

**Multilateral CSA Staff Notice 51-338**  
*Continuous Disclosure and Prospectus Requirements Relating to  
Documents Prepared Under the U.S. Securities and Exchange Act of  
1934*

**March 7, 2013**

**Purpose**

This CSA staff notice is published by the following jurisdictions: Saskatchewan, Manitoba, Ontario, Québec, New Brunswick, Prince Edward Island, Nova Scotia, Newfoundland and Labrador, Yukon, Northwest Territories and Nunavut. This notice provides information about continuous disclosure and prospectus requirements applicable to documents that are schedules or exhibits to, or incorporated by reference in, disclosure documents prepared in accordance with the United States *Securities and Exchange Act of 1934* (the 1934 Act) and filed in Canada.

**Filing requirements under continuous disclosure rules**

***Regulation 51-102***

*Regulation 51-102 respecting Continuous Disclosure Obligations* (Regulation 51-102) has certain provisions that apply to reporting issuers that are SEC issuers (as defined in that rule).

In particular, the definition of annual information form (AIF) in Regulation 51-102 allows SEC issuers to file as an AIF an annual report under the 1934 Act on Form 10-K or Form 20-F (a 1934 annual report). A 1934 annual report may contain various schedules and exhibits, as well as documents incorporated by reference, all of which form part of the 1934 annual report.

- Staff have noted that certain SEC issuers filing a 1934 annual report in Canada do not include in their SEDAR filings all schedules and exhibits to, or documents incorporated by reference in, the 1934 annual report.
- An SEC issuer filing a 1934 annual report in Canada as its AIF must also file all schedules and exhibits to, and documents incorporated by reference in, the 1934 annual report.

Furthermore, section 11.1 of Regulation 51-102 requires a reporting issuer that is an SEC issuer to file a copy of any disclosure material that it files with, or furnishes to, the U.S. Securities and Exchange Commission (SEC) under the 1934 Act. This includes material filed as exhibits to other documents, if the material contains information that has not been included in disclosure already filed in Canada by the SEC issuer. Staff have noted that certain SEC issuers do not comply with this requirement.

***Regulation 71-102***

Part 4 of *Regulation 71-102 respecting Continuous Disclosure and Other Exemptions Relating to Foreign Issuers* (Regulation 71-102) contains certain exemptions that apply to reporting issuers that are SEC foreign issuers (as defined in that rule).

In particular, Part 4 of Regulation 71-102 allows an SEC foreign issuer to satisfy certain continuous disclosure obligations under Regulation 51-102 by filing in Canada a copy of certain disclosure documents that it files with, or furnishes to, the SEC.

- Staff have noted that certain SEC foreign issuers filing a U.S. disclosure document in reliance on an exemption in Part 4 do not include in their SEDAR filings all schedules and exhibits to, or documents incorporated by reference in, the U.S. disclosure document.
- An SEC foreign issuer filing a U.S. disclosure document in Canada in reliance on an exemption in Part 4 must also file all schedules and exhibits to, and documents incorporated by reference in, the U.S. disclosure document.

### **Incorporation by reference requirements under short form prospectus rule**

If an SEC issuer uses its 1934 annual report as an AIF in Canada, the 1934 annual report must be incorporated by reference in any short form prospectus filed under *Regulation 44-101 respecting Short Form Prospectus Distributions* (Regulation 44-101), as required by item 11 of Form 44-101F1 *Short Form Prospectus*.

- Staff have received questions from issuers as to whether it is possible not to incorporate by reference certain portions of, or schedules and exhibits to, a 1934 annual report that are not required in an AIF prepared under Form 51-102F2 *Annual Information Form*.
- The requirement to incorporate a document by reference under item 11 of Form 44-101F1 applies to the entire document, including schedules and exhibits to, and documents incorporated by reference in, the document.

### **Filing schedules, exhibits and documents incorporated by reference on SEDAR**

When an SEC issuer files a 1934 annual report or other U.S. disclosure document on SEDAR, the issuer may comply with the above requirements by filing the schedules, exhibits and documents incorporated by reference as:

- attachments to the version of the 1934 annual report or other disclosure document that is filed on SEDAR (i.e., as one single document under the appropriate document type),
- a single filing under the document type “Other” in the same SEDAR project, or
- separate filings under the document type “Other” in the same SEDAR project.

However, if annual financial statements, annual MD&A, a management information circular, a material contract or other specific continuous disclosure document required by Regulation 51-102 has already been filed under the appropriate document type in the “Continuous Disclosure” category on SEDAR, it is not necessary to re-file them with the 1934 annual report if they are incorporated by reference into that 1934 annual report.

Furthermore, an SEC issuer that files a 1934 annual report may incorporate by reference all or part of a document that was previously filed on SEDAR as part of a 1934 annual report for a previous year.

Regardless of which of the above methods is followed for a 1934 annual report or other U.S. disclosure document filed on SEDAR, we suggest that SEC issuers file a “notice to public” under the document type “Cover Letter” in the same SEDAR submission indicating where the

schedules, exhibits and documents incorporated by reference can be found (e.g., by referring to the date of filing on SEDAR).

### **Exemptive relief**

We have granted exemptive relief to certain SEC issuers that made submissions on why they should not be required to:

- file in Canada certain schedules and exhibits to, or documents incorporated by reference in, a U.S. disclosure document, or
- incorporate those materials by reference into a short form prospectus.

Staff will consider applications for exemptive relief on a case-by-case basis. If an SEC issuer seeks exemptive relief in respect of certain schedules or exhibits required to be filed with or furnished to the SEC, staff will consider a number of factors, including whether the schedules and exhibits:

- consist of documents that only have to be filed under a specific requirement of U.S. securities legislation that has no equivalent in Canada, or
- contain material information that the issuer is required to disclose under Canadian securities legislation, including Regulation 51-102 or Regulation 44-101.

### **French language requirements under Québec legislation**

If an issuer files a short form prospectus in Québec, section 40.1 of the *Securities Act* (Québec) requires that the prospectus, as well as any document required to be incorporated by reference in the prospectus, be drawn up in French or in French and English. Accordingly, any 1934 annual report or other document prepared in accordance with the 1934 Act that is incorporated by reference in a short form prospectus filed in Québec (including all schedules and exhibits to, and documents incorporated by reference in, the 1934 annual report or other document), must be drawn up in French or in French and English, unless exemptive relief from section 40.1 is granted by the Autorité des marchés financiers (AMF).

### **Questions**

Please refer your questions to any of the following people:

Marc-Olivier St-Jacques  
Analyst, Corporate Finance  
Autorité des marchés financiers  
514-395-0337, ext. 4424  
marco.st-jacques@lautorite.qc.ca

Heather Kuchuran  
Senior Securities Analyst, Securities Division  
Financial and Consumer Affairs Authority of  
Saskatchewan  
306-787-1009  
heather.kuchuran@gov.sk.ca

Gabriel Araish  
Analyst, Corporate Finance  
Autorité des marchés financiers  
514-395-0337, ext. 4414  
gabriel.araish@lautorite.qc.ca

Wayne Bridgeman  
Senior Analyst  
Manitoba Securities Commission  
204-945-4905  
wayne.bridgeman@gov.mb.ca

Matthew Au  
Senior Accountant, Corporate Finance  
Ontario Securities Commission  
416-593-8132  
mau@osc.gov.on.ca

Michael Bennett  
Senior Legal Counsel, Corporate Finance  
Ontario Securities Commission  
416-593-8079  
mbennett@osc.gov.on.ca

Nicole Stephenson  
Legal Counsel, Corporate Finance  
Ontario Securities Commission  
416-593-2349  
nstephenson@osc.gov.on.ca

Donn MacDougall  
Deputy Superintendent, Legal & Enforcement  
Office of the Superintendent of Securities  
Government of the Northwest Territories  
867-920-8984  
donald\_macdougall@gov.nt.ca

Pierre Thibodeau  
Senior Securities Analyst  
New Brunswick Securities Commission  
506-643-7751  
pierre.thibodeau@nbsc-cvmnb.ca

Katharine Tummon  
Superintendent of Securities  
The Office of the Superintendent of Securities,  
P.E.I.  
902-368-4542  
kptummon@gov.pe.ca

Abel Lazarus  
Securities Analyst  
Nova Scotia Securities Commission  
902-424-6859  
lazaruah@gov.ns.ca

Louis Arki  
Director, Legal Registries  
Department of Justice  
Government of Nunavut  
867-975-6587  
larki@gov.nu.ca

Fred Pretorius  
Superintendent of Securities  
Office of the Superintendent of Securities  
Government of Yukon  
867-667-5225  
fred.pretorius@gov.yk.ca

Douglas J. Connolly  
Superintendent of Securities  
Service Newfoundland and Labrador  
709-729-4909  
connolly@gov.nl.ca