

SECURITIES LAW UPDATE

May 2010

New Insider Reporting Rules

Effective April 30, 2010, the Canadian Securities Administrators (the “CSA”) has implemented a new regime for insider reporting under National Instrument 55-104 – *Insider Reporting Requirements and Exemptions* (“NI 55-104” or the “Instrument”). NI 55-104 will harmonize the requirements relating to insider reporting across all provinces and territories of Canada. Generally, NI 55-104 will reduce the scope of persons required to file insider reports and expand the nature of interests required to be reported.

Reporting issuers and insiders should review the new definitions and requirements to determine if their reporting obligations are affected. Insiders currently filing insider reports but who are not “reporting insiders” within the meaning of the Instrument will be relieved from future filing obligations, while those that fit that definition will be required to report a broader range of interests. In addition, effective October 31, 2010, the deadline for filing insider reports for changes in security ownership accelerates from 10 days to 5 days. The new Instrument also amends the insider reporting exemption for eligible institution investors under National Instrument 62-103 – *The Early Warning System and Related Take-Over Bid and Insider Reporting Issues* (“NI 62-103”). These and other significant features of NI 55-104 are discussed in detail below.

The “Reporting Insider” Concept

Generally, the Instrument reduces the scope of persons required to file insider reports to a narrower category of reporting insiders. A “reporting insider” includes:

- **Senior Management and Directors:** the Chief Executive Officer, Chief Financial Officer, Chief Operating Officer¹ or a director of a reporting issuer, of a significant shareholder of the reporting issuer or of a “major subsidiary”² of the reporting issuer;
- **Key Personnel:** a person or company responsible for a principal business unit, division or function of the reporting issuer;
- **10% Voting Shareholders:** a significant shareholder of the reporting issuer (based on post-conversion beneficial ownership of the reporting issuer’s securities and including the Chief Executive Officer, Chief Financial Officer, Chief Operating Officer and every director of the significant shareholder);
- **External Management Companies:** a management company that provides significant management or administrative services³ to the reporting issuer or a major subsidiary of the reporting issuer, every director, Chief Executive Officer, Chief Financial Officer or Chief Operating Officer of the management company, and every significant shareholder of the management company;
- **Persons Performing Similar Functions:** an individual performing functions similar to the functions performed by any of the insiders described above; and
- **Individuals with Information and Influence:** any other insider that (i) in the ordinary course of business receives or has access to information as to material facts or material changes concerning the reporting issuer before the material facts and material changes are generally disclosed; and (ii) directly or indirectly exercises, or has

1 The terms “Chief Executive Officer”, “Chief Financial Officer” and “Chief Operating Officer” include individuals that have the responsibilities normally associated with these positions or act in a similar capacity, regardless of corporate title or employment.

2 The definition of “major subsidiary” has been amended under the Instrument to increase the asset and revenue threshold from 20% to 30%.

3 At present the CSA has not provided guidance on what will constitute “significant” management or administrative services.

the ability to exercise, significant power or influence over the business, operations, capital or development of the reporting issuer (the “**Basket Criteria**”).

CSA guidance in the companion policy to NI 55-104 states that the determination as to whether an insider is captured under the Basket Criteria requires the exercise of reasonable judgement as to whether the insider exercises, or has an ability to exercise, power and influence over the reporting issuer which is comparable to the influence exercised by the other categories included within the definition of reporting insider. The CSA also notes that the power and influence of a position or relationship to an issuer may change over time. For example, the directors and the Chief Executive Officer, Chief Financial Officer and Chief Operating Officer of a 20 per cent subsidiary (i.e. not a “major subsidiary”, as defined in the Instrument) who are not reporting insiders for any other reason may be reporting insiders prior to and during a significant business acquisition or reorganization, or a material announcement. For this reason, reporting issuers may wish to consider preparing and periodically updating a list of persons working for them or their affiliates who have access to material facts or material changes before those facts and changes are generally disclosed.

New Obligations for Holders of Convertible Securities

As noted above, the category of reporting insider includes a significant shareholder based on a calculation of “post-conversion beneficial ownership” of securities. A person or company will be considered to have post-conversion beneficial ownership of a security on a particular date if they beneficially own securities which are convertible into that security within 60 days following that date or have a right or obligation, whether or not on conditions, to acquire the reporting issuer’s security within the same time period, by a single transaction or a series of linked transactions. In addition, the denominator in the calculation includes only those securities that may be acquired by the particular shareholder and ignores all other convertible secu-

rities of the reporting issuer outstanding as at the relevant date.

The same definition applies to a determination of beneficial ownership in the context of early warning reports. Accordingly, the practical impact of this change will be to expand the reporting obligations of individuals and entities already caught within the disclosure regime pursuant to the early warning requirements under Multilateral Instrument 62-104 — *Take-Over Bids and Issuer Bids*. Each person or entity obliged to comply with the early warning requirements will now also be required to register on SEDI as a “reporting insider” and file insider reports (subject to the continuing exemption for eligible institutional investors discussed further below).

Clarification of Reporting Requirements — Derivative Transactions

The insider reporting obligation applies to both (i) direct or indirect changes in beneficial ownership of, or control or direction over, securities of the reporting issuer, and (ii) interests in or rights or obligations associated with a “related financial instrument” involving a security of the reporting issuer.

While the definition of a “related financial instrument” continues to reside in the local securities legislation in several jurisdictions, including British Columbia and Ontario, the companion policy to the Instrument states that the definition is to be interpreted broadly and that reporting insiders will be required to disclose all transactions which affect their economic interest in a security. An example is a derivative transaction such as an equity swap effected by a reporting insider in an effort to reduce or eliminate the economic risk associated with a fall in the value of the securities while retaining ownership of the securities. The equity swap would represent a “related financial instrument” since, among other things, the agreement would affect the reporting insider’s economic interest in a security of the reporting issuer.

In addition, supplemental insider reporting requirements for certain agreements, arrangements or understandings that correspond to the

derivative transactions previously governed by Multilateral Instrument 55-103 – *Insider Reporting for Certain Derivative Transactions (Equity Monetization)* (which was previously in force in all jurisdictions, except for British Columbia) are now governed by the Instrument.

Acceleration of Filing Deadlines

NI 55-104 accelerates the filing deadline for insider reports in respect of *changes* in a disclosable interest from ten calendar days to five calendar days. However, initial insider reports required to be filed upon becoming a reporting insider are still subject to a ten calendar day filing deadline. Under the transition provisions in NI 55-104, the accelerated five day deadline comes into force after October 31, 2010.

Deemed Insider Look Back Provisions

In the interests of harmonization, provisions based on the “deemed insider look-back provisions” in the securities legislation of some Canadian jurisdictions outside of British Columbia are now included in NI 55-104. Under these provisions, if a reporting issuer becomes a reporting insider of another reporting issuer, the Chief Executive Officer, Chief Financial Officer, Chief Operating Officer and each director of the first reporting issuer will be deemed to have been a reporting insider of the other reporting issuer for the previous six months and will be required to file a retroactive insider report within ten days of this determination.

Filing Exemptions for Stock Option Grants and NCIBs

Directors and officers of a reporting issuer (but not all reporting insiders) may, in certain circumstances, be able to file insider reports on an annual basis. These circumstances include acquisitions of securities under compensation arrangements es-

tablished by the reporting issuer or by a subsidiary of the reporting issuer, such as the grant of options under a reporting issuer’s stock option plan.

For these types of transactions cumulative reports may be filed by the reporting insider by March 31 of each year, provided that (1) 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, and (2) the reporting issuer has filed an *issuer grant report* on SEDI in respect of the acquisition that includes the disclosure required by the Instrument. There is no obligation for an issuer to file an issuer grant report for a grant of stock options or similar instruments; however, an issuer may choose to do so to assist its reporting insiders with their reporting obligations.

Finally, NI 55-104 also continues filing exemptions relating to normal course issuer bids (“**NCIBs**”) by permitting an issuer which acquires securities of its own issue under an NCIB to file a report within ten days of the end of the month in which the acquisition occurred. Also provided is a new general exemption for an issuer from having to report in connection with a transaction, other than an NCIB, involving a security of its own issue if the existence and material terms of the transaction have been generally disclosed in a public filing on SEDAR.

Changes for Eligible Institutional Investors

NI 62-103 will continue to exempt from the insider reporting obligations eligible institutional investors who file under the early warning or alternative monthly reporting regimes, *provided that* it discloses its position under related financing instruments in its reports and treats a significant change to its position as a change in a material fact giving rise to an obligation to amend the report.

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