

Blakes Bulletin

Securities Regulation

Canadian Securities Administrators Adopt New Insider Reporting Regime

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The Canadian Securities Administrators (CSA) recently announced the adoption of National Instrument 55-104 – *Insider Reporting Requirements* (NI 55-104) and the related companion policy (the Companion Policy), a new insider reporting regime which harmonizes insider reporting requirements and exemptions in one national instrument across all Canadian jurisdictions except Ontario where equivalent requirements will remain in the *Securities Act* (Ontario), amended to reflect the new regime.

The key changes to the current insider reporting regime introduced by NI 55-104 include:

- reducing the number of persons required to file insider reports by focusing on a core group of insiders with the greatest access to material undisclosed information and the greatest influence over an issuer (reporting insiders);
- after a six-month transition period, accelerating the filing deadline from 10 calendar days after the relevant transaction to five calendar days;
- harmonizing the reporting requirements for stock-based compensation arrangements, which results in some new deferrals becoming available that were not previously available and some existing exemptions being dispensed with; and
- facilitating an alternative process for insider reporting of stock-based compensation arrangements by allowing issuers to file an “insider grant report” which will allow affected insiders to report on a deferred basis.

“REPORTING INSIDERS”

NI 55-104 reduces the range of insiders required to file insider reports by introducing the concept of a “reporting insider”. Section 9.2 of NI 55-104 exempts all insiders except for “reporting insiders” from the insider reporting requirements under the instrument (or under the *Securities Act* (Ontario)).

A “reporting insider” is defined as 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 of the reporting issuer (the definition of significant shareholder remains largely unchanged from the corresponding definition under current insider reporting requirements, meaning a person or company that has beneficial ownership of, or control or direction over, or a combination of ownership of, or control or direction over, securities of an issuer carrying more than 10% of the voting rights attached all the issuer’s outstanding voting securities);

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Highlights

- Number of insiders required to file insider reports reduced
- Imposes accelerated filing deadline of five days (instead of 10 days)
- Eliminates exemption for reporting cash-settled deferred share units

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- (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.

This definition of "reporting insider" reduces the group of insiders that are currently required to report by:

- (a) excluding certain officers that do not have a significant power or influence over a reporting issuer, and
- (b) excluding officers of a "major subsidiary" other than the CEO, CFO and COO.

The definition of "major subsidiary" has also been amended to refer to subsidiaries of a reporting issuer whose assets or revenue represent 30% (instead of 20% as under the current regime) or more of the reporting issuer's consolidated assets or revenue, respectively.

ACCELERATED FILING DEADLINE

Currently, insider reports are required to be filed within 10 calendar days of the event that triggers the reporting requirement. Under NI 55-104, insider reports must be filed within five calendar days of the triggering event, with some exceptions for alternative (deferred) filing requirements (such as the alternatives for reporting automatic securities purchase plans and security-based compensation described below). However, the instrument provides a six-month transition period until October 31, 2010 to comply with this accelerated filing deadline during which period insider reports may continue to be filed within 10 calendar days. The 10-calendar-day deadline remains for initial insider reports.

AUTOMATIC SECURITIES PURCHASE PLANS

As under National Instrument 55-101 – *Insider Reporting Exemptions* (NI 55-101), there is an exemption available under Part 5 of NI 55-104 for both acquisitions and "specified dispositions" of securities and related financial instruments acquired under an automatic securities purchase plan as defined in NI 55-101 (ASPP), provided that the reporting insider complies with the related deferred reporting requirement.

SECURITY-BASED COMPENSATION REQUIREMENTS

Under Part 6 of NI 55-104, there is a new procedure available for reporting transactions involving options or similar securities for reporting insiders. A reporting insider is permitted to file insider reports with respect to such transactions on a deferred basis as set out below if:

- (a) the reporting issuer has already disclosed the existence and material terms of the compensation arrangement in an information circular or other public document filed on SEDAR;
- (b) with respect to option acquisitions/grants, the reporting issuer has filed an "issuer grant report" on SEDI, which is similar to an issuer event report under NI 55-101, within five days of the grant; and
- (c) the director or officer complies with the deferred reporting procedure applicable to compensation arrangements as set out below.

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The deferred reporting procedure for acquisitions under such compensation arrangements where the foregoing requirements are met is the same as is currently the case for ASPPs. Under this deferred reporting:

- (a) if there is a disposition of a security acquired under an automatic securities purchase plan arrangement (with exceptions for certain specified dispositions), the reporting insider must file an insider report for the acquisition within five days of the disposition; and
- (b) for any acquisition of a security under a compensation arrangement, the reporting insider must file an insider report on or before March 31 of the next calendar year.

An issuer grant report filed on SEDI under Part 6 of NI 55-104 in respect of a stock-based compensation arrangement must include:

- (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 and 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 in public filing on SEDAR.

Therefore, if a reporting insider intends to make use of the deferred reporting procedure, he or she must first determine that the issuer has previously disclosed the terms of the compensation arrangement and filed the applicable issuer grant report on SEDI within five days of the applicable grant of securities.

NI 55-104 does not include a reporting exemption that was previously available under Multilateral Instrument 55-103 – *Insider Reporting for Certain Derivative Transactions (Equity Monetization)* (NI 55-103) for cash-settled agreements, arrangements or understandings, including deferred stock unit arrangements (DSU Plan), if the material terms and existence of the arrangement are described in an annual filing on SEDAR.

PUBLICATION OF LATE INSIDER REPORTS

The CSA determined to withdraw its proposal to require disclosure in management proxy circulars of late insider filings. However, the CSA indicated they will make a decision as to whether to reintroduce this proposal in the context of future proposals to harmonize late fees and other consequences of late insider filings.

PRACTICAL CONSEQUENCES TO REPORTING ISSUERS

Reduced Filing Deadline

All insider reports must be filed within five calendar days (instead of 10 calendar days) of the triggering event, unless the reporting insider chooses to file under an applicable deferred filing option if available.

Change in Reporting Insiders

For most issuers, there will likely be a reduction in the number of insiders that are required to report. In determining whether certain officer-insiders will no longer need to report, insiders should consider whether they:

- (a) directly or indirectly exercise, or have the ability to exercise, significant power or influence over the business, operations, capital or development of a reporting issuer;
- (b) are responsible for a principal business unit, division or function of a reporting issuer; or
- (c) are a CEO, CFO or COO of a material subsidiary.

New Procedure Available for Reporting Option Transactions

Reporting insiders will have a choice of reporting their option (or similar security) acquisitions within five calendar days (the basic reporting deadline) or on or before March 31 of the next calendar year (under the deferred reporting procedure described below), provided the reporting issuer has previously disclosed the terms of the compensation arrangement and filed the applicable issuer grant report on SEDI within five days of the applicable grant of securities. However, if it is the reporting issuer's practice to prepare and file insider reports on behalf of its reporting insiders, it is likely more efficient to file only insider reports within five calendar days rather than filing an issuer grant report within five calendar days and then filing a related insider report on or before March 31 of the next calendar year. Therefore, we expect that this new procedure will be of limited value to many reporting issuers.

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New Requirement to Report DSU Transactions

Insiders that currently have an exemption for reporting cash-settled DSU transactions under MI 55-103 will now have to file insider reports in respect of DSU transactions. Other than reporting for DSUs within the new five-day deadline, there will be two other possible choices available for filing the insider reports:

- (a) DSU holders can report under the deferred reporting procedure, provided the reporting issuer files an issuer grant report and discloses the terms of the compensation arrangement in a SEDAR filing; or
- (b) assuming the DSU Plan qualifies as an ASPP (as set out below), DSU holders can report on a deferred basis under the ASPP exemption pursuant to which the reporting insider must report a disposition of DSUs within five calendar days but may report an acquisition of DSUs on or before March 31 of the next calendar year, without the reporting issuer having to file an issuer grant report on SEDI.

"Automatic securities purchase plan" is defined under NI 55-104 as "a dividend or interest reinvestment plan, a stock dividend plan, or any other plan established by an issuer or by a subsidiary of an issuer to facilitate the acquisition of securities of the issuer if the timing of acquisitions of securities, the number of securities which may be acquired under the plan by a director or officer of the issuer or of the subsidiary of the issuer, and the price payable for the securities are established in advance by written formula or criteria set out in a plan document and not subject to a subsequent exercise of discretion."

EFFECTIVE DATE

NI 55-104 comes into effect on April 30, 2010.

For further details, or if you have any questions concerning this bulletin, please contact John Tuzyk at 416-863-2918 or john.tuzyk@blakes.com or Lindsay Bunt at 416-863-4005 or lindsay.bunt@blakes.com, or any member of our Securities Group.

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