

# National Instrument 52-109

## *Certification of Disclosure in Issuers' Annual and Interim Filings*



November 13, 2008

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# Agenda

- History
- Substantive changes in Pending NI 52-109
- Companion Policy



# History

- MI 52-109
- Proposed MI 52-111
- CSA Notice 52-313
- Proposed replacement of MI 52-109 (March 2007)
- New NI 52-109



# Pending NI 52-109

- Purpose: Improve the quality, reliability and transparency of financial reporting
- Application: Apply to all reporting issuers, while recognizing unique circumstances of certain issuers
- Timing: The new rule will apply to financial periods ending on or after December 15, 2008.



# DC&P and ICFR

- **DC&P – Disclosure Controls & Procedures**

Controls and other procedures designed to provide reasonable assurance that information required to be disclosed is recorded, processed, summarized and reported within the time periods specified.

- **ICFR – Internal Control over Financial Reporting**

Process designed by, or under supervision of, the CEO and CFO to provide reasonable assurance regarding reliability of financial reporting and preparation of financial statements.



# Substantive Changes in NI 52-109

- Additional Certifications
- Material Weakness Disclosure
- Use of a Control Framework
- Scope Limitation (JVs, VIEs, Acquisitions)
- “Basic Certificate” for Venture Issuers
- IPO / RTO Exemption
- Expanded Companion Policy



# Pending Additional Certifications

- NI 52-109 will require CEOs and CFOs to certify that:
  - They have evaluated the effectiveness of ICFR as at the end of the issuer's financial year
  - They have caused the issuer to disclose in its annual MD&A their conclusions re: the effectiveness of ICFR
  - based on the evaluation of ICFR, they have disclosed to the auditors, the board of directors and audit committee any fraud that involves management or other employees who have a significant role in ICFR



# Certifications in Current MI 52-109

- MI 52-109 requires CEOs and CFOs to certify that:
  - the issuer’s filings do not contain any misrepresentations;
  - the financial statements and other financial information in the filings fairly present the financial condition, results of operations and cash flows of the issuer;
  - they have designed and evaluated the effectiveness of DC&P and caused the issuer to disclose the conclusions about their evaluation in the MD&A;
  - they have designed ICFR; and
  - they have caused the issuer to disclose certain changes in ICFR in the MD&A



# Key Changes

## Material Weakness

- Threshold for reporting a weakness in ICFR is a “material weakness” rather than the previously proposed “reportable deficiency”
- Definition of “material weakness” is the same as the US definition
- MD&A disclosure requires:
  - a description of the material weakness;
  - the impact of the material weakness on the issuer’s financial reporting and its ICFR; and
  - the issuer’s current plans, if any, or any actions already undertaken, for remediating the material weakness.
- No requirement to remediate the material weakness



# Key Changes (cont'd)

## Control Framework

- The certifying officers must use a control framework in order to certify the design of the issuer's ICFR.
- The control framework used must be disclosed in the certificate.



# Key Changes (cont'd)

## Scope Limitations

- Proportionately consolidated entities or variable interest entities
- Businesses acquired not more than 365 days before the end of the financial period



# Key Changes (cont'd)

## Scope of application – Venture Issuer Basic Certificate

- No requirement to certify design of DC&P and ICFR
- Certifying officers are only required to certify that they reviewed the filings, they contain no misrepresentations, and the filings provide a fair presentation
- Note to Reader language:

*Investors should be aware that inherent limitations on the ability of certifying officers of a venture issuer to design and implement on a cost effective basis DC&P and ICFR as defined in NI 52-109 may result in additional risks to the quality, reliability, transparency and timeliness of interim and annual filings and other reports provided under securities legislation.*



# Key Changes (cont'd)

## Alternative Certificates Following Certain Transactions

- Permitted for first financial period following an IPO or RTO
  - No requirement to certify as to the establishment and maintenance of DC&P and ICFR
  - Certificate includes “Note to Reader” language similar to Venture Issuer certificate.



# Key Changes (cont'd)

**New guidance in the Companion Policy**



# Companion Policy

- Purpose of Companion Policy
  - Help you understand how we interpret and apply the Instrument
- More extensive guidance than “normal”
  - over 30 pages
  - Built on existing material and 2007 proposed materials
  - Commenters wanted more guidance on certain topics
  - Changes to Instrument reflected in Companion Policy
- Not prescriptive – left to judgment of certifying officers
- Top-down, risk-based approach
- Layout of CP is a logical progression



# Changes to Parts 1 and 2

- Part 1 – General
  - Reminds venture issuers that they may elect to file full certificates
- Part 2 – Form of Certificates
  - Certificates must be in exact wording prescribed by form without amendment. Failure = breach of Instrument.



# Changes to Parts 3 and 4

- Part 3 – Certifying Officers
  - “new” certifying officers – person who is CEO/CFO at the time of filing certificates is the person who must sign the certificate
- Part 4 – Fair Presentation, Financial Condition and Reliability of Financial Reporting
  - Added “reliability” – in definition of ICFR
  - Refers to amounts and disclosures in the f/s



## Part 5 – Control Frameworks for ICFR

- Requirement to use a control framework added to Instrument
- CP suggests framework used should be a suitable 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
- Examples – COCO, COSO, Turnbull, IT Governance Institute for IT controls



## Part 6 - Design of DC&P and ICFR

- Design includes both developing and implementing the controls
- Implemented = placed in operation (but does not have to be evaluated for effectiveness)
- Multiple locations or business units
  - Identify risks of material misstatement
  - Consider these risks at each location or business unit
  - No need to focus resources at location if risk is addressed by control that operates centrally or if risk not present at location
- Documentation – up to certifying officers to use their judgment, acting reasonably, to determine the extent and form



## Part 7 - Evaluating Operating Effectiveness of DC&P and ICFR

- To determine whether DC&P and ICFR designs are operating as intended
- New section on self-assessments
  - May not be objective – supplementary testing might be needed
- Testing can take place after year end
- Must be sufficient testing each year (i.e., each year stands on its own)



## Part 8 – Use of a Service Organization or Specialist for an Issuer’s ICFR

- If you use a service organization, must consider risks – determine extent of design and evaluation of controls
  - Service auditor’s report (adequacy, time period)
  - Direct access to controls to design and evaluate
  - Compensating controls present
- If nothing available, material weakness?



## Part 9 – Material Weakness

- Added comments on compensating controls versus mitigating procedures
- Compensating control
  - Another control that addresses a risk that deficient ICFR component failed to address – if no compensating control, the deficiency stands
  - But might be another control/procedure that reduces risk from deficient ICFR component – mitigating procedure – the deficiency stands



## Part 10 – Weakness in DC&P that is Significant

- Concept of “material weakness” as defined relates to ICFR
- Because of overlap, material weakness in ICFR may also represent a weakness that is significant in DC&P



# Part 11 – Reporting Changes in ICFR

- Required to disclose any change in ICFR that has or is reasonably likely to materially affect ICFR
- A change to remediate a material weakness is always considered material



# Part 12 – Role of Board of Directors and Audit Committee

- Board approves the MD&A containing the DC&P and ICFR disclosures
- Audit committee reviews financial disclosures
- Any fraud involving management who have significant role in ICFR must be reported to the auditors, the board or the audit committee



# Part 13 – Certain Long Term Investments

- Access to underlying entities in indirect structures
  - Generally expect trust indenture, partnership agreement, etc. to allow sufficient access to underlying entity to design and evaluate
- Scope limitations for pro con entity or VIE
  - Only if risk that could reasonably result in material misstatement
- Limited access to underlying entity of portfolio investment or equity investment




# Part 14 – Business Acquisitions

- Limit scope of design for business acquired within 365 days of certificate period end
- Meaningful summary financial information



# Part 15 – Venture Issuer Basic Certificates

- Added to deal with new certificates
- Mentions inherent limitations to design
- Optional for venture issuers
- Non-venture cannot use
- Note to reader required – no wording changes
- Not precluded from discussing effectiveness of DC&P and ICFR in MD&A



# Part 20 – Certification of Revised or Restated Annual or Interim Filings

- Subject of lots of questions
- Basic premise is that all filings must be certified
- Created a new form of certificate
- Dated when filed and filed same day as revised CD document
- Consider original conclusions and disclosures re controls in light of revisions/restatements



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**Form 51-102F6 – *Statement of Executive Compensation***  
*(in respect of financial years ending on or after December 31, 2008)*




***November 13, 2008***  
***Tom Graham***  
***Director, Corporate Finance***



# Overview - Executive Compensation

1. Background to changes
2. Summary of significant changes
3. Other notable changes
4. Some differences from the US rule
5. Effective date and transition



# Why revisit the current requirements?

- Increasingly disclosure is supplemented by voluntary additional disclosure based upon “best practices” - this has created significant differences in reporting
- Compensation practices continue to evolve and they are not addressed in our current rules (e.g. certain pension arrangements, performance share units, change of control payments)
- New SEC rule
- Other jurisdictions have received feedback requesting review
- Staff Notice 51-304 was issued in November 2002 based on a review of 76 issuers - 95% of these issuers agreed to prospective changes



# History of the new rule

- March 2007: published for initial comment and received 38 comment letters
- February 2008: published for second comment period with significant changes to the 2007 Proposal to address March 2007 comments and received a further 20 comment letters
- September 18, 2008: final publication
- December 31, 2008: implementation



# Key aspects of the proposal

- Disclosure of all direct and indirect compensation provided to certain executive officers and directors
- Revised summary compensation table that leads to a single “total” compensation number
- Additional compensation discussion and analysis aimed at providing a better understanding of how companies determine compensation
- Additional tabular disclosure of equity-based awards
- More specifics on key aspects of compensation such as termination payments and pension benefits
- Tabular disclosure of director compensation

# Summary compensation table

Name and principal position (a)	Year (b)	Salary (\$) (c)	Share-based awards (\$) (d)	Option-based awards (\$) (e)	Non-equity incentive plan compensation (\$) (f)		Pension value (\$) (g)	All other compensation (\$) (h)	Total compensation (\$) (i)
					Annual incentive plans (f1)	Long-term incentive plans (f2)			
CEO									
CFO									
A									
B									
C									



# Summary compensation table

- Share and option based compensation is included at grant date fair value
- Pension values are to include all service costs and other compensatory items relating to defined benefit or defined contribution plans
- Cash bonuses are split into annual and long-term components



# Compensation Discussion & Analysis

- Describe and explain all significant elements of compensation awarded
- If applicable, clearly state the benchmark and explain its components, including the companies included in the benchmark group and the selection criteria
- If applicable, disclose performance goals or similar conditions
- If performance goals or similar conditions are subjective, these may be described without providing specific measures
- Company is not required to disclose performance goals if a reasonable person would consider that disclosing them would ***seriously prejudice the company's interests***



# Other notable changes

- Determination of NEO
- More specifics relating to compensation associated with termination
- Perquisites, including property or other personal benefits provided to an NEO that are not generally available to all employees, and that in aggregate are worth \$50,000 or more, or are worth 10% or more of an NEO's total salary for the financial year



# TSX Venture Issuers

- No performance graph required
- Less complex structures will require less disclosure

# Some Differences from the US regime

## Who is disclosed



Top 5 over CDN\$150,000 including CEO and CFO



Top 5 over US\$100,000 including CEO and CFO

## Certification



Remains in Info Circ



Included in 10K and certified by management

## Perquisite disclosure



Disclose unless less than \$50,000 and 10% of total income



All perqs over \$10,000

## Summary Compensation Table



Grant date fv of equity awards; Compensatory component for pensions



Accounting values for equity; Total changes in pensions

## Director's Table



Total compensation similar to executives



Significantly more detail however similar information in general

## Venture Issuers



Top 5 over CDN\$150,000 including CEO and CFO



3 NEOs disclosed, No CD&A (small business issuers)



# Effective date and transition

- Effective for years ended on or after December 31, 2008
- Old form will not be repealed immediately
- Comparative figures



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