

# Allen & Allen Update on Securities Law

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May 1, 2004

## Enacted:

### **Investor confidence rules now in force**

A series of new rules to promote investor confidence and significantly change a number of the disclosure and governance practices of most Canadian public companies came into force in most Canadian jurisdictions on March 30, 2004. The rules apply to almost all reporting issuers other than investment funds.

The new rules include:

**Continuous Disclosure Obligations** - National Instrument 51-102. It replaces existing continuous disclosure obligations of reporting issuers, other than investment funds. It sets out requirements regarding financial statements, annual information forms, management discussion and analysis (MD&A), material change reporting, information circulars, proxies and proxy solicitation, restricted share disclosure, and other matters. "Venture issuers" have less stringent requirements. ("Venture issuers" are those that do not have their securities listed or quoted on the Toronto Stock Exchange, a national securities exchange in the US, Nasdaq, or a market place outside of Canada and the US. You are a Venture issuer if your securities are only listed on the TSX Venture, CNQ or the OTCBB or any combination of these.)

**Acceptable Accounting Principles, Auditing Standards and Reporting Currency** - National Instrument 52-107. It establishes a harmonized set of accounting principles and auditing standards for preparing and auditing financial statements in filing a prospectus, continuous disclosure obligations, or otherwise required to be filed with the securities regulators.

**Auditor Oversight** - National Instrument 52-108. It requires a reporting issuer to have the auditor's report signed by a public accounting firm that is a participant in the Canadian Public Accountability Board ("CPAB") oversight program for public accounting firms that audit reporting issuers (the "CPAB Oversight Program"), and in compliance with any restrictions or sanctions imposed by the CPAB.

**Certification of Disclosure in Issuers' Annual and Interim Filings** - Multilateral Instrument 52-109. Chief executive officers (CEOs) and chief financial officers (CFOs) (or persons performing functions similar to a CEO or CFO) of all reporting issuers (including "venture issuers"), other than investment funds, will be required to personally certify a number of financial and disclosure matters. This has not been adopted by the British Columbia Securities Commission.

**Audit Committees** - Multilateral Instrument 52-110. It 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: (a) overseeing the work of the external auditor engaged for the purpose of preparing or issuing an audit report or related work; (b) pre-approving all non-audit services to be provided to the issuer or its subsidiary entities by the issuer's external auditor; and (c) reviewing the issuer's financial statements, MD&A, and annual and interim earnings press releases before they are publicly disclosed by the issuer. There are other requirements. This has not been adopted by the British Columbia Securities Commission.

### **Failure to file Certification of Disclosure in Issuers' Statements – CSA Staff Notice**

The Canadian Securities Administrators (CSA) are advising reporting issuers that failure to file the certificates prescribed by Multilateral Instrument 52-109 (Certification of Disclosure in Issuers' Annual and Interim Filings) will be viewed by staff (except for staff in British Columbia, which did not adopt the Instrument) as a serious breach of securities law. Staff will take appropriate action, which will generally include recommending the imposition of a cease trade order against the chief executive officer and/or chief financial officer of the issuer (or persons performing functions similar to a chief executive officer or chief financial officer) with respect to trading in securities of the issuer, and placing the issuer on a list of defaulting reporting issuers.

The Instrument came into force on March 30, 2004. It applies to interim periods and financial years beginning on or after January 1, 2004. Accordingly, issuers should be aware that, in some cases, certificates will need to be filed as early as mid-May 2004.

### **Prospectus relief by incorporating continuous disclosure – CSA Staff Notice**

An issuer preparing a prospectus can now apply for relief from certain requirements of the prospectus rules that are provided in the issuer's continuous disclosure records under National Instruments 51-102 or 52-107. CSA staff will generally recommend that the relief be granted from the following requirements:

The provisions relating to generally accepted accounting principles, generally accepted auditing standards and foreign auditors' reports on the condition that the issuer complies with NI 52-107;

The significance tests for determining if a business acquisition is significant and the financial statements required to be included in a prospectus, on the condition that the issuer applies the significance tests set out in Section 8.3 of NI 51-102 and provides the financial statements specified in Section 8.5 of NI 51-102.

### **Uniform four month resale rule in force – National**

With the adoption of new, harmonized, enhanced, continuous disclosure rules, all jurisdictions except Quebec have eliminated the "qualifying issuer" concept and have moved to a simple four-month hold/seasoning regime for all reporting issuers.

Under the old resale rule, securities acquired in a private placement were only subject to the shortened four-month hold if the issuer was a "qualifying issuer" (that is, its securities were listed on a specified exchange and the issuer had filed a current AIF). If the issuer was not a qualifying issuer, resale was restricted for twelve months. The four-month/twelve-month regime also applied to seasoning periods and control block distributions.

The Ontario Commission has compiled a list of frequently asked questions on the topic, available on its website at: [www.osc.gov.on.ca](http://www.osc.gov.on.ca)

## Proposed:

### **Disclosure of Corporate Governance Practices – BC, Alberta, Quebec - Proposed Rule**

British Columbia, Alberta and Quebec have published for comment proposed Instrument 51-104, which would require an issuer to disclose its corporate governance practices. Proposed 51-104 differs from the corporate governance Instruments proposed in all jurisdictions except British Columbia and Quebec, i.e. 58-101 (Disclosure of Corporate Governance Practices) and 58-201 (Effective Corporate Governance). The differences between 51-104 and 58-101/102 include these:

- **Best Practices:**  
51-104 would not require a comparison of corporate governance with a standard of “best practices”. In contrast, 58-101 would require issuers to compare against the best practices described in 58-201, and if one of the best practices was not adopted, the issuer must explain why.
- **Disclosure of Independent Directors**  
51-104 would require an issuer to identify each director as independent or not, and, for each director that is not independent, to describe the relationship. In contrast, 58-101 and 58-201 would require only a statement indicating whether the majority of the board is independent.
- **Board Committees**  
51-104 would require disclosure of all board committees, including the identity of the members of those committees and the purpose and function of each committee. In contrast, 58-101 and 58-201 would require issuers to provide disclosure only about compensation and nomination committees.

Comments are due June 22, 2004

**Please call if you have any questions - 416-865-0303**

## **ALLEN AND ALLEN**

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**JOHN ALLEN:** A graduate of law from Queen's University, John was called to the Bar in 1991, clerked with the Ontario Superior Court, and has a Masters of Law in securities law from Osgoode Hall. He is a graduate of the "Canadian Securities Course", "Financial Planning Course", and has all academic requirements for the designation of Certified Financial Planner (CFP). He is also the author of a monthly securities "Netletter" available only on Quicklaw ([www.quicklaw.com](http://www.quicklaw.com)), a fee-based legal database service.