

## Securities Law Update – March 2010

### New Insider Reporting Regime

On January 22, 2010, the Canadian Securities Administrators announced certain changes to the insider reporting regime. The new regime, outlined in National Instrument 55-104 (“NI 55-104”), attempts to harmonize and streamline insider reporting requirements and exemptions nationwide, except in Ontario where the equivalent principal insider reporting requirements contained in the *Securities Act* (Ontario) will remain in effect.

The new NI 55-104 regime is expected to come into force on April 30, 2010.

The key changes to the insider reporting regime that insiders should be aware of are outlined below.

#### Summary of NI 55-104

Insiders should be aware of the following changes. NI 55-104 will:

1. reduce the number of persons required to file insider reports to a core group of *reporting insiders*;
2. accelerate the filing requirement from 10 calendar days to 5 calendar days (after a six month transition period ending on October 31, 2010);
3. simplify and make reporting requirements for stock-based compensation arrangements more consistent; and
4. facilitate insider reporting of stock-based compensation arrangements by allowing issuers to file an *issuer grant report* in a similar manner to the current *issuer event report*.

#### The Concept of the *Reporting Insider*

Currently, securities legislation imposes a reporting requirement on all persons who are *insiders*. There are certain exemptions to the current reporting requirements for *insiders* who: (i) are not *significant shareholders*; (ii) are not in the role of, or do not exercise, an executive officer or director function; and (iii) do not routinely have access to material undisclosed information about the reporting issuer prior to the public disclosure of such information.

NI 55-104 introduces the concept of the *reporting insider* which allows the focus of insider reporting requirements to be cast upon a core group of insiders. NI 55-104 defines *reporting insider* to mean an insider of a reporting issuer if the insider is:

- (a) the CEO, CFO or COO of the reporting issuer, of a *significant shareholder* of the reporting issuer or of a *major subsidiary* of the reporting issuer;
- (b) a director of the reporting issuer, of a *significant shareholder* of the reporting issuer or of a *major subsidiary* of the reporting issuer;
- (c) a person or company responsible for a principal business unit, division or function of the reporting issuer;
- (d) a *significant shareholder* (which term remains similar to the current insider reporting requirements, meaning a person or company that has beneficial ownership of, or control or direction over, whether direct or indirect, or a combination of ownership of, or control or direction over, securities of an issuer carrying more than 10% of the voting rights attached to all the issuer’s outstanding voting securities);
- (e) a *significant shareholder* based on post-conversion beneficial ownership of the reporting issuer’s securities and the CEO, CFO, COO and every director of the *significant shareholder* based on post-conversion beneficial ownership;
- (f) a management company that provides significant management or administrative services to the reporting issuer or a *major subsidiary* of the reporting issuer, every director of the management

- company, every CEO, CFO and COO of the management company, and every *significant shareholder* of the management company;
- (g) an individual performing functions similar to the functions performed by any of the insiders described in paragraphs (a) to (f);
  - (h) 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
  - (i) any other insider that
    - (i) in the ordinary course receives or has access to information as to material facts or material changes concerning the reporting issuer before the material facts or material changes are generally disclosed; and
    - (ii) 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.

NI 55-104 amends the definition of *major subsidiary* to include subsidiaries of a reporting issuer whose assets or revenues represent 30% or more of the reporting issuer's assets or revenues, respectively. This amendment narrows the current concept of *major subsidiary* which includes subsidiaries whose assets or revenues represent 20% or more of the reporting issuer's assets or revenues, respectively.

The concept of the *reporting insider* in NI 55-104 reduces the scope of insiders that are currently required to report to a core group of insiders that have the greatest access to material undisclosed information about the reporting issuer.

#### **Accelerated Filing Deadline**

Currently, the reporting deadline for insider reports is 10 calendar days from the day of the event that triggers a reporting requirement. Effective on October 31, 2010, NI 55-104 decreases the reporting deadline to 5 calendar days for insider reports. Initial insider reports still must be filed within 10 calendar days of becoming an insider of a reporting issuer. The 10 calendar day deadline still applies to normal course issuer bids.

#### **Supplemental Insider Reporting Requirements**

In addition to the reporting requirements for *reporting insiders* as discussed above, Part 4 of NI 55-104 requires *reporting insiders* to disclose:

- (a) any interests in, or rights associated with *related financial instruments* involving securities of the reporting issuer (a *related financial instrument* includes derivatives and other instruments that affect the *reporting insider's economic interest* in securities of a reporting issuer or *economic exposure* to a reporting issuer), and
- (b) any other agreement, arrangement or understanding that has the effect of altering a *reporting insider's economic exposure* to a reporting issuer that involves a security of the reporting issuer or a *related financial instrument*.

The objective of the reporting requirements in NI 55-104 is to have *reporting insiders* disclose all dealings that affect their interests in the reporting issuer. This objective prevents any potential harm to investors and preserves the integrity of the insider reporting regime.

#### **Automatic Securities Purchase Plans**

NI 55-104 provides an exemption to the reporting requirements for insiders for both *acquisitions* and *specified dispositions* of securities and related financial instruments of reporting issuers under an automatic securities purchase plan (an "ASPP") provided that the insider complies with the alternative reporting requirements in Section 5.4 of NI 55-104. The alternative reporting requirements in Section 5.4 of NI 55-104 applicable to ASPP's are the same as the alternative reporting requirements in Section 6.4 of NI 55-104 applicable to compensation arrangements ("CAs"), which are discussed below.

### Issuer Grant Reports

Part 6 of NI 55-104 provides an exemption to the reporting requirements for insiders for both *acquisitions* and *specified dispositions* of securities and related financial instruments of reporting issuers under a CA if:

- (a) the reporting issuer has previously disclosed the existence and material terms of the CA in an information circular or on SEDAR;
- (b) in the case of an acquisition of securities or related financial instruments, the reporting issuer has filed an *issuer grant report* on SEDI within 5 days of the grant; and
- (c) the director or officer complies with the alternative reporting requirements in Section 6.4 of NI 55-104 (as further described below).

Although there is no required format for the *issuer grant report*, it is similar to the issuer event report currently required to be disclosed under National Instrument 55-101. An *issuer grant report* must include the following information:

- (a) the date the option or other security was issued or granted;
- (b) the number of options or other securities issued or granted to each director or officer;
- (c) the price at which the option or other security was issued or granted and the exercise price;
- (d) the number and type of securities issuable on the exercise of the option or other security; and
- (e) any other material terms that have not been previously disclosed or filed on SEDAR.

The deadlines for filing an insider report under the alternative reporting requirement for both ASPPs and CAs are summarized as follows:

- (a) if there is a disposition of a security acquired under an ASPP or a CA, the insider report must be filed within 5 days of the disposition (there are particular exceptions for certain specified dispositions); and
- (b) if there is an acquisition of a security under an ASPP or a CA, the insider report must be filed on or before March 31 of the next calendar year.

### Exemptions from Reporting Requirements

Part 8 of NI 55-104 exempts *reporting insiders* from the insider reporting requirement if their beneficial ownership of, or control or direction over, whether direct or indirect, a security of the reporting issuer changes as a result of an *issuer event* of the reporting issuer. An *issuer event* includes a stock dividend, stock split, consolidation, amalgamation, reorganization, merger or other similar event that affects all holdings of a class of securities of an issuer in the same manner. A *reporting insider* relying on insider reporting exemption must file an *insider report* if the above mentioned changes have not already been disclosed.

Part 9 of NI 55-104 contains general exemptions from the insider reporting requirements. Generally, the insider reporting requirement does not apply to:

- (a) an insider of an issuer that is a mutual fund;
- (b) the insider of an issuer if the insider is not a *reporting insider* of that issuer;
- (c) in certain circumstances, a director or officer of a *significant shareholder*, or a director or officer of a subsidiary of a *significant shareholder*, in respect of securities of an *investment issuer* or a *related financial instrument* involving a security of the *investment issuer*;
- (d) a *reporting insider* of a reporting issuer who:
  - a. does not have any beneficial ownership of, or control or direction over, whether direct or indirect, a security of the issuer;
  - b. does not have any interest in, or right or obligation associated with, a *related financial instrument* involving a security of the issuer;

- c. has not entered into any agreement, arrangement or undertaking as described in part 4 of NI 55-104; and
- d. is not a *significant shareholder* based on post-conversion beneficial ownership;
- (e) a *reporting insider*, if the *reporting insider* is a subsidiary or affiliate of another *reporting insider* and such *reporting insider* has filed an insider report disclosing the required information;
- (f) in certain circumstances, a *reporting insider* for a security of an issuer beneficially owned or controlled, directly or indirectly, by an estate.



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