

# Securities Law Bulletin

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## New Material Contract Filing Obligations Effective March 17, 2008

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### Introduction

A number of changes to material contract filing obligations of reporting issuers are expected to come into effect on March 17, 2008 by way of amendments to NI 51-102 – Continuous Disclosure Obligations (the “Proposed Amendments”). The changes will (i) increase the number of agreements that reporting issuers must file with the securities regulators as “material contracts”, and (ii) reduce the ability of reporting issuers to omit (redact) certain information contained in material contracts filed on the basis that such information is seriously prejudicial to the interests of the issuer or subject to confidentiality obligations.

### The Current Regime

Currently, a reporting issuer must file a material contract that it or any of its subsidiaries has entered into, other than a material contract entered into in the ordinary course of business (the “Ordinary Course of Business Exemption”), no later than the earlier of:

- (i) the time a material change report is required to be filed in respect of the making of a contract that

constitutes a material change for the issuer; and

- (ii) the filing of the issuer’s next annual information form (“AIF”).<sup>1</sup>

A material contract entered into prior to January 1, 2002 is not required to be filed. A reporting issuer is permitted to redact provisions of a material contract when an executive officer of the issuer reasonably believes the disclosure would be seriously prejudicial to the interests of the reporting issuer or that would violate any confidentiality provisions (the “Redaction Option”).

### The New Regime

The principal changes contained in the Proposed Amendments narrow the scope of the Ordinary Course of Business Exemption and reduce the ability of issuers to take advantage of the Redaction Option. The securities regulators also confirmed their views regarding the filing of schedules, exhibits and side letters referenced in the material contract.

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<sup>1</sup> If the issuer is not required to file an AIF, then within 120 days after the end of the most recently completed financial year end.

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### **The Ordinary Course of Business Exemption**

Under the Proposed Amendments, the Ordinary Course of Business Exemption will not be available if the material contract is:

- a contract to which directors, officers, or promoters are parties other than a contract of employment;
- a continuing contract to sell the majority of the issuer's products or services or to purchase the majority of the issuer's requirements of goods, services, or raw materials;
- a franchise or licence or other agreement to use a patent, formula, trade secret, process or trade name;
- a financing or credit agreement with terms that have a direct correlation with anticipated cash distributions;
- an external management or external administration agreement; or
- a contract on which the issuer's business is substantially dependent.

This means that material contracts captured within any of the above mentioned categories would be required to be filed even where it was entered into in the ordinary course of business. A contract that falls within one of the categories noted above would only need to be filed if it is considered to be a contract that is material to the issuer.

With respect to the last category above, the companion policy accompanying the Proposed Amendments (the "Companion Policy") describes such a contract as one that is "so significant that the reporting issuer's business

depends on the continuance of the contract" and cites the following as examples of such contracts:

- a financing or credit agreement providing a majority of the issuer's capital requirements for which alternative financing is not readily available at comparable terms;
- a contract calling for the acquisition or sale of substantially all of the reporting issuer's property, plant and equipment, long-lived assets, or total assets; and
- an option, joint venture, purchase or other agreement relating to a mining or oil and gas property that represents a majority of the issuer's business.

### **Treatment of Side Letters**

The Companion Policy also confirms the securities regulators' view that the material contract filing obligation generally would include any schedules, exhibits or side letter referred to in the material contract and any amendments thereto. It appears that this commentary may be aimed at a practice among certain issuers who do not generally file disclosure letters or similar documents.

### **The Redaction Option**

Under the Proposed Amendments, where a reporting issuer is required to file a material contract, the Redaction Option will not be available (notwithstanding an issuer's confidentiality obligations or that disclosure may be seriously prejudicial to the issuer) where the provisions contain:

- debt covenants and ratios in financing or credit agreements;
- events of default or other terms relating to the termination of the material contract; or

- other terms necessary for understanding the impact of the material contract on the business of the issuer (which according to the Companion Policy may include: the duration and nature of a patent, trademark, licence, franchise, concession, or similar agreement; disclosure about related party transactions; and contingency, indemnification, anti-assignability, take-or-pay clauses, or change-of-control clauses).

The Companion Policy also provides that where redactions are made to a material contract, the reporting issuer must provide a brief description of the material redacted.

It is important to note that pursuant to the Companion Policy, exemptive relief from the changes to the Redaction Option may be sought where the disclosure of a provision would violate a confidentiality provision and the material contract was negotiated before the adoption of the Proposed Amendments (March 17, 2008).

## Conclusion

The Proposed Amendments are expected to come into effect on March 17, 2008 and will apply to the existing material contracts of a reporting issuer entered into after January 1, 2002 that have not been previously filed.

Reporting issuers planning to file their AIF after March 17, 2008 will need to review their existing material contracts that have not already been filed to determine whether the Ordinary Course of Business Exemption still applies.

To the extent that this review uncovers material contracts that require filing, reporting issuers should review such contracts against the terms of the revised Redaction Option and, if necessary, seek exemptive relief from the securities regulators in relation to confidential

provisions to which the Redaction Option no longer applies.

Going forward, reporting issuers should consider the implications of the Proposed Amendments when negotiating contracts and, in particular, consider including language stating that confidentiality provisions would not apply where a reporting issuer is required to disclose the terms of the contract as a matter of law.

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