

SECURITIES BULLETIN

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NATIONAL INSTRUMENT 71-102 - CONTINUOUS DISCLOSURE AND OTHER EXEMPTIONS RELATING TO FOREIGN ISSUERS

INTRODUCTION

In March of 2004, the Canadian Securities Administrators (“CSA”) introduced a rule which sets out exemptions from continuous disclosure (“CD”) and other requirements for Foreign Reporting Issuers (as defined below). National Instrument 71-102, “Continuous Disclosure and Other Exemptions Relating to Foreign Issuers” (“NI 71-102”), and its Companion Policy 71-102CP. NI 71-102 contain statutory exemptions from the requirements of Canadian securities legislation for Foreign Reporting Issuers on the condition that they comply with the requirements of their home jurisdictions in a number of areas, including news releases, material change reporting, financial statements, AIF and MD&A, proxy and proxy solicitation, early warning, insider reporting and communication with beneficial owners of securities requirements. The effect of NI 71-102 is to reduce Canadian securities compliance requirements for Foreign Reporting Issuers.

The Ontario Securities Commission (the “OSC”) has also published OSC Rule 71-802, “Implementing National Instrument 71-102 Continuous Disclosure and Other Exemptions Relating to Foreign Issuers” (“OSC Rule 71-802”). OSC Rule 71-802 contains exemptions from certain provisions of the *Securities Act* (Ontario) (the “OSA”) and rules made under the OSA that are necessary in order to implement NI 71-102 in Ontario (many of the other CSA jurisdictions have similar implementing rules). NI 71-102 and OSC Rule 71-802 came into effect on March 30, 2004.

FOREIGN REPORTING ISSUERS

Under NI 71-102, a “foreign reporting issuer” is a reporting issuer, other than an investment fund, that is incorporated outside of Canada, unless it has more than 50 per cent of its shares held in Canada and one or more of the following is also true: the majority of its directors and officers are Canadian residents; more than 50 per cent of its assets are in Canada; or the business is principally administered in Canada (“Foreign Reporting Issuer”). There are two categories of Foreign Reporting Issuers: SEC foreign issuers (“SEC Foreign Issuers”) and certain designated foreign issuers (“Designated Foreign Issuers”).

A SEC Foreign Issuer is a Foreign Reporting Issuer that has a class of securities registered under section 12 of the *Securities Exchange Act of 1934* (the “1934 Act”), or is required to file reports under paragraph 15(d) of the 1934 Act and is not registered as an investment company under the *Investment Company Act of 1940*. A Designated Foreign Issuer is a Foreign Reporting Issuer that is not a SEC Foreign Issuer, is subject to the foreign disclosure requirements of one of 15 designated foreign jurisdictions, and does not have more than 10 per cent of its equity securities held by Canadian residents. The designated foreign jurisdictions are Australia, France, Germany, Hong Kong, Italy, Japan, Mexico, The Netherlands, New Zealand, Singapore, South Africa, Spain, Sweden, Switzerland and the United Kingdom of Great Britain and Northern Ireland.

The exemptions found in NI 71-102 are for the most part similar for SEC Foreign Issuers and Designated Foreign Issuers, but there are some important differences. For example, in order to rely on NI 71-102, Designated Foreign Issuers must, at least once a year, disclose in, or as an appendix to, a document that it is required by foreign disclosure requirements to be sent to its shareholders in Canada a notice that it is a Designated Foreign Issuer as defined in NI 71-102; that it is subject to the foreign regulatory requirements of a foreign regulatory authority; and the name of the foreign regulatory authority. Another example is that NI 71-102 relieves Designated Foreign Issuers, but not SEC Foreign Issuers, from the requirements under NI 51-102 with respect to a change in year end.

FILING AND SENDING OF DOCUMENTS

A person or company filing a document under NI 71-102 must file the document with the Canadian regulatory authority at the same time as, or as soon as practicable after, the filing or furnishing of the document to the SEC or to a foreign regulatory authority.

Under section 3.2 of NI 71-102, if a document is sent to holders of securities of any class under US federal securities law, or the laws or requirements of a designated foreign jurisdiction, and that document is required to be filed under NI 71-102, then the document must be sent in the same manner and at the same time, or as soon as practicable after, to holders of securities of that class in the local jurisdiction.

Any documents required to be sent under NI 71-102 may be sent by electronic delivery, as long as such delivery is made in compliance with Quebec Staff Notice 11-201 related to the Delivery of Documents by Electronic Means, in Quebec, and National Policy 11-201, “Delivery of Documents by Electronic Means”, in the rest of Canada.

LANGUAGE OF DOCUMENTS

A Foreign Reporting Issuer must file any required document in either French or English. If the document is translated from English to French or French to English, and the translation is sent to security holders, the foreign issuer must also file the translation. In Quebec, a reporting issuer must comply with linguistic obligations and rights prescribed by Quebec law. If the document filed is translated from a language other than English or French, the foreign issuer must also file the document on which the translation is based and a certificate of translation.

MATERIAL CHANGE REPORTING

NI 71-102 provides that the material change reporting requirements of NI 51-102 and OSC Rule 51-801 do not apply to SEC Foreign Issuers and Designated Foreign Issuers, as defined in NI 71-102, provided that they comply with the requirements of NI 71-102. SEC Foreign Issuers and Designated Foreign Issuers will be exempt if the issuer complies with the US market requirements and foreign disclosure requirements for making public disclosure of material information on a timely basis; complies with foreign disclosure requirements for making public disclosure of material information on a timely basis, if securities of the issuer are not listed or quoted on a US market (no similar provision for Designated Foreign Issuers); promptly files each news release issued by it for the purpose of complying with the requirements; complies with the requirements of US federal securities law for filing or furnishing current reports to the SEC (no similar provision for Designated Foreign Issuers); and files the current reports filed with or furnished to the SEC or if a Designated Foreign Issuer files the documents disclosing the material information filed with or furnished to the foreign regulatory authority or disseminated to the public or shareholders of the Designated Foreign Issuer.

FINANCIAL STATEMENTS

Under NI 71-102, SEC Foreign Issuers and Designated Foreign Issuers are exempt from NI 51-102 requirements relating to the preparation, approval, filing and delivery of its interim financial statements, and annual financial statements and auditor's reports on annual financial statements if they comply with the requirements of US federal securities law and foreign disclosure requirements relating to interim financial statements, annual financial statements and auditor's reports on annual financial statements; and comply with the US market requirements and foreign disclosure requirements relating to interim financial statements and annual financial statements respectively. If securities of the issuer are listed or quoted on a US market (no similar provision for Designated Foreign Issuers), they must also file the interim financial statements, annual financial statements and auditor's reports on annual financial statements filed with or furnished to the SEC or a US market. Both must comply with section 3.2 of NI 71-102; and comply with National Instrument 52-107, "Acceptable Accounting Principles, Auditing Standards and Reporting Currency" ("NI 52-107"), as it relates to financial statements of the issuer that are included in any such documents.

AIFs AND MD&A

Under NI 71-102, SEC Foreign Issuers and Designated Foreign Issuers are exempt from the requirements of NI 51-102 relating to the preparation, approval, filing and delivery of AIFs and MD&A if they comply with the requirements of US federal securities law or foreign disclosure requirements relating to annual reports, quarterly reports, current reports and management's discussion and analysis; file each annual report, quarterly report, current report and management's discussion and analysis filed with or furnished to the SEC or the foreign regulatory authority; send the documents to Canadian shareholders in compliance with section 3.2 of NI 71-102; and comply with NI 52-107 as it relates to financial statements that are included in any such documents.

BUSINESS ACQUISITION REPORTS

Under NI 71-102, a SEC Foreign Issuer or a Designated Foreign Issuer is able to satisfy NI 51-102 requirements relating to the preparation and filing of business acquisition reports if it complies with the requirements of US federal securities law relating to business acquisitions reporting and foreign disclosure requirements relating to business acquisitions and reporting; sends documents to Canadian shareholders in compliance with section 3.2 of NI 71-102; and complies with NI 52-107 as it relates to financial statements that are included in any such documents.

PROXIES AND PROXY SOLICITATION BY THE ISSUER AND INFORMATION CIRCULARS

NI 71-102 exempts SEC Foreign Issuers and Designated Foreign Issuers from certain requirements of Canadian securities legislation relating to information circulars, proxies and proxy solicitation, if they comply with the requirements of US federal securities law or the laws of the foreign regulatory jurisdiction relating to proxy statements, proxies and proxy solicitation; file all material relating to a meeting of shareholders that is filed with or furnished to the SEC or the foreign regulatory authority; send each document filed to Canadian shareholders in accordance with section 3.2 of NI 71-102; and comply with NI 52-107 as it relates to financial statements of the issuer that are included in any such documents. NI 71-102 also contains relief for any person that solicits proxies in respect of the Foreign Reporting Issuer, not just the issuer.

NEWS RELEASES

NI 71-102 provides an exemption to a SEC Foreign Issuer or a Designated Foreign Issuer from NI 51-102 requirements relating to the filing of news releases that disclose information regarding its results of operations or financial condition if the issuer complies with the requirements of US federal securities laws or the foreign disclosure requirements relating to the filing of news releases disclosing financial information and files a copy of each news release disclosing financial information that is filed with or furnished to the SEC or the foreign regulatory authority.

CHANGE OF AUDITOR

NI 71-102 provides an exemption to SEC Foreign Issuers and Designated Foreign Issuers from the requirement under NI 51-102 relating to a change of auditor if the issuer complies with the requirements of US federal securities laws relating to a change of auditor; and files a copy of all materials relating to a change of auditor that are filed with or furnished to the SEC or the foreign regulatory authority.

CHANGE IN YEAR END

NI 71-102 provides an exemption to Designated Foreign Issuers, but not SEC Foreign Issuers, from the requirements under NI 51-102 relating to a change in year end if the issuer complies with foreign disclosure requirements relating to a change in year end and files a copy of all filings made under foreign disclosure requirements relating to the change in year end.

EARLY WARNING

NI 71-102 provides that the warning requirements and acquisition announcement provisions of Canadian securities legislation and National Instrument 62-103, “The Early Warning System and Related Take-Over Bid and Insider Reporting Issues” (“NI 62-103”), do not apply to SEC Foreign Issuers that have a class of securities registered under section 12 of the 1934 Act and also do not apply to Designated Foreign Issuers, if they comply with the requirements of US federal securities law or the laws of the foreign jurisdiction relating to the reporting of beneficial ownership of equity securities of the SEC Foreign Issuer or the Designated Foreign Issuer; and file each report of beneficial ownership that is filed with or furnished to the SEC or the foreign regulatory authority.

INSIDER REPORTING

NI 71-102 provides an exemption from the insider reporting requirement of Canadian securities legislation to an insider of a SEC Foreign Issuer that has a class of securities registered under section 12 of the 1934 Act, and Designated Foreign Issuer if the SEC or foreign issuer is not a SEDI (as defined below) issuer; and the insider complies with the requirements of US federal securities law and the foreign disclosure requirements relating to insider reporting. NI 71-102 does not relieve Foreign Reporting Issuers that electronically file under National Instrument 13-101, “System for Electronic Document Analysis and Retrieval”, or their insiders, from the requirements of National Instrument 55-102, “System for Electronic Disclosure by Insiders (SEDI).

COMMUNICATIONS WITH BENEFICIAL OWNERS OF SECURITIES

NI 71-102 provides an exemption from the requirements relating to communications with beneficial owners of their securities to SEC Foreign Issuers and Designated Foreign Issuers, if they comply with comparable foreign requirements and with National Instrument 54-101, “Communications with Beneficial Owners of Securities of a Reporting Issuer”, regarding fees payable to intermediaries for any depository or intermediary located in Canada.

GOING PRIVATE TRANSACTIONS AND RELATED PARTY TRANSACTIONS

NI 71-102 provides Canadian securities legislation relating to going private transactions and related party transactions, such as those found in OSC Rule 61-501, “Insider Bids, Issuer Bids, Going Private Transactions and Related Party Transactions”, does not apply to a SEC Foreign Issuer carrying out a going private transaction or a related party transaction if the total number of equity securities of the SEC Foreign Issuer owned of record, directly or indirectly by residents of Canada, does not exceed 20 per cent on a fully diluted basis and does not apply to any Designated Foreign Issuer carrying out a going private transaction or related party transaction.

RESTRICTED SECURITIES

NI 71-102 provides that restricted share continuous disclosure requirements in NI 51-102 and minority approval requirements in Canadian securities legislation such as OSC Rule 56-501, “Restricted Shares”, do not apply to a SEC Foreign Issuer or a Designated Foreign Issuer.

EXEMPTIONS NOT INCLUDED UNDER NI 71-102

NI 71-102 does not relieve foreign issuers from the requirements of National Instrument 43-101, “Standards of Disclosure for Mineral Projects”, or National Instrument 51-101, “Standards of Disclosure for Oil and Gas Activities”.

NI 71-102 relieves Designated Foreign Issuers, but not SEC Foreign Issuers, from the requirements with respect to a change in year end under NI 51-102. However, NI 51-102 contains exemptions for SEC issuers from the change in yearend requirements in NI 51-102. SEC Foreign Issuers under NI 71-102 will meet the definition of SEC issuers under NI 51-102, and will be able to rely on the change in yearend exemption in NI 51-102.

NI 71-102 does not provide an exemption for any Foreign Reporting Issuers from the requirement in section 4.9 of NI 51-102. A Foreign Reporting Issuer must deliver a notice if it has been a party to an amalgamation, arrangement, merger, winding-up, reverse takeover, reorganization or other transaction that will have the effect of changing its continuous disclosure obligations under NI 51-102.

NI 71-102 does not provide an exemption to Foreign Reporting Issuers from the requirement to file disclosure materials under section 11.1 of NI 51-102 (any material sent to shareholders, or in the case of a SEC issuer, material that it files with the SEC if not filed earlier), or to file a notice of change of status under section 11.2 of NI 51-102 (becoming or ceasing to become a venture issuer).

The foregoing provides only an overview. Readers are cautioned against making any decisions based on this material alone. Rather, a qualified lawyer should be consulted.

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