



## **CSA Issues Final Form of NI 55-104 - Insider Reporting Requirements and Exemptions**

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On January 22, 2010, the Canadian Securities Administrators (CSA) published the final version of National Instrument 55-104 - *Insider Reporting Requirements and Exemptions* (NI 55-104) and certain related materials. NI 55-104, originally published for comment in December 2008 (see the Wildeboer Dellelce LLP Securities Law Update of January 2009), sets out the main insider reporting requirements and exemptions for insiders of reporting issuers across Canada, other than in Ontario, where the main insider reporting requirements will remain in the *Securities Act* (Ontario).

Except in Ontario, provided all necessary approvals are obtained, NI 55-104 is to come into force on April 30, 2010. In Ontario, NI 55-104 will come into force on the later of the following: (a) April 30, 2010, and (b) the date certain amendments (including a proposed revision of section 107 regarding insider reporting) to the *Securities Act* (Ontario) are proclaimed into force.

### *Summary of NI 55-104*

NI 55-104 is to consolidate the main insider reporting requirements and exemptions in a single national instrument to make it easier for issuers and insiders to understand their obligations and to help promote timely and effective compliance. Specifically, the CSA are proposing to:

- reduce the number of persons required to file insider reports to a narrower class of “reporting insiders”,
- accelerate the filing deadline for insider reports from ten calendar days to five calendar days,

- simplify and make more consistent the reporting requirements for stock-based compensation arrangements, and
- facilitate the reporting of stock-based compensation arrangements by allowing issuers to file an “issuer grant report” similar to the current “issuer event report”.

### *The “reporting insider” concept*

Although securities legislation has historically imposed an insider reporting requirement on all persons who are “insiders”, the CSA have, through various rules and regulations, provided a variety of exemptions for insiders who are not significant shareholders, do not exercise an executive officer or director function and do not routinely have access to material undisclosed information about the reporting issuer prior to general disclosure.

NI 55-104 will utilize an “insider reporting regime” rather than the current approach in an effort to focus the reporting requirement on a narrower, core group of insiders. The core group of “reporting insiders” includes significant shareholders of the issuer and other insiders who satisfy both of the following criteria:

- the insider in the ordinary course has access to material undisclosed information concerning the reporting issuer prior to general disclosure, and
- the insider, 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.

The reporting insider definition comprises a list of persons or companies that include significant shareholders plus other insiders the CSA think generally satisfy both of the criteria, and a “basket” provision that explicitly cites these two criteria.

It should also be noted that NI 55-104 introduce the concept of “significant shareholder based on post-conversion beneficial ownership”. This concept, which is based on a similar concept which exists in the early warning regime, is intended by the CSA to ensure that a person cannot avoid crossing a disclosure threshold (either the early warning disclosure threshold or disclosure obligations associated with insider status) by holding a convertible security rather than the underlying security directly. Under NI 55-104, a person who holds 9.9% of an issuer’s common shares together with special warrants convertible into an additional 10% of the issuer’s common shares, will have the same reporting requirements as a person who holds 19.9% of the issuer’s common shares directly.

Insiders who are not reporting insiders are to remain subject to the provisions in Canadian securities legislation prohibiting improper insider trading.

#### *Reportable transactions*

Under Part 3 of the NI 55-104, reporting insiders are generally required to file insider reports disclosing the reporting insider’s (i) beneficial ownership of, or control or direction over, directly or indirectly, securities of the reporting issuer, and (ii) interest in, or right or obligation associated with, a related financial instrument involving a security of the reporting issuer.

Part 4 of NI 55-104 contains a supplemental insider reporting requirement relating to certain agreements, arrangements or understandings that may not technically trigger the above tests for reporting but that otherwise satisfy the policy rationale for insider reporting.

#### *Deadline for filing*

Following an initial six-month transition period (to October 31, 2010), the CSA have accelerated the deadline for filing insider reports from ten calendar days to five calendar days after a trade.

In Ontario, once the proposed amendments to the *Securities Act* (Ontario) have become effective and in the case of transactions occurring after October 31, 2010, the prescribed period (under section 107 of the *Securities Act* (Ontario)) to report changes in the beneficial

ownership of, or control or direction over, whether direct or indirect, securities of the reporting issuer or any interest in, or right or obligation associated with, a related financial instrument, will be within five days of such change.

NI 55-104 will retain the current ten day timeline for filing initial reports to accommodate new filers and the time associated with creating new insider profiles on the System for Electronic Disclosure by Insiders (SEDI).

#### *Issuer Grant Reports*

NI 55-104 introduces a new exemption that would permit an issuer to file on SEDI an “issuer grant report” to assist its insiders in their reporting of option grants. If the issuer files an issuer grant report, the insider recipients of the grant subject to such report would then be exempt from the requirement to file an insider report about the grant by the ordinary filing deadline and could instead file an alternative report on an annual basis.

Under section 6.2 of NI 55-104, the insider reporting requirement does not apply to a director or officer for the acquisition of a security of the reporting issuer, or a specified disposition of a security of the reporting issuer, under a compensation arrangement established by the reporting issuer or by a subsidiary of the reporting issuer, if (a) 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, (b) in the case of an acquisition of securities, the reporting issuer has previously filed in respect of the acquisition an issuer grant report on SEDI in accordance with section 6.3, and (c) the director or officer complies with the alternative reporting requirement in section 6.4.

Section 6.3 of NI 55-104 provides that an issuer grant report 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 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 in a public filing on SEDAR.

A reporting insider may file under the alternative reporting requirement, disclosing securities acquired under compensation arrangements during a calendar year that have not been disposed of or transferred, on or before March 31 of the next calendar year.

*Changes to NI 55-104 from those proposed in December 2008*

The final version of NI 55-104 reflects certain changes to the instrument published for comment by the CSA in December 2008, including:

- Information Circular Disclosure – The CSA have withdrawn the proposed requirement for an issuer to disclose in its information circular whether insiders have been subject to late filing fees.
- Early Warning System and Related Take-Over Bid and Insider Reporting Issues – The final version of NI 55-104 has been revised so that an eligible institutional investor is exempt from the insider reporting requirement of NI 55-104, including the requirements relating to related financial instruments and agreements, arrangements and understandings, if that 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*.

These changes were not deemed to be material by the CSA and, as a result, the CSA have not republished NI 55-104 for a further comment period.

*This update is intended as a summary only and should not be regarded or relied upon as advice to any specific client or regarding any specific situation.*

*If you would like further information regarding the issues discussed in this update or if you wish to discuss any aspect of this commentary, please feel free to contact us.*

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