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Proposed National Instrument 51-103: What Venture Issuers Need to Know

By Derek Van Doorn and Bobbi Wallace

On July 29, 2011, the Canadian Securities Administrators (the “CSA”) published *National Instrument 51-103 Ongoing Governance and Disclosure Requirements for Venture Issuers* (“NI 51-103”) for comment. The intent of NI 51-103 is to streamline and modify venture issuer disclosure obligations to balance the ability of venture issuers to manage those obligations while, at the same time, provide disclosure that is more useful and user friendly for investors. Another key feature of NI 51-103 is to consolidate the vast majority of disclosure obligations applicable to venture issuers into a single instrument and reduce disclosure redundancies.

NI 51-103 would apply to venture issuers (as defined under applicable securities laws)¹ other than debt-only issuers, preferred share-only issuers and issuers of securitized products, thereby limiting the application of NI 51-103 to public companies listed on a junior exchange. All other venture issuers would continue to be subject to the current venture issuer requirements contained in *National Instrument 51-102 Continuous Disclosure Obligations*.

Highlights proposed by NI 51-103 include:

- **Annual Report.** A consolidation of venture issuer governance and disclosure requirements into one document called an Annual Report. The Annual Report would combine business, corporate governance and executive compensation disclosure, management, discussion & analysis (herein “MD&A”), audited annual financial statements and chief executive officer and chief financial officer certifications.
- **Semi-Annual Report.** Introduction of a Semi-Annual Report requiring an interim financial report, associated MD&A, and chief executive officer and chief financial officer certifications. The Semi-Annual Report would replace the interim MD&A and financial reports that would be voluntary on a quarterly basis.
- **Material Change Reporting.** New enhanced material change reporting would replace Business Acquisitions Reports (“BARS”) as well as reporting of material related party transactions and major acquisitions.
- **Delivery of Continuing Disclosure Documents.** Mandatory delivery of disclosure documents by mail would be eliminated, and rather would only have to be provided upon request, or in compliance with the charter documents of the venture issuer.
- **Prospectuses and Other Offering Documents.** Amendments to the disclosure currently required under *Form 41-101F1 Information Required in a Prospectus* will be simplified so that a long-form prospectus would conform to the Annual Report requirement (removing BARs, introducing semi-annual financial reports and associated MD&A) and would require only two years of historical annual financial statements. Annual Reports could be used in place of an Annual Information Form (which is currently an optional filing for most venture issuers) in order to qualify as short-form eligible under *National Instrument 44-101 Short Form Prospectus Distributions*, essentially giving venture issuers the same access to the short form regime as senior issuers.
- **Corporate Governance Disclosure.** NI 51-103 also creates new substantive corporate governance requirements for venture issuers that would replace the governance and disclosure obligations currently applicable to venture issuers and set forth in *National Instrument 52-110 Audit Committees* and *National Instrument 58-101 Disclosure of Corporate Governance Practices*.

The anticipated implementation date of NI 51-103 is currently unknown. While the initial period for comment offered by the CSA closed October 27, 2011, given the number of comments received, a second comment period may be added to allow for further comments on the changes made as a result of comments received during the initial period.

¹ A venture issuer under applicable securities laws is defined as a reporting issuer that does not have any of its securities listed or quoted on the Toronto Stock Exchange, an exchange registered as a national securities exchange under section 6 of the U.S. *Securities and Exchange Act of 1934*, or a marketplace outside of Canada or the U.S. other than the AIM of the London Stock Exchange and the PLUS markets operated by the PLUS Markets.