

Blakes Bulletin

Securities Regulation

CSA Publishes FAQs Regarding New Insider Reporting Regime

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In January 2010, the Canadian Securities Administrators (CSA) adopted National Instrument 55-104 – *Insider Reporting Requirements and Exemptions* (NI 55-104) and the related companion policy (the Companion Policy) which introduced a new insider reporting regime which came into effect on April 30, 2010, as discussed in our February 2010 Blakes Bulletin on Securities Regulation: *Canadian Securities Administrators Adopt New Insider Reporting Regime*. In response to the many inquiries received by the CSA with respect to the new regime, the CSA published CSA Staff Notice 55-315 – *Frequently Asked Questions about National Instrument 55-104 Insider Reporting Requirements and Exemptions* (FAQ Notice) to assist reporting insiders with respect to the new regime and to promote consistency in electronic filings on the System for Electronic Disclosure by Insiders (SEDI).

NEW INSIDER REPORTING REGIME

As discussed in the February 2010 bulletin, the key changes to the insider reporting regime introduced by NI 55-104 include:

- (a) 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);
- (b) after a six-month transition period, accelerating the filing deadline from 10 calendar days after the relevant transaction to five calendar days;
- (c) dispensing with the exemption available for reporting cash-settled DSU transactions under Multilateral Instrument 55-103 – *Insider Reporting for Certain Derivative Transactions (Equity Monetization)* (MI 55-103); and

(d) 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.

GUIDANCE IN FAQs

The FAQ Notice sets out five frequently asked questions (FAQs) relating to the new NI 55-104. The FAQ Notice is provided for guidance purposes only and reflects the views of CSA staff.

Initial Reports

The first FAQ clarifies that existing insiders who fall under the definition of “reporting insider” under NI 55-104 do not need to file a new initial insider report within 10 days of April 30, 2010, the date the new regime came into force.

Disclosing Change in Reporting Status

The second FAQ provides guidance to insiders who previously filed insider reports but who are not “reporting insiders” on how to disclose their change in reporting status on SEDI. There is no requirement to file an amended insider profile on SEDI for an insider who has ceased to have reporting obligations under NI 55-104, but who remains an insider under securities legislation (indeed, the SEDI framework does not allow for such an amendment). However, the CSA recommends that such insiders add a comment on SEDI in the “Remarks” field regarding their changed status by amending their last transaction already filed on SEDI or adding the comment on their next transaction to be filed on SEDI. Given that such insiders will not likely need to file any further SEDI reports unless their status changes such that they become reporting insiders, it is probable that most such insiders will amend their last SEDI-reported transaction in order to disclose their change in reporting status in a timely manner.

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Highlights

- CSA publishes FAQs regarding new insider reporting regime
- Notice provides guidance for reflecting change in reporting status on SEDI

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Grants of Related Financial Instruments and DSUs under Compensation Arrangements

The third and fifth FAQs state that, in CSA staff's view, the exemption under Part 5 of NI 55-104 for automatic securities purchase plans (ASPP Exemption) does not generally apply to a grant of related financial instruments (RFIs), including DSUs, under a compensation arrangement. However, the FAQ Notice also states that if the compensation arrangement provides for the automatic issuance of RFIs/DSUs as dividend equivalents, staff would accept that aspect of the compensation arrangement as falling within the definition of "automatic securities purchase plan" for the purposes of the ASPP Exemption. As certain DSU plans are structured in such a way as to come within the definition of an ASPP, it is not clear from the FAQ Notice why all grants under such DSU plans would not qualify for the ASPP Exemption as well. Under the ASPP Exemption, reporting insiders may report an acquisition of RFIs/DSUs on or before March 31 of the next calendar year but must report a disposition of RFIs/DSUs within five calendar days.

Reporting Prior Grants of DSUs

The fourth FAQ provides guidance on how reporting insiders should report grants of DSUs made prior to April 30, 2010.

Assuming the DSUs were cash-settled, and other conditions met, the FAQ Notice indicates that grants of DSUs prior to April 30, 2010 were properly covered by the exemptions under MI 55-103 and do not need to be reported on SEDI within 10 days of April 30, 2010. However, grants of DSUs after April 30, 2010 would need to be reported on SEDI.

The FAQ Notice indicates that a reporting insider may use one of two methods to disclose prior grants of DSUs:

Method 1 – filing an opening balance that shows the pre-April 30th grants

Under Method 1, the reporting insider records his or her Opening Balance as reflecting pre-April 30th grants and includes the following in the General Remarks section to disclose that he or she is using Method 1: "Opening

balance for DSUs reflects grants of DSUs prior to April 30, 2010. At the time of the grants, the grants were exempt from reporting requirements under Part 2 of MI 55-103 and Part 3 of BCI 55-506".

Method 2 – notional adjusting transaction

Under Method 2, the reporting insider records his or her Opening Balance as "0". Then, prior to filing an insider report for any post-April 30th grants, the reporting insider files a report showing a notional acquisition of pre-April 30th DSUs on that filing date (and not the actual date of acquisition) and includes the following in the General Remarks section to disclose that he or she is using Method 2: "Notional transaction to reflect grants of DSUs prior to April 30, 2010. At the time of the grants, the grants were exempt from reporting requirements under Part 2 of MI 55-103 and Part 3 of BCI 55-506".

ADDITIONAL GUIDANCE

The FAQ Notice also indicates that the CSA will shortly publish the following general guidance:

- CSA Staff Notice 55-312 – *Insider Reporting Guidelines for Certain Derivative Transactions (Equity Monetization) (REVISED)*; and
- CSA Staff Notice 55-316 – *Questions and Answers on Insider Reporting and the System for Electronic Disclosure by Insiders (SEDI)* which will replace CSA Staff Notice 55-306 – *Questions and Answers on the System for Electronic Disclosure by Insiders (SEDI)*.

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