

## Securities Law Bulletin

September 2008

### Notice of New National Instrument Relating to Officer Certification Requirements

#### Table of Contents

Introduction.....	1
Non-venture issuers must file expanded annual and interim certificates .....	2
Non-venture issuers must make increased disclosure in their annual and interim MD&A.....	3
Expanded guidance under the new Companion Policy for non-venture issuers.....	3
Non-venture issuers may limit the scope of design of DC&P and ICFR .....	4
Non-venture issuers must use a Control Framework .....	4
Venture issuers may file a Basic Certificate.....	4

#### ***Introduction***

The Canadian Securities Administrators (CRA) have announced that they will be repealing Multilateral Instrument 52-109 *Certification of Disclosure in Issuers' Annual and Interim Filings* (the "**Current Instrument**") and replacing it with the new National Instrument 52-109 *Certification of Disclosure in Issuers' Annual and Interim Filings* (the "**New Instrument**").

The New Instrument is subject to ministerial approval in Quebec, Ontario, Alberta and British Columbia. Provided these approvals are obtained, the New Instrument will come into force on December 15, 2008 and will apply to annual and interim filings for financial periods ending on or after that date.

The New Instrument draws a distinction between non-venture and venture issuers. A venture issuer is defined as a reporting issuer that does not have securities listed or quoted on the Toronto Stock Exchange or any major foreign marketplace. A non-venture issuer is defined as any reporting issuer that is not a venture issuer.

The New Instrument will apply to all reporting issuers, other than investment funds, in all jurisdictions in Canada. However, venture issuers will be subject to reduced requirements. The New Instrument provides exemptions for issuers that comply with U.S. securities laws regarding certification requirements under the *Sarbanes-Oxley Act of 2002*.

The New Instrument explicitly requires non-venture issuers to establish and maintain disclosure controls and procedures (DC&P) and internal control over financial reporting (ICFR), and it

requires non-venture issuers to make expanded representations and disclosure relating to ICFR in their annual and interim certificates and Management Discussion and Analysis (MD&A).

The following is a summary of some of the significant changes introduced by the New Instrument.

***Non-venture issuers must file expanded annual and interim certificates***

Under the Current Instrument, the issuer's CEO and CFO must certify, among other things, that:

- they have designed, or caused to be designed under their supervision, suitable DC&P and ICFR;
- they have evaluated the effectiveness of the issuer's DC&P and caused the issuer to disclose in its annual MD&A conclusions regarding the effectiveness of the issuer's DC&P; and
- they have caused the issuer to disclose in the issuer's MD&A certain changes in the issuer's ICFR.

The New Instrument has expanded the certification and disclosure requirements relating to ICFR. In addition to the above-listed requirements, the New Instrument requires the issuer's CEO and CFO to certify, among other things:

- that they have evaluated, or caused to be evaluated under their supervision, the effectiveness of the issuer's ICFR;
- that they have caused the issuer to disclose in its annual MD&A conclusions regarding the effectiveness of the issuer's ICFR;
- that the issuer has disclosed and described in its MD&A any "material weakness" (defined below) relating to the design or operation of its ICFR;
- the control framework used to design the issuer's ICFR; and
- that they have disclosed to the issuer's auditors and board of directors or audit committee any fraud that involves management or other employees who have a significant role in the issuer's ICFR.

Only non-venture issuers are required to file a full certificate with the representations set out above (a "**Full Certificate**"). Venture issuers may utilize a "venture issuer basic certificate" (the "**Basic Certificate**"). The Basic Certificate is discussed in a subsequent section of this bulletin.

The New Instrument permits a non-venture issuer to use alternative forms of certificates for the first financial period following the completion of an initial public offering or a reverse takeover and for the first financial period after the issuer has become a non-venture issuer. These alternative forms do not require representations regarding the establishment and maintenance of DC&P and ICFR and are similar to the form available to venture issuers.

***Non-venture issuers must make increased disclosure in their annual and interim MD&A***

The New Instrument requires expanded disclosure with respect to ICFR in a non-venture issuer's MD&A. Under the New Instrument, a non-venture issuer must disclose in its MD&A, among other things:

- the certifying officer's conclusions regarding the effectiveness of the issuer's ICFR (annual MD&A only);
- the name of the control framework used in the design of its ICFR (annual and interim MD&A); and
- any "material weakness" in its ICFR that the certifying officers have discovered, which disclosure must include a description of each material weakness, the impact of the material weakness on the issuer's financial reporting and ICFR, and any current plans or actions undertaken for remediating the material weakness (annual and interim MD&A).

"Material weakness" means "a deficiency, or a combination of deficiencies, in ICFR such that there is a reasonable possibility that a material misstatement of the reporting issuer's annual or interim financial statements will not be prevented or detected on a timely basis."

***Expanded guidance under the new Companion Policy for non-venture issuers***

The New Instrument explicitly requires a non-venture issuer to establish and maintain DC&P and ICFR, and the companion policy to the New Instrument (the "**New Companion Policy**") provides extended guidance on how issuers are to design and evaluate the operating effectiveness of DC&P and ICFR.

With regard to how issuers are to design DC&P and ICFR, the New Companion Policy refers to developing and implementing controls, policies and procedures (the "components") of DC&P and ICFR. The New Companion Policy suggests that certifying officers should use their judgment in designing the components, giving consideration to factors particular to the issuer, such as the size and nature of the business. The certifying officers should use a top-down, risk-based approach to design the components. Under this approach, certifying officers first identify and assess risks faced by the issuer in order to determine the scope and necessary complexity of the issuer's DC&P or ICFR. This approach assists certifying officers in focusing their resources on the areas of greatest risk. While the New Instrument does not prescribe specific components of DC&P and ICFR, the New Companion Policy provides a list of the suggested components that issuers should generally include in DC&P and ICFR. The New Companion Policy also sets out the key features of ICFR and related design challenges.

With regard to how issuers are to evaluate the operating effectiveness of DC&P and ICFR, the New Companion Policy suggests a number of evaluation tools that certifying officers might use, as well as the extent of documentary evidence sufficient to provide reasonable support for such evaluation.

### ***Non-venture issuers may limit the scope of design of DC&P and ICFR***

It may be difficult for certifying officers to design or evaluate controls, policies and procedures carried out by an underlying entity due to insufficient access to such underlying entity. It may also be difficult for certifying officers to design or evaluate controls, policies and procedures carried out by an acquired business shortly after acquiring the business. Thus, the New Instrument allows non-venture issuers to limit the scope of their design of DC&P and ICFR to exclude controls, policies and procedures of: (i) a proportionately consolidated entity or a variable interest entity in which the issuer has an interest and (ii) a business that the issuer has acquired not more than 365 days before the end of the financial period to which the certificate relates. The non-venture issuer must disclose any such limitation in scope, as well as summary financial information on the underlying or acquired entity, in its MD&A.

### ***Non-venture issuers must use a Control Framework***

The New Instrument requires a non-venture issuer to use a control framework to design the issuer's ICFR. The New Instrument does not stipulate what type of framework should be used, but the New Companion Policy suggests that an issuer should use a suitable control framework that is established by a body or group that has followed due-process procedures, including the broad distribution of the framework for public comment. The New Companion Policy provides the following examples of suitable frameworks:

- the *Risk Management and Governance: Guidance on Control* (COCO Framework), formerly known as *Guidance of the Criteria of Control Board*, published by The Canadian Institute of Chartered Accountants;
- the *Internal Control – Integrated Framework* (COSO Framework) published by The Committee of Sponsoring Organizations of the Treadway Commission (COSO); and
- the *Guidance on Internal Control* (Turnbull Guidance) published by The Institute of Chartered Accountants in England and Wales.

The New Companion Policy suggests that a smaller issuer can also refer to *Internal Control over Financial Reporting – Guidance for Smaller Public Companies* published by COSO, which provides guidance to smaller public companies on the implementation of the COSO Framework. This is of interest to venture issuers who may be required in certain circumstances to use a control framework to design ICFR (discussed below).

Finally, the New Companion Policy suggests that *IT Control Objectives for Sarbanes-Oxley* published by the IT Governance Institute might provide useful guidance for the design and evaluation of information technology controls that form part of an issuer's ICFR.

### ***Venture issuers may file a Basic Certificate***

The New Instrument permits venture issuers to file a Basic Certificate rather than the Full Certificate required of non-venture issuers. Under the Basic Certificate, the CEO and CFO of a venture issuer are not required to certify that they have designed and evaluated the effectiveness of DC&P and ICFR. As well, the venture issuer is not required to disclose in its MD&A the

design of, or conclusions regarding, the effectiveness of the issuer's DC&P and ICFR. Currently, all CSA jurisdictions have provided exemptive relief orders such that venture issuers may take advantage of these certification changes for periods ending on or after December 31, 2007.

The Basic Certificate under the New Instrument must contain a note to the reader which explains that the certifying officers make no representations as to the establishment or maintenance of DC&P and ICFR. The note to the reader must also explain that certifying officers of a venture issuer face inherent difficulties in designing and implementing DC&P and ICFR, which may result in additional risks to the quality and reliability of filings. If a venture issuer who files a Basic Certificate wishes to discuss DC&P or ICFR in its MD&A, the New Companion Policy suggests that the issuer include a note to the reader similar to that included in the Basic Certificate.

The New Instrument permits venture issuers to elect to file a Full Certificate rather than a Basic Certificate. If the venture issuer chooses to file a Full Certificate, it must meet certain requirements expected of non-venture issuers, such as the need to use a control framework to design its ICFR. As noted above, the New Companion Policy provides an example of a control framework suitable for a smaller issuer.

Venture issuers that become non-venture issuers (i.e., by being listed on the Toronto Stock Exchange or a major foreign marketplace) may use an alternative form of certificate similar to a Basic Certificate for their first financial period, after which period they are required to file Full Certificates.

### ***Securities Law Group***

For further information, please contact your Fogler, Rubinoff LLP lawyer or one of the following members of our Securities Group:

#### **Grant Sawiak**

Direct Line: 416.941.8841  
E-mail: [gsawiak@foglers.com](mailto:gsawiak@foglers.com)

#### **Eric Roblin**

Direct Line: 416.941.8811  
E-mail: [eroblin@foglers.com](mailto:eroblin@foglers.com)

#### **Dunniel Medina**

Direct Line: 416.864.7622  
E-mail: [dmedina@foglers.com](mailto:dmedina@foglers.com)

*This document is not intended to serve as legal advice or form a legal opinion. The purpose of this document is to provide information on current developments and matters of interest in securities law. It does not contain a complete analysis of the law and is summary in nature.*