

Securities Law Update

The Canadian provincial and territorial securities regulators, with the exception of the British Columbia Securities Commission, are expected to adopt new officer certification of disclosure filings and audit committee requirements.

New Officer Certification And Audit Committee Requirements

Effective March 30, 2004, the securities regulatory authorities in Alberta, Saskatchewan, Manitoba, Ontario, Quebec, New Brunswick, Nova Scotia, Prince Edward Island, Newfoundland and Labrador, Yukon Territory, the Northwest Territories and Nunavut are expected to adopt:

- Multilateral Instrument 52-109 *Certification of Disclosure in Issuer's Annual and Interim Filings*, Form 52-109F1, Form 52-109FT1, Form 52-109F2 and Form 52-109FT2 and Companion Policy 52-109CP *Certification of Disclosure in Issuers' Annual and Interim Filings* (collectively, "MI 52-109"); and
- Multilateral Instrument 52-110 *Audit Committees*, Form 52-110F1, Form 52-110F2 and Companion Policy 52-110CP *Audit Committees* (collectively, "MI 52-110").

In Ontario, MI 52-109 and MI 52-110 were delivered to the Minister of Finance on January 14, 2004. If the Minister does not reject either of MI 52-109 or MI 52-110 or take any further action by March 15, 2004, MI 52-109 or MI 52-110 will come into force on March 30, 2004.

MI 52-109 and MI 52-110 are part of a group of Canadian securities regulatory authorities' initiatives being implemented in response to similar

requirements adopted in the United States under the *Sarbanes-Oxley Act of 2002* and by the U.S. Securities and Exchange Commission, the NYSE and Nasdaq. Like the U.S. initiatives, MI 52-109 and MI 52-110 are designed to improve the quality and reliability of reporting issuers' annual and interim disclosure and thereby promote investor confidence in the integrity of capital markets, but in a manner that reflects Canadian corporate law and certain realities of Canadian markets, such as the high number of public junior issuers and controlled companies.

Officer Certification Of Disclosure Filings

Once MI 52-109 comes into force, the provisions in the Instrument concerning

- (i) annual certificates will apply for *financial years beginning on or after January 1, 2004*; and
- (ii) interim certificates will apply for *interim periods beginning on or after January 1, 2004*.

MI 52-109 provides transitional relief to issuers by permitting an issuer to file annual certificates in Form 52-109FT1, as opposed to Form 52-109F1, in respect of any financial year ending on or before March 30, 2005. Similarly, MI 52-109 permits an issuer to file interim certificates in Form 52-109FT2, as opposed to Form 52-109F2, in respect of any interim period that occurs prior to the end of the first financial year in respect of which the issuer is required to file an annual certificate in Form 52-109F1. The "T" versions of the forms do not require certification as to disclosure controls and procedures and internal controls over financial reporting.

Continued...

For example, under MI 52-109 an issuer with a year-end of December 31, 2004 will be required to file an annual certificate in Form 52-109F1 together with its Annual Information Form, if applicable, and with its annual financial statements and annual MD&A for that financial year, or, at the issuer's option and strictly for the year-ended December 31, 2004, in Form 52-109FT1. The issuer will also be required to file interim certificates for interim periods ending March 31, June 30 and September 30 in Form 52-109F2 or, at the issuer's option and strictly for the 2004 year, in Form 52-109FT2.

CEO and CFO Certifications

The filings required to be certified by chief executive officers ("CEOs") and chief financial officers ("CFOs") (or persons performing functions similar to a CEO or CFO) include:

- annual information forms;
- annual financial statements;
- annual MD&A;
- interim financial statements; and
- interim MD&A.

CEOs and CFOs (or persons performing functions similar to a CEO or CFO) of reporting issuers will be required to personally certify that among other things:

- their issuers' annual filings and interim filings do not contain any misrepresentations or omit to state any material facts;
- the financial statements and other financial information in the annual filings and interim filings fairly present the financial condition, results of operations and cash flows of their issuers for the relevant time period;
- they have designed disclosure controls and procedures and internal controls over financial reporting (or caused them to be designed under their supervision);
- they have evaluated the effectiveness of such disclosure controls and procedures and caused their issuers to disclose their conclusions regarding their evaluation; and
- they have caused their issuers to disclose certain changes in internal controls over financial reporting.

Audit Committee Requirements

Once MI 52-110 comes into force, it applies to issuers commencing on the earlier of:

- (a) the first annual meeting of the issuer after July 1, 2004, and
- (b) July 1, 2005.

Audit Committee Responsibilities

MI 52-110 requires that every reporting issuer have an audit committee to which the issuer's external auditor must directly report. In addition, every audit committee must be responsible for:

- overseeing the work of the external auditor engaged for the purpose of preparing or issuing an audit report or related work;
- pre-approving all non-audit services to be provided to the issuer or its subsidiary entities by the issuer's external auditor; and
- reviewing the issuer's financial statements, MD&A, and annual and interim earnings press releases before they are publicly disclosed by the issuer.

Every audit committee must recommend to the board of directors the external auditor to be nominated for the purpose of preparing or issuing an auditor's report (or any related work), as well as the compensation to be paid to the external auditor.

MI 52-110 also requires that every audit committee be provided with the authority to engage and compensate independent counsel and other advisers which the committee determines are necessary to carry out its duties. Every audit committee must also have the authority to communicate directly with the internal and external auditors.

Every audit committee, including audit committees of venture issuers, must have a written charter that sets out its mandate and responsibilities.

Audit Committee Composition

MI 52-110 establishes composition requirements for audit committees. Every audit committee must have a minimum of three members, and each member must be financially literate and independent. Under MI 52-110, an individual is financially literate if he or she is able to read and understand a set of financial statements that present a breadth and level of complexity of accounting issues that are generally comparable to the breadth and complexity of the issues that can reasonably be expected to be raised by the issuer's financial statements. MI 52-110 also provides that an audit committee member who is not financially literate may be appointed to the audit committee provided such member becomes financially literate within a reasonable period of time. A member is independent if the member has no direct or indirect material relationship with the issuer. A material relationship is defined as a relationship that could, in the view of the issuer's board of directors, reasonably interfere with the exercise of a member's independent judgement. In addition, certain categories of persons are considered to have a material relationship with the issuer.

MI 52-110 exempts an issuer that has recently completed its initial public offering from the independence requirement (i) for a period of up to 90 days from the prospectus receipt date, provided one member of the audit committee is independent and (ii) for a period of up to one year from the prospectus receipt date, provided a majority of the audit committee members are independent.

MI 52-110 exempts venture issuers from the audit committee composition requirements of MI 52-110. As a result, the members of a venture issuer's audit committee are not required to be either independent or financially literate; however, venture issuers must provide, on an annual basis, the alternative disclosure required by Form 52-110F2. The term "venture issuer" is defined as an issuer that does not have any of its securities listed or quoted on the Toronto Stock Exchange, a U.S. marketplace or a marketplace outside of Canada and the U.S.

MI 52-110 also contains an exemption to the audit committee composition requirements for issuers who are U.S. listed issuers.

Disclosure Obligations

Every issuer, other than venture issuers and U.S. listed issuers, must include in its AIF the disclosure required by Form 52-110F1, which is described below. In addition, management information circulars that accompany a management proxy solicitation for the purpose of electing directors must include a cross-reference to the sections in the issuer's AIF that contain the above described disclosure.

If management of a venture issuer solicits proxies from security holders for the purpose of electing directors, the venture issuer must include in its management information circular the disclosure required by Form 52-110F2. A venture issuer that is not required to distribute a management information circular must provide the disclosure required by Form 52-110F2 in its AIF or annual MD&A. Since venture issuers are exempt from the requirement to file an AIF under new National Instrument 51-102 *Continuous Disclosure Obligations* and the new Multilateral Instrument 45-102 *Resale of Securities* abolishes the concept of a qualifying issuer and, thereby, the utility of voluntarily filing an AIF, most venture issuers will include such Form 52-110F2 disclosure in their Annual MD&A.

Generally, Form 52-110F1 prescribes that an issuer disclose the text of its audit committee charter, composition of its audit committee, audit committee member qualifications, audit committee oversight and policies and procedures and external auditor service fees, including audit and non-audit fees. Form 52-110F2 requires similar disclosures, except that less disclosure is required regarding audit committee member qualifications.

Continued...

How McLean & Kerr LLP Can Add Value

We are available to answer any questions you may have regarding MI 52-109 and MI 52-110 and to assist you comply with the certification and audit committee requirements imposed by these Instruments.

For more information:

Koby Smutylo

Direct Dial: 416 369 6610

Email: ksmutylo@mcleankerr.com

James Blake

Direct Dial: 416 369 6629

Email: jblake@mcleankerr.com

Nadim Wakeam

Direct Dial: 416 369 6612

Email: nwakeam@mcleankerr.com

Prepared by:

Koby Smutylo

Direct Dial: 416 369 6610

Email: ksmutylo@mcleankerr.com

The Securities Law Update is a periodic publication of the Securities and Corporate Law Practice Group of McLean & Kerr LLP.

Website: www.mcleankerr.com

MCLEAN & KERR LLP

BARRISTERS & SOLICITORS

Founded over 75 years ago, McLean & Kerr is a multi-disciplined law firm located in the heart of Toronto. Its clients include individuals as well as local, national and international enterprises and groups requiring a wide range of personal and business assistance.

McLean & Kerr's areas of practice include corporate, commercial, secured lending, commercial real estate, commercial leasing (landlord and tenant), insurance, employment, family, international, securities, mining,

labour, probate and estate administration and litigation in all courts.

In addition, the firm has access, through established relationships, to professional tax advice and counsel in other jurisdictions.

The *Bulletin* is produced by McLean & Kerr for its clients and other interested parties. The contents of the *Bulletin* are necessarily of a general nature and are not intended to be relied upon as legal advice.