

New Continuous Disclosure Obligations Regime

By Sébastien Vézina and Johanne Duchesne

The Canadian Securities Administrators recently adopted a new National Instrument pertaining to continuous disclosure, which aims at standardizing the obligations of reporting issuers in Canada.

Into force since March 30, 2004, National Instrument 51-102, “*Continuous Disclosure Obligations*” (“**NI 51-102**”) makes such obligations identical in all Canadian provinces and territories.

As a reminder, please note that a company that makes an offering of securities in Canada by way of a prospectus becomes a “reporting issuer” under Canadian securities legislation.¹

The purpose of this document is to provide a summary of the continuous disclosure obligations of reporting issuers (with the exception of an investment fund). This bulletin takes into account the new obligations included in NI 51-102 and Multilateral Instrument 52-109, “*Certification Of Disclosure in Companies’ Annual and Interim Filings*”, also into force since **March 30, 2004**.

Periodic Disclosure

Interim Financial Statements

A reporting issuer, other than a venture issuer,² must henceforth file and send interim financial statements to all of its securityholders, other than holders of debt securities, who so request within **45 days**³ of the end of each of the first three quarters of its financial year. In the case of a venture issuer, the filing deadline, remains **60 days** following the end of the quarter.

A reporting issuer, other than a venture issuer,² must, within 45 days⁴ of the end of each of the first three quarters of its financial year, file interim financial statements with the Canadian Securities Administrators (collectively referred to as the “**Commissions**”) and send them to all of its securityholders, other than holders of debt securities, who so request. The interim financial statements must contain:

- a **balance sheet** as at the end of the interim period and a balance sheet as at the end of the immediately preceding financial year;

- an **income statement** for the interim period and an income statement for the year to date, as well as comparative statements for the corresponding interim periods in the immediately preceding financial year;
- a **statement of retained earnings** for the year to date, as well as a comparative statement for the corresponding period in the immediately preceding financial year;
- a **cash flow statement** for the interim period and a cash flow statement for the year to date, as well as comparative statements for the corresponding interim period in the immediately preceding financial year.

Interim financial statements that are not reviewed by an auditor must be filed along with a **notice** from the issuer stating that such a review was not performed.

¹ A company may also become a reporting issuer by the listing of its securities on a securities exchange, upon the issuance of securities in the context of a plan of arrangement or merger with the security holders of a reporting issuer, or upon the issuance of securities in a public offering.

² A venture issuer is a reporting issuer whose securities are not listed or quoted on any of the Toronto Stock Exchange, a U.S. exchange or a marketplace outside of Canada or the United States. This definition thus includes an issuer whose securities are listed on the TSX Venture Exchange.

³ This new filing deadline applies to interim periods of financial years beginning on or after January 1, 2004.

⁴ For venture issuers, the filing deadline remains **60 days**.





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The interim financial statements must be reviewed by the company's board of directors prior to being filed with the Commissions and sent out to the shareholders. The board of directors may delegate such review to the audit committee. Even though the auditing of interim financial statements is not mandatory, the Commissions now strongly encourage issuers to submit such financial statements to their respective auditors for review. Interim financial statements that are not reviewed by an auditor must henceforth be filed along with a **notice** from the issuer stating that such a review was not performed.

The interim financial statements must now be filed along with a **certificate** signed by both the chief executive officer and the chief financial officer stating that such statements, together with the corresponding **Management's Discussion and Analysis of the company's financial condition and results of operations** (the "MD&A"), do not contain any false or misleading information and fairly present the financial condition, results of operations and cash flows of the issuer for the relevant period.⁵

Annual Financial Statements

An issuer, other than a venture issuer, must henceforth file its annual financial statements and send such statements to all of its securityholders, other than holders of debt securities, who so request within **90 days** of the end of its financial year. For venture issuers, the deadline is now **120 days**.⁶

An issuer, other than a venture issuer, must, within 90 days⁷ of the end of its financial year, file audited annual financial statements with the Commissions and send such statements to all of its securityholders, other than the holders of debt securities, who so request. The annual statements must include:

- a balance sheet;
- an income statement;
- a statement of retained earnings; and
- a cash flow statement.

A reporting issuer must file its annual and interim financial statements along with a **certificate** signed by both the chief executive officer and the chief financial officer stating that such statements, together with the corresponding MD&A and the annual information form, do not contain any false or misleading information and fairly present the financial condition, results of operations and cash flows of the issuer for the relevant period. In the case of the annual financial statements, this certificate must also cover the annual information form, including the documents and information incorporated by reference therein.⁵

Financial statements must be presented in comparison with those of the preceding financial year. The annual financial statements must be approved by the company's board of directors following their review by the audit committee. The signature of the balance sheet by two members of the board of directors attests to such approval. The annual financial statements must be accompanied by the same certificate as that accompanying the interim financial statements. However, the certificate accompanying the annual statements must also cover the contents of the annual information form, including the documents and information incorporated therein by reference.

The annual financial statements, like the interim financial statements, must be prepared in accordance with generally accepted accounting principles in Canada, unless the issuer is an SEC issuer, as set out in NI 51-102 or qualifies as an eligible foreign reporting issuer within the meaning of National Instrument 71-102 "*Continuous Disclosure and other Exemptions Relating to Foreign Issuers*".

Management's Discussion and Analysis

The interim and annual financial statements must be accompanied by the MD&A. The purpose of the MD&A, prepared by management, is to discuss the principal factors and features that have materially affected the company's results, as well as those likely to have an impact on its future results.

A venture issuer that has not had significant revenue from operations in either of the last two financial years must henceforth provide in its MD&A a breakdown of several expenditure items.

If the first MD&A filed by an issuer under NI 51-102 is not an annual MD&A, it must contain all the information required in an annual MD&A, unless the MD&A for the issuer's financial year beginning before January 1, 2004 is filed in accordance with the provisions of NI 51-102 pertaining to the annual MD&A.

The interim or annual MD&A must be approved by the company's board of directors, which may, in the case of the interim MD&A, delegate such duty to the audit committee. The issuer must send a copy of the MD&A to any securityholder of the company who so requests.

⁵ Such certification, as well as that pertaining to the annual financial statements, apply to financial years and to interim periods beginning on or after January 1, 2004. For financial years beginning on or after April 1, 2004 and interim periods in financial years beginning on or after April 1, 2005, such certification will also be required to cover internal controls and disclosure controls. However, reporting issuers are free to include these items in their certificates prior to the above-mentioned deadline.

⁶ These new filing deadlines apply to financial years beginning on or after January 1, 2004.

⁷ For venture issuers, the deadline is **120 days**.

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Annual Information Form

A reporting issuer, other than a venture issuer, must file an Annual Information Form ("AIF") within **90 days** of the end of its financial year.⁸ The AIF is a general information document, the purpose of which is to complete the information appearing in the annual financial statements and in the MD&A. A reporting issuer that files an AIF must, at the same time, file copies of all materials incorporated by reference in the AIF that have not previously been filed. The reporting issuer must provide copies of the AIF to any of its securityholders or any other person upon request.

A venture issuer is exempt from the obligation to prepare an AIF. However, it becomes subject to this obligation as of the financial year in which it ceases to be a venture issuer.⁹

Proxy Solicitations

Where management of a reporting issuer gives notice of a meeting of the holders of its voting securities, it must send a management proxy circular (the "**Circular**") to the persons solicited and the Commissions.

The company must also send to the solicited persons a Proxy Form, the contents of which are now specified in NI 51-102. The form is designed so as to allow the holder to specify whether or not he wants his proxy to vote on certain issues. The form must also allow a security holder to indicate how the proxy must vote on any other issue specified in the Notice of Meeting or the Circular.

The Notice of Meeting, Circular and Proxy Form must all be sent to the securityholders within the delays prescribed by National Instrument 54-101 prior to the date of the meeting for which they were prepared.

Timely Disclosure

As soon as a material change that is not generally known to the public has occurred that is likely to have a significant influence on the value or the market price of the securities, the reporting issuer must prepare and distribute for publication in the media a press release authorized by a member of management, disclosing the substance of the change. The reporting issuer must also immediately file a copy of the press release, along with a statement of material change, with the Commissions.

Additional Filing Requirements and Filing of Material Documents

The reporting issuer must file with the Commissions, concurrently with its publication, a copy of any news release issued by it that discloses information regarding its financial condition or results of operations. It must also file any information document that it sends to its securityholders, concurrently with the sending of such document. The issuer must further file a copy of any document¹⁰ defining the rights of the securityholders or affecting them, as well as any material change to such documents. The issuer must also file a copy of any material contract that was entered into otherwise than in the ordinary course of business during the last financial year or prior thereto, to the extent that it is still in force. The filing is effected either concurrently with the filing of

the AIF or, for an issuer that is not required to file an AIF, within 120 days from the end of its financial year or as an enclosure to the material change report if the change qualifies as a material change. The issuer, other than a venture issuer, must henceforth file a report pertaining to all matters submitted to a vote at any meeting of its securityholders. The issuer must also file a notice when it becomes a venture issuer or when it ceases to be a venture issuer.

Significant Business Acquisition Report

When an issuer completes a significant acquisition,¹¹ it must file with the Commissions a business acquisition report within **75 days** following the date of the acquisition, along with specified financial statements and pro forma financial statements of the acquired business. Such requirement applies to any acquisition that takes place on or after **March 30, 2004**.

⁸ Such requirement applies to financial years beginning on or after January 1, 2004.

⁹ Since March 30, 2004, a venture issuer is no longer required to file an annual information form to avail itself of the 4 month resale restriction period provided for in Multilateral Instrument 45-102 and Ruling No. 2003-C-0377 of the *Commission des valeurs mobilières du Québec*.

¹⁰ By-laws, regulations, constating document, shareholder agreement, voting trust agreement or any other contract of the issuer or a subsidiary of the issuer that affects the rights or obligations of the securityholders.

¹¹ In the case of an issuer other than a Venture Issuer, a significant acquisition is an acquisition where the consolidated assets of the acquired business, the reporting issuer's consolidated investments in the acquired business or the consolidated income of the acquired business exceeds 20% of the reporting issuer's consolidated assets or income, as the case may be. For a venture issuer, an acquisition is significant where it meets any of the above criteria and the threshold exceeds 40%.

The financial statements of the acquired business must cover at least the most recent financial year and at most the last three completed financial years preceding the acquisition date, depending on the importance of the acquired business relative to the size and activities of the reporting issuer.

When a reporting issuer completes a significant acquisition, it must file with the Commissions a business acquisition report within **75 days** following the date of acquisition, along with specified financial statements and pro forma financial statements of the acquired business. Such requirement applies to any acquisition that takes place on or after **March 30, 2004**.

Conclusion

The new continuous disclosure regime under NI 51-102 standardizes the continuous disclosures obligations and the contents of documents such as the AIF, material change reports, management proxy circulars, executive compensation disclosure and the MD&A. However, it also brings changes to the current regime and creates new obligations.

Please do not hesitate to contact Mr. Sébastien Vézina at (514) 877-2964 or Ms. Johanne Duchesne at (514) 877-3045 if you have any questions pertaining to this new regime.

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