

Reminder of new certifications and MD&A disclosure required for 2008 year-end filings

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On October 24, 2008, the Canadian Securities Administrators (the CSA) adopted a revised form of National Instrument 52-109 *Certification of Disclosure of Issuers' Annual and Interim Filings* (NI 52-109 or the Instrument).¹ Effective December 15, 2008, NI 52-109 has introduced new interim and annual certification requirements and new disclosure requirements for interim and annual management discussion and analysis (MD&A).


Under the revised NI 52-109, the issuer's chief executive officer (CEO) and chief financial officer (CFO), or other persons performing similar functions (referred to as certifying officers), are required to personally certify as to certain matters. The revised NI 52-109 expands significantly upon the items that were previously included in interim and annual certificates. These expanded certifications may also have a significant impact on related MD&A depending on the state of an issuer's design and effectiveness of disclosure controls and procedures (disclosure controls) and internal control over financial reporting (internal control).

The following is a summary of what is now to be included in the annual and interim certifications. All items that are new as of December 15, 2008 are specifically highlighted.

Certification requirements for both annual and interim certificates

Under NI 52-109, both internal and annual certificates must address the following:

- > that the issuer's interim and annual filings, as applicable, fairly present the financial condition, results of operations and cash flows of the issuer and do not contain any misrepresentations;
- > the establishment and maintenance of disclosure controls and internal control;
- > the design of disclosure controls and internal control to a reasonable assurance standard;
- > **new** » the control framework used to design internal control;²
- > **new** » the disclosure of any material weakness relating to design of internal control, including its impact on financial reporting and internal



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This newsletter was prepared by members of the Securities Group at Stikeman Elliott.

control, and the issuer's current plans or actions already taken for remediating the material weakness;

- > **new** » the disclosure of any limitation on the scope of the design of disclosure controls and internal control and summary financial information about the entity or business in respect of which the limitation is ruled upon; and
- > the disclosure of any changes in the issuer's internal control during the relevant period that have materially affected, or are reasonably likely to materially affect, the issuer's internal control.

Additional certifications required for annual certificates

Beyond the certifications summarized above, annual certifications are required to address the following additional matters:

- > the evaluation and disclosure of effectiveness of disclosure controls;
- > **new** » the evaluation and disclosure of the effectiveness of internal control, and a description of each material weakness relating to the operation of internal control existing at the financial year end, together with the impact of the material weakness on the issuer's financial reporting and its internal control, and the issuer's current plans or any actions already undertaken for remediating such material weakness; and
- > **new** » the disclosure to the issuer's auditors, the board of directors or the audit committee of any fraud that involves management or other employees who have a significant role in the issuer's internal control.

Related disclosure requirements for MD&A

On account of the certifications required under NI 52-109, related disclosure must also be provided in the corresponding interim or annual MD&A. Both the interim and the annual MD&A must therefore include the following disclosure:

- > **new** » if the certifying officers identify a material weakness relating to the design of internal control (that exists as at the end of the relevant reporting period), a description of such material weakness, its impact on financial reporting and internal control, and the issuer's current plans or actions already taken for remediating the material weakness;
- > **new** » if the certifying officers have relied on a scope limitation exemption (in respect of proportionately consolidated entity, variable interest entity or acquired business), a description of such scope limitation and summary financial information about the proportionally consolidated or variable interest entity or the business acquired; and
- > if there has been a change in the issuer's internal control during the relevant period that has materially affected or is reasonably likely to materially affect the issuer's internal control, such change.

In addition to the disclosure summarized above, annual MD&A disclosure must also include the following:

- > the certifying officers' conclusions about the effectiveness of the issuer's disclosure controls as at the financial year end; and
- > **new** » the certifying officers' conclusions about the effectiveness of the issuer's internal control as at the financial year end, and if applicable, a description of any material weakness relating to the operation of internal control existing at the financial year end, together with the impact of the material weakness on the issuer's financial reporting and its internal control and the issuer's current plans or any actions already undertaken for remediating such material weakness.

General requirements under NI 52-109

NI 52-109 applies to all reporting issuers other than investment funds and applies in respect of annual filings and interim filings for financial periods ending on or after December 15, 2008. While the instrument itself applies to

venture and non-venture issuers alike, the disclosure and certification requirements applicable to venture issuers are substantially less onerous (as discussed in further detail below).

Disclosure of weaknesses

NI 52-109 prescribes disclosure in respect of any material weaknesses in design and effectiveness of internal control for non-venture issuers. This requirement applies to design of internal control for interim and annual certificates and to both design and effectiveness of internal control for annual certificates. A material weakness is defined to mean a deficiency or a combination of deficiencies in internal control, such that there is a reasonable possibility that a material misstatement of the reporting issuers' annual or interim financial statements will not be prevented or detected on a timely basis. If such a material weakness exists with respect to design or effectiveness of internal control, the prescribed disclosure (set out above in the summary of the contents of the certificates) must be included in the corresponding MD&A.

Scope limitations

NI 52-109 permits a non-venture issuer to limit the scope of its design of disclosure controls and internal control to exclude controls, policies and procedures of a proportionally consolidated entity or variable interest entity in which the issuer has an interest, or a business that the issuer acquired not more than 365 days before the end of the financial period to which the certificate relates. The scope limitation is only available where the certifying officers would not have a reasonable basis for making the representation required in the applicable certificate because they do not have sufficient access to a proportionately consolidated or variable interest entity in order to be able to design and evaluate the controls, policies and procedures carried out by that entity.

Venture issuers

Keeping with the relief previously granted to venture issuers from the requirement to provide full certificates, under NI 52-109 venture issuers have the option of omitting certain certifications by filing a venture issuer certificate under Form 52-109FV1 or Form 52 109FV2. The venture issuer form of certificate requires certifying officers of venture issuers to omit certifications relating to disclosure controls and internal control and contains a notice to readers regarding these limitations. While the Instrument allows a venture issuer to file the streamlined form of certificate, a venture issuer is nevertheless permitted to file a full certificate if it wishes to do so.

As venture issuers are not required to file an AIF, if a venture issuer voluntarily files an AIF, it must also file a separate annual certification in the prescribed form on the same date that it files its AIF.

Exemptions

NI 52-109 introduces some new exemptions from the requirement to file a full certificate in certain circumstances. Where these exemptions are relied upon, the alternative form of certificate prescribed for these circumstances must be filed. These exemptions are available for the first financial period after an issuer's initial public offering if the issuer becomes a reporting issuer by filing a prospectus. An alternative form of certificate may also be filed for the first financial period that ends after the completion of a reverse takeover if the issuer is the acquiree in that transaction and was not a reporting issuer before the transaction. Exemptions are also available for the first financial period after becoming a non-venture issuer and for new reporting issuers.

For further information, please contact your Stikeman Elliott representative or any member of our Corporate Finance and Securities Group listed at www.stikeman.com

¹ (2008) 31 OSCB 10325. All references are to the Companion Policy (CP), unless otherwise indicated.

² The Companion Policy provides examples of control frameworks that are acceptable and states that the control framework used should be a suitable control framework that is established by a body or group that has followed due-process procedures, including broad distribution for public comment (CP, section 5.1).

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