and will come into force in all Canadian jurisdictions, except Ontario, on April 30, 2010. Amendments to the *Ontario Securities Act* must be approved before these changes will take effect in Ontario, but it is likely that this will occur by the same April 30, 2010 date.

Highlights

- Introduction of a new "reporting insider" concept which should reduce the number of persons required to file an insider report
- reducing the filing deadline for insider reporting from 10 calendar days to five, effective October 31, 2010
- increasing the threshold needed to be considered a "major subsidiary" from 20% to 30% of a reporting issuer's consolidated assets or revenues
- providing a simplified reporting option for certain stock-based compensation arrangements by allowing issuers to file an "issuer grant report"

Details of each of these changes are outlined below.

Recommendations

We suggest reporting issuers take the following steps before the new rules come into force:

1. review the issuer's current list of insiders and determine if there will be any changes under the new insider reporting requirements;
2. advise insiders as to the new rule and its requirements, including in respect of reporting all outstanding unreported security-based compensation by April 30, 2010, and the accelerated filing deadlines which take effect October 31, 2010;
3. decide whether the issuer will file issuer grant reports in respect of securities granted under compensation arrangements such as option grants; and
4. revise the issuer's insider trading policy to reflect changes to insider reporting obligations.

The new insider reporting regime under NI 55-104 will have the effect of harmonizing insider reporting requirements across the country while reducing the number of insiders required to file and increasing the timeliness of these filings. These new rules should also have the effect of clarifying some aspects of the current scheme, such as whether the rules apply to certain types of derivative-based transactions and simplifying reporting on stock-based compensation arrangements.

SUMMARY OF CHANGES UNDER NI 55-104

The main insider reporting requirements and exemptions have been consolidated into a single National Instrument. NI 55-104 will replace National Instrument 55-101 *Insider Reporting Exemptions* and Multilateral Instrument 55-103 *Insider Reporting for Certain Derivative Transactions (Equity Monetization)* ("MI 55-103"). In British Columbia, NI 55-104 will replace BC Instrument 55-506 *Exemptions from insider reporting requirements for certain derivative transactions*.

While the procedural filing requirements for insider reports has not changed (they are still found in National Instrument 55-102 *System for Electronic Disclosure by Insiders* (SEDI)) ("NI 55-102"), the new rules under NI 55-104 will result in some substantive changes to the insider reporting regime in Canada. The following is a more detailed description of some of the changes of which insiders and reporting issuers should be aware.

Changes in persons or companies required to file insider reports

NI 55-104 aims to reduce the number of persons required to file insider reports, in part through the introduction of a "reporting insider" concept. In general, the following individuals will be subject to insider reporting obligations under the new concept of reporting insider:

1. the CEO, CFO, COO and the directors of the reporting issuer, of a significant shareholder of the reporting issuer or of a major subsidiary of the reporting issuer;
2. a person or company that is responsible for a principal business unit or function of the reporting issuer;
3. a significant shareholder;
4. a management company that provides significant management or administrative services to the reporting issuer and every CEO, CFO, COO and director of the management company;
5. individuals who perform functions similar to those described above; and
6. any other insider that (a) in the ordinary course of business has access to undisclosed material information and (b) has the ability to exercise "significant power or influence" over the business, operations, capital or development of the reporting issuer (the "**Basket Clause**").

The Basket Clause is new and should serve to further focus and restrict the group of insiders required to file reports. Under the current rules, all officers are required to file insider reports if they meet the first requirement listed in the Basket Clause (access to information in the ordinary course) but, under the new rules, they must also have the ability to exercise "significant power or influence" over the issuer to be considered a reporting insider. All directors and officers of a significant shareholder of a reporting issuer continue to be exempt from the reporting requirements if they do not meet the first requirement of the Basket Clause.

Other changes to the requirements include the following:

- In order to be considered a "major subsidiary", the threshold of a reporting issuer's consolidated assets or revenues for which a subsidiary must account has been increased from 20% to 30%, based on the issuer's most recent financial statements.
- A "significant shareholder" continues to be a person or company that has a direct or indirect beneficial ownership of, or control or direction over more than 10% of a reporting issuer's securities. However, this 10% calculation can now include an insider's "post-conversion beneficial ownership". This concept, which currently exists in the take-over bid regime, involves the calculation of securities convertible into voting securities within the next 60 days. A shareholder will have "post-conversion beneficial ownership" of voting securities of an issuer if the shareholder: (i) has ownership of a convertible security that the shareholder may convert into voting securities within the next 60 days; or (ii) has a right or obligation, whether or not based on conditions, to acquire beneficial ownership within the following 60 days.

New deadline for filing insider reports

The new rules will maintain the current 10-day deadline for filing an insider's initial report. However, the 10-day deadline will be decreased from 10 calendar days to five calendar days for reporting all changes in direct or beneficial ownership of securities or related financial instruments, and to the filing of insider reports as required upon the disposition of securities acquired through an automatic securities purchase plan or a compensation arrangement. This change will take place on October 31, 2010, and will apply to all transactions that occur after that date.

New rules simplify stock-based compensation arrangements by allowing issuers to file an "issuer grant report" in a similar manner to the current "issuer event report"

NI 55-104 introduces a separate exemption for certain grants of securities or related financial instruments by directors and officers of a reporting issuer or major subsidiary of a reporting issuer as part of a compensation arrangement. The CSA believes that this will ease the burden on insiders that is associated with insider reporting of stock options and similar instruments.

This exemption is available to an insider of a reporting issuer if: (i) the reporting issuer has previously disclosed the existence and material terms of the compensation arrangement in an information circular or other SEDAR filing; (ii) the reporting issuer has filed an "issuer grant report" on SEDI in accordance with the requirements of Part 6 of NI 55-104; and (iii) the insider complies with the alternative reporting requirement in Part 6.

Although there is no required format for an "issuer grant report", it must include the date and number of options or other securities that were granted to each director or officer, the grant and exercise price of the securities, the number and type of securities issuable and any other material terms not disclosed in a SEDAR filing.

The alternative reporting rule requires a reporting insider to file a report: (i) within five days of the disposition or transfer of any acquired security, or (ii) on or before March 31 of the next calendar year for any acquired securities that have not been disposed of. This report shall disclose, in summary form or on a transaction-by-transaction basis, each acquisition and disposition of a security under a compensation arrangement that has not previously been disclosed by or on behalf of the insider in question.

Unlike issuer event reports, which are required to be filed by the reporting issuer pursuant to Part 2 of NI 55-102, a reporting issuer does not have to file an issuer grant report. If the reporting issuer chooses not to do so, the reporting insider will not qualify under the above exemption and will have to comply with the standard insider reporting requirements.

The automatic securities purchase plan and issuer event exceptions remain

The new rule continues to provide an exemption to insiders from filing reports for acquisitions of securities under automatic securities purchase plans, provided the insider complies with the alternative annual reporting regime described above. The new rule also confirms the existing exemption from filing insider reports for insiders whose direct or indirect beneficial ownership of, control or direction over securities of a reporting issuer changes as a result of an "issuer event", such as a stock dividend, stock split, amalgamation, etc.

Historical reporting by certain deemed insiders of a second reporting issuer

Under the current rules of certain jurisdictions, if an issuer becomes an insider of another issuer, all officers and directors of both issuers will be deemed to have been reporting insiders of the other for the previous six months and will be required to file a retroactive insider report within 10 days of this determination. The new harmonized rule NI 55-104 will now require insider reports to be filed retroactively by the CEO, CFO, COO and directors in respect of transactions involving securities or related financial

instruments involving securities of the other issuer during the previous six months.

NI 55-104 clarifies the reporting requirements for derivative-instrument transactions

There has been some uncertainty with respect to the reporting requirements for derivative and other stock-based financial instruments. While NI 55-104 is consistent with the current insider reporting requirements for derivatives found in MI 55-103, which currently applies to all Canadian jurisdictions except British Columbia, the new instrument clarifies these requirements by including derivative instruments in the definition of “related financial instrument”.

Although the definition of “related financial instrument” continues to reside in the local securities legislation in several jurisdictions, including British Columbia and Ontario, the Companion Policy to NI 55-104 indicates that the definition is to be interpreted broadly and that reporting insiders will be required to disclose all transactions which affect their economic interests and exposure to the issuer.

Most transactions previously subject to a reporting requirement under MI 55-103 will fall within the new instrument's definition of “related financial instruments” and the new primary insider reporting requirements of Part 3 of NI 55-104. This includes cash-settled arrangements and stock-based compensation instruments, such as phantom-stock units, deferred share units, restricted share awards, performance share units and stock appreciation rights. The secondary reporting requirements of Part 4 of NI 55-104 will capture any transactions or dealings that do not fall under the primary reporting requirements and affect the insider's economic exposure to the issuer, including, for example, hedging transactions to reduce the insider's sensitivity to changes in the issuer's share price.

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