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OSC staff identify compliance issues with insider reporting

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Author: Justin Dharamdial

On February 18, 2016, the Ontario Securities Commission (OSC) staff released a report detailing their findings of a significant level of material reporting deficiencies in insider reports. OSC Staff Notice 51-726 discusses the results of staff's review and includes recommended practices for issuers.

Significant deficiencies identified

Staff identified a significant level of material reporting deficiencies. Of the 100 issuers reviewed, 15% had material insider reporting deficiencies and 70% had at least one insider who was required to make a remedial filing. These findings suggest insiders are still struggling to address insider reporting requirements, especially in light of the changes introduced in 2010, including:

- the need to create and use security designations for reporting equity-based compensation, necessitated when compensation awards became subject to insider reporting in 2010; and
- the omission of a reporting exemption for companies controlled by an individual reporting insider which existed prior to 2010 (companies controlled by an individual reporting insider were exempted from reporting under the *Securities Act* (Ontario) but such exemption was not carried forward upon the creation of NI 55-104).

Staff reminders for insiders

Based on the findings of the review, the staff report includes reminders to assist issuers and insiders with meeting their insider reporting obligations, some of which are set out below:

- Periodically review who qualifies as a reporting insider. Since directors and officers of material subsidiaries are also subject to insider reporting, we recommend issuers should confirm which are its material subsidiaries at least quarterly.
- Issuers can help insiders by creating security designations for reporting equity-based compensation before any grants are made. We also recommend issuers ensure their insider reporting policy addresses the need to file insider reports respecting equity-based compensation.
- Staff encourage the use of issuer grant reports to simplify subsequent reporting of grants by insiders, but note that few issuers use this reporting mechanism. In practice, we understand most issuers prefer to file the insider report on behalf of the reporting insiders or leave the responsibility (and liability) solely with the insider than to make use of this

alternative.

- Staff confirm that issuers must file an insider report when purchasing their own securities even when the securities are cancelled immediately upon repurchase.

Additional staff views

The staff's report sets out helpful guidance regarding compliance with insider reporting obligations. There are two comments that are worth particular mention:

- Staff express the view that option repricing is per se an "improper practice". While not favoured by shareholders, repricing options may in certain circumstances be in the issuer's best interests, but should be executed in a manner transparent to investors.
- Staff state it is essential that insider trading policies restrict the issuer from granting stock options or similar forms of stock-based compensation during blackout periods. This is a strong statement and may foreshadow a potential future rule change.

Conclusion

Failure to comply with the insider reporting regime can result in fines, while other regulatory enforcement action may be taken against those issuers and insiders with serious compliance concerns. The staff's review signals to issuers and insiders that there are concerns with the quality of insider reporting and that the OSC will be focusing its attention on this matter. We will continue to monitor further staff initiatives on insider reporting and are available to discuss the application of these rules to your circumstances.