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SECURITIES ALERT

Ontario Securities Commission Provides Tips and Guidance for Reporting Insiders

How to stay compliant and avoid personal liability

The Ontario Securities Commission (OSC) recently reviewed the records of approximately 1,500 reporting insiders to assess compliance with the insider reporting requirements of the *Securities Act* (Ontario) and National Instrument 55-104 *Insider Reporting Requirements and Exemptions* (NI 55-104). In general, these require reporting insiders to file an initial insider report within 10 calendar days of becoming a reporting insider. Any subsequent insider reports reflecting changes in their holdings must be filed within 5 calendar days of such change. "Reporting insider" is defined in NI 55-104 and generally includes persons who have routine access to material undisclosed information concerning a reporting issuer and/or significant influence over the reporting issuer.

Approximately 30% of the issuers reviewed had at least one reporting insider that did not have an insider profile and failed to file insider reports on the system for electronic disclosure by insiders (SEDI). The majority of these reporting insiders were either directors or senior officers of reporting issuers or significant shareholders of reporting issuers. In certain cases, the reporting insiders who failed to file were the issuers themselves (usually for acquisitions under a normal course issuer bid (NCIB)).

In addition, approximately 65% of the issuers reviewed had at least one reporting insider with a variance of 5% or more between the balances of securities holdings reported on SEDI and on its continuous disclosure (CD) records. The majority of these reporting insiders were directors or senior officers of reporting issuers. The variances were mostly for holdings of common shares and stock options.

Some of the common reasons for the material discrepancies found were as follows:

- Unfamiliarity with the definition of "reporting insider." Some reporting insiders were not aware of their reporting obligations under NI 55-104.
- Unfamiliarity with the definition of "significant shareholder" in NI 55-104. Some reporting insiders were not aware that when an individual holds more than 10% of the outstanding shares of an issuer through a holding company, that holding company is also a "significant shareholder" under NI 55-104 and is required to have its own insider profile and file its own insider reports.
- Failure to file reports for acquisitions under a NCIB. Some issuers failed to file insider reports for acquisitions of a security of its own issue under a NCIB in accordance with NI 55-104, which requires issuers to file an insider report disclosing each acquisition under a NCIB within 10 days of the end of the month in which the acquisition was completed.
- Failure to report expiration of securities. Many reporting insiders failed to report expiration of derivative securities such as options or warrants within the required 5 day period.
- Reliance on third parties. Some reporting insiders relied on third parties to make their filings and erroneously believed that such filings had been made.

The above were considered material deficiencies by the OSC and, in approximately 70% of the issuers reviewed, at least one reporting insider was required to make a remedial filing to address a material deficiency. These reporting insiders were generally charged late filing fees (usually \$50 per day up to a maximum of \$1,000) as contemplated in 55-104.

In addition, the OSC observed the following non-material deficiencies:

- Unfamiliarity with the requirement to update insider profiles and issuer profile supplements on SEDI, particularly the requirement, when ceasing to be a reporting insider, to amend their insider profile on SEDI to reflect this fact within 10 calendar days of the change.
- Some reporting insiders were not aware their contact information was out of date.

It is quite common for reporting insiders to rely on third parties to file their insider reports. Very often, the reporting issuer performs this function. Nevertheless, responsibility for the timeliness and accuracy of insider reports remains with reporting insiders personally. Reporting insiders should make it a practice to proactively and periodically review both SEDI and their issuer's CD records to ensure their reports are being filed correctly and on time. This practice could help to avoid unexpected and often painful late filing fees.

For more than 40 years, Perley-Robertson, Hill and McDougall has provided financing solutions to a wide variety of clients, including privately held companies, public companies, reporting issuers and companies listed on NASDAQ, the Toronto Stock Exchange, the TSX Venture Exchange and various OTC and private markets. In addition to providing advice on securities registration and compliance, we have completed venture capital funding transactions, debt and/or equity private placements, initial public offerings, prospectus offerings, capital pool company listings and qualifying transactions, reverse takeovers and limited partnership fundings. Whatever your financing requirements, we are confident we can find a cost efficient solution tailored to your needs.

Contact us today and speak with a member of our securities law team.

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