

# CROSS BORDER SECURITIES UPDATE

May 2004

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## New National Instrument 51-102: Changes to Disclosure Requirements and how they may affect you and your Company

The new National Instrument 51-102-Continuous Disclosure Requirements (the "Instrument"), its companion policy and accompanied forms went into effect as of March 31, 2004. The Instrument has made changes regarding disclosure requirements for Financial Statements, Management Discussion & Analysis (MD&A), Annual Information Forms (AIFs), Material Change Reports and Information Circulars.

This new policy has also created two new disclosure requirements in the form of Business Acquisition Reports (BARs) and Restricted Securities Disclosure. There are also minor changes to other filing documents and exemptions against compliance with the Instrument.

The Instrument applies to all reporting issuers, including venture issuers, but it does not apply to investment funds. Additionally, the Instrument distinguishes between venture issuers ("VIs") and other issuers ("Non-VIs"). As defined by the Instrument, VIs are those issuers that have their securities listed on TSX Venture Exchange, the CNQ or the OTCBB, but not those with securities listed on the TSX, NASDAQ, a national exchange in the US or any national marketplace outside US or Canada.

## Financial Statements

Perhaps the most important change with respect to financial statements is the change in filing deadlines. The British Columbia Securities Commission (the "BCSC") wishes to encourage issuers to file their financial statements as soon as possible following the completion of their audits.

	Annual Financials	Interim Financials
<b>VIs</b>	120 days	60 days
<b>Non-VIs</b>	90 days	45 days

Therefore, the BCSC has shortened the time for filing of financial statements. Additionally the requirement to have the board of directors' approval before filing of financial statements can now be delegated to the audit committee, subject to requirements of any corporate legislation.

Regarding interim financial statements, if they are not reviewed by an auditor, a statement must accompany them stating the reasons for the lack of auditor review and disclosing any reservations the auditor may have had.

Another big change is that it is no longer mandatory for issuers to deliver their annual and interim financial statements to

all shareholders. Instead, the concept of an Annual Request Form has been introduced, where the issuer is allowed to send this form, as prescribed in NI 54-101-Communication with Beneficial Owners, to shareholders annually and upon receiving a request for financial statements, the issuer must then deliver the statements to the shareholder by the later of the filing deadline or 10 days after the request. Also, keep in mind that when your company is delivering financial statements, a copy of the MD&A must also be delivered.

These requirements are effective for financial years beginning after January 1, 2004.

Additional filing requirements regarding financial information effective as of March 31, 2004, include:

- disclosure of any news release regarding historical or prospective operational results;
- changes to the notice of change of auditor;
- changes to the notice of change of year end; and
- changes to the notice of change in corporate structure.

## MD&A-Form 51-102F1

The Instrument extends the requirement for filing of MD&A to all reporting issuers and is effective for all financial years beginning after January 1, 2004.

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As with financial statements, delivery to all shareholders is no longer mandatory and there is no need to send in a separate annual request form, as the MD&A request is covered under the form sent out for financial statements. If either the MD&A or the financial statements are requested, but not both, the issuer must send both documents to the shareholder together.

Perhaps one of the most important changes to the MD&A are the change made to the form of the document. These changes include:

- addition of disclosure of “trends”—this used to be disclosed in the AIF but has been removed from the AIF and included in the MD&A;
- disclosure of selected financial data—for the 3 most completed financial years; 8 most recently completed interim periods and discussion of factor causing period-period variations;
- requirement for VIs with no significant revenue for past 2 most completed years to disclose additional information;
- discussion of off-balance sheet arrangements;
- analysis of contractual commitments in tabular format;
- disclosure of changes made, or expected to be made, to accounting policies;
- disclosure of outstanding share data;

- update of forward looking statements; and
- dating the MD&A as of the date of preparation.

### AIFs-Form 51-102F2

The Instrument obliges all Non-VIs to file AIFs within 90 days of their year-end. VIs who have used a short-form prospectus or a short-form offering under TSX-Venture policies are also required to file AIFs annually. Unlike the MD&A, AIFs do not have to be filed at the same time as the financial statements. Therefore, if the financial statements are filed earlier, your company still has the full 90 days to file its AIF. The AIF changes are effective for financial years beginning after January 1, 2004.

The form of AIFs is still similar to that before. It is important to note that companies registered with the Securities and Exchange Commission (the “SEC”), in the US, can file their annual form 10-KSB, 10-K or 20-Fs with the BCSC instead of an AIF.

Changes made to the AIFs include:

- removal of the discussion of “trends” and “significant dispositions” (significant acquisitions must still be disclosed);
- requirement for increased disclosure regarding historical information for asset backed securities- from 2 years to 3 years of historical data;
- requirement for disclosure of contracts the company’s business is substantially dependant on;
- requirement for disclosure of fundamental social or environmental policies;

- disclosure of penalties and sanctions; in particular for directors and officers—they must make this disclosure if they were a director or officer of a company during the occurrence of an event that caused the penalty or sanction to be placed; and
- addition of some prospectus disclosure items; examples include: trading information, risk factors, capital structure, escrowed shares, interest of management and material contracts entered into other than in the ‘ordinary course of business’ after January 1, 2002.

### Material Change Reports-Form 51-102F3

As of March 31, 2004, management of companies can choose to file confidential material change reports when the management decides that to disclose the change would be unduly detrimental to the company. This decision must be made reasonably. However, should any trades be made as a result of the undisclosed information, that information must then immediately be publicly disclosed.

### Information Circulars-Form 51-102F5

There have been some changes made to the form of information circulars. Proxy solicitation rules remain substantially the same and the new form is effective as of June 1, 2004.

Changes to the form of Information Circulars include:

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- the Instrument permits incorporation of information by reference, so long as the document referred to is filed with the circular and provided to the shareholders upon request;
- addition of penalties and sanctions disclosure for directors and officer nominees;
- disclosure of “Indebtedness of Directors and Officers” changed so that only debts above C\$50,000 need be mentioned;
- regarding reorganizations, mergers, arrangements and restructurings-now required to provide prospectus-level disclosure for both the issuer and the resulting entity; and
- definition of “Named Executive Officer” found in “Statement of Executive Compensation”-Form 51-102F4-has been changed to mean the CEO, CFO and 3 highest paid employees so long as total compensation is above C\$150,000 per annum (this term used to mean the CEO and the 4 most highest paid officers with total compensation over C\$100,000 per year).

### Business Acquisition Reports (BARs)- Form 51-102F4

This is a new disclosure form required to be filed within 75 days of a significant acquisition by all issuers and must be accompanied by the required financial statements of the acquired business/ the company invested in. To determine what is a significant acquisition, the Instrument provides three tests, which can be used:

- the Asset Test
- the Investment Test; and
- the Income Test.

Non-VIs are obliged to make use of all three test, but VIs need not use the Income Test.

These tests are based on the most recent audited, annual financial statements.

However, the Instrument does allow the option of recalculating significant acquisitions using the most recent interim financial statements.

The thresholds for meeting significant acquisition tests is met if the consolidated assets of/ consolidated investment in the acquired business is greater than or within the following percentage ranges of the issuer’s assets.

VIs	Required Financial Statements
40% or more	1 year audited and subsequent interim financials
Non-VIs	
20%-40%	1 year audited and subsequent interim financials
40% or more	2 years audited and subsequent interim financials

It is important to note that if your company files an information circular or a filing statement under TSX-V policies, within 9 months of the acquisition, which includes financial statements of the acquired business, and there have been no material changes regarding the acquisition, you can be exempted from filing a BAR.

The new BAR requirements apply to all significant acquisitions entered into via binding agreements dated after March 31, 2004.

### Restricted Security Disclosure

This is another new disclosure requirement imposed on issuers in BC by the adoption of the Instrument. In effect, the BCSC is now requiring issuers to provide disclosure regarding their restricted securities (all classes of shares, which have less or more restricted voting rights than other classes) in certain documents required to be filed or sent to shareholders.

Issuers must disclose the following:

- how voting rights are restricted;
- rights to participants in take-over bids; and
- percentage of voting rights represented by the restricted securities.

Issuers must provide this information in all Information Circulars, all documents delivered to shareholders by request and all AIFs. This type of disclosure is not required in financial statements or the MD&A.

### **Other Filing Requirements**

Effective immediately, the Instrument has put into place other filing requirements. These include:

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- reports of outcome of any shareholder votes (this does not apply to VIs);
- report of change in status of issuer (i.e. if cease to be a VI or become a VI);
- filing copies of news releases regarding results of financial operations;
- filing copies of all documents sent to shareholders or filed with the SEC in each province or territory where the issuer is registered as a reporting issuer; and
- filing of all "Material Documents" entered into after January 1, 2002- these include constating documents (notice of articles and by-laws/articles), and material contracts (contracts that define or materially change shareholder rights or contracts entered into not in 'ordinary course of business').

It is important to note that contracts causing a material change in the business of the issuer must be filed with the Material Change Report; all other contracts must be filed with the AIF or if the company is not required to file an AIF, within 120 days after the company's financial year end.

### Exemptions from complying with NI 51-102 and Insider Reporting Requirements

These exemptions are available as outlined below:

Issuer	Exemption
Exchangeable Share Issuers	Need only file copies of the parents' documents (ex. only copies of parents' financials or AIFs or MD&A)
Credit Support Issuers	Need only file copies of the parents' documents (ex. only copies of parents' financials or AIFs or MD&A)  Note: this only applies if the parent company is eligible to use the Multi-Jurisdictional Disclosure System and the subsidiary does not have any independent operations
BC Issuers	exempt from the BAR, Restricted Securities Disclosure and Filing of Certain Documents (Part 12 of NI 51-102).  <b>Note:</b> if issuer has reporting status in more than one province (ex. listed on the TSX Venture or the TSX), the exemption only applies in regards to filings required in BC.

### Conclusion

The Instrument puts in place many important changes, most of which have been summarized above. However, it is up to each individual issuer to ensure that they are in full compliance with all of the Instrument's requirements. Should you have any questions regarding the new continuous disclosure rules, do not hesitate to contact us.

## Continuous Disclosure and other Exemptions relating to Foreign Issuers: NI 71-102

The British Columbia Securities Commission recently adopted NI 71-102, Continuous Disclosure and Other Exemptions Relating to Foreign Issuers. This new national instruments provides broad relief from some of the disclosure requirements of NI 51-102, Continuous Disclosure, for two sub-categories of foreign reporting issuers; namely US foreign issuers registered with the Securities and Exchange Commission (the "SEC") and other designated foreign issuers. This instrument does not apply to investment funds and does not provide exemptions for mineral projects or oil and gas companies. Mining companies and oil and gas companies must still comply with requirements of NI 43-101 and NI 51-101, respectively.

Foreign reporting issuers are those which are incorporated under the laws of a foreign jurisdiction. As defined by NI 71-102, these issuers are *not*:

- those whose outstanding securities that carry more than 50% of the votes for the election of directors are owned by Canadian residents;

## Continuous Disclosure and other Exemptions relating to Foreign Issuers: NI 71-102 (continued)

- whose majority of officers and directors are resident in Canada;
- or issuers that have more than 50% of their consolidated assets within Canada; or
- have their business administered principally in Canada.

SEC foreign issuers are those who have a class of securities registered with under the 1934 Act or are required to file reports under the same Act. SEC foreign issuer definition excludes those issuers who are registered or re-registered under the *Investment Company Act of 1940*.

Designated foreign issuers are those that are not SEC foreign issuers; do not have more than 10% of their equity securities owned, directly or indirectly, by Canadian residents and are subject to foreign disclosure requirements of designated foreign jurisdictions.

The 15 designated foreign jurisdictions are as follows: Australia, France, Germany, Hong Kong, Japan, Mexico, the Netherlands, New Zealand, Singapore, South Africa, Spain, Sweden, Switzerland and the United Kingdom and Northern Ireland.

To qualify under NI 71-102 for the exemptions from certain continuous disclosure requirements of NI 51-102, a SEC foreign issuer or a designated foreign issuer must:

- be in compliance with SEC requirements or the disclosure requirements of the designated foreign jurisdiction;

- file copies of all documents filed with the SEC or the designated foreign jurisdiction in Canada; and
- send copies of documents sent to foreign jurisdiction security holders to its Canadian security holders.

Should the SEC foreign issuer or the designated foreign issuer comply with the above requirements, then NI 71-102 provides relief from the requirements of NI 51-102 in the following areas of continuous disclosure rules:

- material change reporting;
- financial statement requirements;
- Annual Information Forms;
- Management Discussion & Analysis;
- Business Acquisition Reports;
- information circulars;
- proxies and proxy solicitations;
- filing of certain news releases and documents;
- disclosure of voting results;
- insider reporting requirements for insiders of SEC foreign issuers or designated foreign issuers if the issuer is not a SEDI filer;
- notice of change of auditor; and
- restricted securities disclosure.

It must be noted, however, that the rules respecting the following requirements under NI 51-102 are not exempted and must be followed by all SEC foreign issuers and designated foreign issuers,:

- disclosures relating to change in corporate structure filings;

- disclosures relating to change in status filings; specifically when a venture issuer becomes a non-venture issuer;
- the requirements to file copies of documents sent to designated foreign security holders or the SEC;
- portions of NI 52-108-Audit Oversight; and
- NI 51-107-Accounting Principles, Auditing Standards and Reporting Currency.

Additionally, if your company is filing financial statements under the exemptions provided by NI 71-102, you must still comply with NI 51-107 requirements of accounting principles, auditing standards and the reporting currency used.



*The information in this newsletter is of a general nature only about recent developments of interest to our clients. You are encouraged to contact legal counsel before acting on any information provided.*

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