

securities and public markets bulletin

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the CSA implements new insider reporting regime

On January 22, 2010 the Canadian Securities Administrators (the “CSA”) announced the adoption of a new insider reporting regime set out in National Instrument 55-104 *Insider Reporting Requirements and Exemptions* (“NI 55-104”) and the related companion policy, together with the repeal of predecessor instrument and policies and amendments to related instruments. Originally published in December 2008 to modernize, harmonize and streamline the insider reporting regime, NI 55-104 consolidates the main reporting requirements for insiders of reporting issuers and exemptions in a single national instrument. In Ontario the main insider reporting requirements will remain in the *Securities Act* (Ontario) (the “Ontario Act”) (though the CSA have indicated that NI 55-104 and Part XXI of the Ontario Act are substantially harmonized). The CSA intend to publish guidance clarifying material differences between insider reporting requirements in NI 55-104 and those in the Ontario Act. NI 55-104 will come into force on April 30, 2010 (the “Effective Date”), subject to all necessary approvals. In Ontario, the new insider reporting regime will come into force on the later of the following: (a) April 30, 2010; and (b) the date the requisite provisions of the *Budget Measures Act, 2006* (No. 2) are proclaimed into force.

This bulletin provides an overview of the new insider reporting regime and important changes to the requirements for insiders of reporting issuers.

key changes to the insider reporting regime

With the goal of improving the effectiveness of the insider reporting regime, NI 55-104:

- significantly reduces the number of persons required to file insider reports;
- accelerates the filing deadline for subsequent insider reports to five calendar days;
- simplifies and makes more consistent the reporting requirements for stock-based compensation arrangements; and
- facilitates insider reporting of stock based compensation arrangements by allowing issuers to file an “insider grant report”.

In the previously published version of the rule, the CSA proposed a requirement for an issuer to disclose whether insiders have been subject to

late filing fees. The CSA has withdrawn this proposal with the caveat that it might be re-introduced with modification in the future, at which time it would be subject to a further comment process.

reporting checklist

Attached to this bulletin is a checklist to assist insiders with their obligations under the new insider reporting regime.

the “reporting insider”

Prior to NI 55-104, securities legislation used a “catch and release” approach to insider reporting, where reporting requirements were imposed on all insiders with various rules and regulations providing certain exemptions for individuals who did not have routine access to material undisclosed information. NI 55-104 focuses the reporting requirements on a narrower, core group of persons and companies by introducing the concept of the “reporting insider”. Now, insiders subject to reporting requirements are persons and companies that the CSA believes have both the greatest access to material undisclosed information and significant influence over the reporting issuer.

The definition of “reporting insider” represents a principles-based approach to determining which insiders are subject to reporting requirements and includes, among others, the chief executive officer (CEO), chief financial officer (CFO), chief operating officer (COO) and director of a reporting issuer, of a “significant shareholder” of the reporting issuer or of a “major subsidiary” of a reporting issuer, a person or company who is responsible for a principal business unit, division or function of a reporting issuer, significant shareholders and significant shareholders based on “post-conversion beneficial ownership” of the reporting issuer’s securities.

The reporting insider definition also contains a basket provision which includes any other insider who (1) in the ordinary course and prior to general disclosure has access to material undisclosed information concerning the reporting issuer and (2) directly or indirectly, exercises, or has the ability to exercise, significant power or influence over the business, operations, capital or development of the reporting issuer. Therefore, in determining whether or not a person is a “reporting insider”, even if an insider does not fall within any of the enumerated positions, the insider must consider whether the insider has access to material undisclosed information and has influence over the reporting issuer that is reasonably commensurate with that of one or more of the enumerated positions.

A “significant shareholder” is a person who has beneficial ownership of, or control or direction over, convertible and non-convertible securities representing more than 10% of the voting rights attached to all of the issuer’s outstanding voting securities. Shareholders who cross the 10% threshold based on securities convertible into voting securities of a reporting issuer within 60 days are also subject to insider reporting requirements based on the inclusion of “post-conversion beneficial ownership”. This concept is based on a similar concept in the early warning regime and is intended to prevent persons from circumventing the disclosure threshold by holding convertible securities rather than the underlying securities directly.

NI 55-104 has increased the percentage threshold of a “major subsidiary” from 20% (in National Instrument 55-101 *Insider Reporting Exemptions*) to 30% of consolidated assets or revenues as reported on issuer’s most recent financial statements in order to reduce the number of reporting insiders. As the determination of a “major subsidiary” is based on the issuer’s most recent financial statements it will generally require a backward-looking determination. The Companion Policy further explains that if an issuer acquires a subsidiary or undertakes a reorganization, with the result that a subsidiary will come within the definition of major subsidiary once the issuer next files its financial statements, the subsidiary will not be a major subsidiary until such filing.

insider reporting requirements

primary insider reporting requirements

The primary insider reporting requirements are found in Part 3 of NI 55-104 and generally require reporting insiders to file an insider report after becoming a reporting insider disclosing: (a) beneficial ownership of, or control or direction over, whether direct or indirect, securities of the reporting issuer; and (b) interest in, or right or obligation associated with, a related financial instrument involving a security of the reporting issuer (an “**Initial Report**”). In addition, a reporting insider must also file an insider report disclosing any change in the above (a “**Subsequent Report**”). Part 3 also specifically sets out the reporting requirements in connection with convertible or exchangeable securities.

While the “reporting insider” concept purports to narrow the range of insiders subject to reporting requirements, the primary insider reporting requirements expands the scope of the disclosure. Through the inclusion of “related financial instruments” in the primary insider reporting requirements, the CSA has made it clear that a reporting obligation exists for derivative instruments. Therefore, most transactions that were previously subject to a reporting requirement under MI 55-103 *Insider Reporting for Certain Derivative Transactions* (which will be repealed on the Effective Date) are now caught by the primary insider reporting requirements under Part 3 of NI 55-104. The definition of related financial instruments includes derivatives and other instruments that affect a reporting insider’s economic interest in securities of a reporting issuer or economic exposure to a reporting issuer.

supplemental insider reporting requirements

The supplemental insider reporting requirements are found in Part 4 of NI 55-104 and capture equity monetization transactions and other derivative-based transactions that may fall outside the scope of related financial instruments in the primary insider reporting requirements but that otherwise satisfy the policy rationale for insider reporting. The supplemental insider reporting requirements apply to agreements, arrangements or understandings which may be found to alter a reporting insider’s “economic exposure” to a reporting issuer or involves, directly or indirectly, as security or related financial instrument involving a security of the reporting issuer and is not caught under the primary insider reporting requirements. If a reporting insider enters into, materially amends or terminates this type of transaction, the insider must report the transaction.

automatic securities purchase plans

Part 5 of NI 55-104 provides for alternative reporting requirements for officers and directors of a reporting issuer and of a major subsidiary of a reporting issuer for both acquisitions and dispositions in limited circumstances (“specified dispositions”) of securities and related financial instruments under an automatic securities purchase plan (“ASPP”). The exemption does not apply to securities acquired under a cash payment option of a dividend or interest reinvestment plan or a lump-sum provision of a share purchase plan. This exemption is intended to cover ASPP’s where the insider is not making discrete investment decisions. The companion policy indicates that although the exemption does not apply to an “automatic securities disposition plan”, exemptive relief may be available where a reporting insider can demonstrate that the plan is genuinely automatic and the insider cannot make discrete investment decisions.

The alternative reporting requirement permits annual disclosure, on a transaction-by-transaction basis, for securities acquired under the ASPP during the calendar year that have not been disposed of or transferred (other than by a specified disposition), by March 31 of the next calendar year. For securities that are disposed of or transferred before year-end the reporting deadline is 5 calendar days.

compensation arrangements

NI 55-104 provides uniform reporting requirements for compensation arrangements which is not the case under previous insider reporting rules. The definition of “compensation arrangement” makes it clear the most equity-based compensation arrangements, including options, stock appreciation rights, phantom shares, restricted share or restricted share units, deferred share units, performance units or performance shares, stock, stock dividends, warrants, convertible securities, or similar instruments are subject to the insider reporting regime. This includes instruments that provide for or permit a payout in cash. The regulatory burden on insiders for insider reporting of compensation arrangements has been reduced with the introduction of the issuer grant report exemption discussed below.

issuer grant report and exemption

NI 55-104 introduces the concept of an “issuer grant report” which is generally similar to the concept of an issuer event report. An issuer is under no obligation to file an issuer grant report for a grant of stock options or similar instruments, but may choose to do so to assist its reporting insiders with their reporting obligations. If an issuer chooses not to file an issuer grant report, the issuer should take all reasonable steps to notify reporting insiders of their grants in a timely manner to allow reporting insiders to comply with their reporting obligations.

As the issuer grant report provides the market with timely information about the existence and material terms of the grant, NI 55-104 provides for alternative reporting requirements for an acquisition or specified disposition of securities under a compensation plan, if:

- the reporting issuer has previously disclosed the existence and material terms of the compensation arrangement in an information circular or other public document filed on SEDAR;

- the reporting insider has previously filed an issuer grant report on SEDI; and
- the director or officer complies with the alternative reporting requirement.

An issuer grant report in respect of a compensation arrangement must be filed on SEDI within five calendar days of grant (in order for the reporting insider to ensure compliance with its insider reporting obligations).

The alternative reporting requirement for compensation arrangements is the same as for the ASPPs discussed above and requires annual disclosure, on a transaction-by-transaction basis, for securities acquired under a compensation arrangement during the calendar year that have not been disposed of or transferred (other than by a specified disposition), by March 31 of the next calendar year. For securities that are disposed of or transferred before year-end the reporting deadline is 5 calendar days.

exemption for eligible institutional investors

Subject to certain exceptions, an eligible institutional investor is exempt from the insider reporting requirements of NI 55-104, including the requirements relating to related financial instruments and the supplemental reporting requirements in Part 4 of NI 55-104, if the eligible institutional investor includes similar disclosure in its early warning filings under National Instrument 62-103 *The Early Warning System and Related Take-Over Bid and Insider Reporting Issues*.

filing deadlines

Under NI 55-104 the filing deadline for an Initial Report remains 10 days from the time of becoming a reporting insider. The filing deadline for a Subsequent Report has been accelerated from 10 calendar days to five calendar days. However, NI 55-104 includes a transition provision to delay the introduction of the accelerated filing deadline until October 31, 2010, six-months after the Effective Date.

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a cautionary note

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Basic Insider Reporting Requirements Checklist

1. are you a reporting insider?

In relation to a reporting issuer, are you:

- the CEO, CFO, COO or a director of the reporting issuer, of a *significant shareholder* of the reporting issuer or of a *major subsidiary* of the reporting issuer;
- a person or company responsible for a principal business unit, division or function;
- a *significant shareholder*;
- a *significant shareholder* based on *post-conversion beneficial ownership* or the CEO, CFO, COO or a director of the *significant shareholder* based on *post-conversion beneficial ownership*;
- a management company that provides significant management or administrative services to the reporting issuer or a *major subsidiary* of the reporting issuer or a director, CEO, CFO, COO or *significant shareholder* of the management company;
- an individual performing functions similar to the functions performed by any of the insiders described above;
- the reporting issuer itself, if it has purchased, redeemed or otherwise acquired a security of its own issue, for so long as it continues to hold that security; or
- an insider that (a) in the ordinary course receives or has access to material undisclosed information AND (b) directly or indirectly exercises, or has the ability to exercise, significant power or influence over the business, operations, capital or development.

2. what and when do you have to report?

- Initial Report - Upon becoming a reporting insider of a reporting issuer, you must report within 10 calendar days:
 - beneficial ownership of, or control or direction over, whether direct or indirect, securities of the reporting issuer, and
 - interest in, or right or obligation associated with, a *related financial instrument* involving a security of the reporting issuer.
- Subsequent Report - a reporting insider must report a change in any of the above within 5 calendar days.
- Supplemental Requirement - a reporting insider must report the entering into, material amendment or termination of an agreement, arrangement or understanding if it:
 - has the effect of altering, directly or indirectly, the reporting insider's economic exposure to the reporting issuer;
 - involves, directly or indirectly, a security or a *related financial instrument* involving a security of the reporting issuer; and
 - is otherwise not subject to the Initial Reporting or Subsequent Reporting Requirements.

3. alternative reporting (annual)

Automatic Securities Purchase Plans - Subject to Alternative Reporting Requirement if:

- it is acquisition or a *specified disposition* of securities under an *ASPP*; and
- the securities have not been subsequently disposed of or transferred.

Compensation Arrangements - Subject to Alternative Reporting Requirement if:

- it is acquisition or a *specified disposition* of securities under a *compensation arrangement*;
- the existence and material terms of the *compensation arrangement* are disclosed on SEDAR;
- the reporting issuer has filed an issuer grant report on SEDI (within 5 calendar days); and
- the securities have not been subsequently disposed of or transferred.

*Refer to NI 55-104 for more detail on the above requirements.

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