

New material contract filing requirements in force March 17, 2008 will impact new and existing contracts

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National Instrument 51-102 *Continuous Disclosure Obligations* (the Disclosure Instrument) is scheduled to be amended on March 17, 2008 as a consequence of the coming into force of the proposed national prospectus rule, National Instrument 41-101 *General Prospectus Requirements*. Amendments to the Disclosure Instrument include significant amendments to the requirements to file material contracts on SEDAR, as well as to the related Companion Policy guidance of the Canadian Securities Administrators (the CSA).

Certain contracts no longer eligible for the “ordinary course of business” filing exemption

Currently, a reporting issuer is required to file a number of different types of material documents on SEDAR, including material contracts, other than those entered into in the ordinary course of business. As of March 17, 2008, the amendments will specifically provide that the following types of material contracts are not eligible for the “in the ordinary course of business” filing exemption and must be filed:

- > 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 reporting issuer’s products or services or to purchase the majority of the reporting 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 (which, pursuant to the Companion Policy, includes an agreement with the issuer and a third party or the issuer and a parent or affiliate under which the latter provides management or other administrative services to the issuer); or
- > a contract on which the reporting issuer’s business is substantially dependent.

Provisions no longer eligible to be redacted or omitted

In addition, the amendments also state that the following types of provisions in a material contract that is filed may not be omitted or redacted:

- > debt covenants and ratios in financing or credit agreements;

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- > events of default or other terms relating to the termination of material contracts; or
- > other terms necessary for understanding the impact of the material contract on the business of the reporting issuer (which, the Companion Policy Guidance advises, 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 or change-of-control clauses).

While certain provisions may still be omitted or redacted if an executive officer reasonably believes that disclosure of such provisions would be seriously prejudicial or would violate confidentiality provisions, the types of provisions listed above will nevertheless have to be disclosed. Issuers are advised to be mindful of these new requirements when negotiating confidentiality provisions. For contracts negotiated before the coming into force of these amendments the Companion Policy states that the issuer may apply for an exemption in order to avoid disclosing the types of provisions listed above, where the disclosure would violate a confidentiality provision. Such exemptions would only be required for contracts filed after March 17, 2008.

Finally, the amendments also require that where any provision is omitted or redacted, the copy of the material contract filed on SEDAR must include a description of the type of information that has been omitted or redacted immediately after the omitted or redacted provision. The Companion Policy advises that a brief one-sentence description immediately following the relevant omitted or redacted provision should generally be sufficient to satisfy this requirement.

Issuers should note that along with the amendments to the Disclosure Instrument itself, the Companion Policy has also been significantly re-written with respect to the filing of material contracts. **In addition to aspects of the Companion Policy mentioned above, it has also been amended to clarify that a material contract generally includes a schedule, side letter or exhibit referred to in the contract and any amendment to the contract.**

Impact on existing contracts that are still in force and on AIF disclosure

These amendments do not only apply to new contracts but may also impact upon contracts entered into on or after January 1, 2002 that are still in effect (**existing contracts**). If an existing contract was previously not filed on SEDAR based on the “ordinary course of business” exemption, issuers may need to reconsider whether the exemption still applies.

As mentioned above, if a contract has been negotiated (but not filed) prior to March 17, 2008 so as to prevent disclosure of certain provisions on account of confidentiality restrictions, the provisions should be reviewed to determine if exemptive relief is necessary in order to omit or redact those provisions. As well, the description provided of the issuer’s material contracts in its annual information form should also be reviewed. To the extent that these amendments have an impact on contracts that have or have not been disclosed; they may also result in new or amended annual information form disclosure.

For further information, please contact your Stikeman Elliott representative or any author listed above. A full list of our lawyers is available at www.stikeman.com