

## **CSA STAFF NOTICE 52-315 CERTIFICATION COMPLIANCE REVIEW**

*Note: This Notice concerns an historical compliance review and contains staff guidance and references to requirements under Multilateral Instrument 52-109 Certification of Issuers' Annual and Interim Filings (MI 52-109). MI 52-109 was repealed and replaced by National Instrument 52-109 Certification of Issuers' Annual and Interim Filings effective December 15, 2008. Issuers and certifying officers are advised to refer to National Instrument 52-109 Certification of Issuers' Annual and Interim Filings and related documents for information regarding current certification requirements.*

### **Purpose of notice**

Staff of the securities regulatory authorities in British Columbia, Alberta, Manitoba, Ontario and Quebec conducted a review of compliance with the provisions of Multilateral Instrument 52-109 *Certification of Disclosure in Issuers' Annual and Interim Filings* (the Certification Instrument).

This notice outlines the results of our review and provides guidance to issuers and certifying officers in complying with the certification requirements.

### **Certification Instrument**

The Certification Instrument came into force in all CSA jurisdictions, except British Columbia and Quebec, on March 30, 2004. The Certification Instrument came into force in Quebec on June 30, 2005 and in British Columbia on September 19, 2005.

With limited exceptions, the Certification Instrument applies to all reporting issuers other than investment funds.<sup>1</sup>

Under the Certification Instrument, issuers are required to file certificates for financial years and interim periods beginning on or after January 1, 2004.<sup>2</sup> Issuers must file a separate certificate for each person who, at the time of filing the certificate, is a chief executive officer or a chief financial officer, or in the case of an issuer that does not have a chief executive officer or chief financial officer, performs similar functions to a chief executive officer or chief financial officer (each a certifying officer).<sup>3</sup>

The form of annual certificate is Form 52-109F1 (the full annual certificate). However, the Certification Instrument permits issuers to file:

- annual certificates in Form 52-109FT1 (the bare annual certificate) for financial years ending on or before March 30, 2005; and
- annual certificates in Form 52-109F1 with the certifications regarding internal control over financial reporting deleted (the modified annual certificate) for financial years ending on or before June 29, 2006.<sup>4</sup>

The form of interim certificate is Form 52-109F2. However, during certain transition periods, the Certification Instrument permits issuers to file interim certificates in Form 52-109FT2 or Form 52-109F2

<sup>1</sup> See section 1.2 and Part 4 of the Certification Instrument.

<sup>2</sup> See sections 2.1, 3.1 and 5.2 of the Certification Instrument.

<sup>3</sup> See sections 2.1 and 3.1 of the Certification Instrument.

<sup>4</sup> See sections 2.1 and 5.2 of the Certification Instrument.

with the certifications regarding internal control over financial reporting deleted.<sup>5</sup>

## **Review program**

We selected a sample of 286 issuers from across the country. This sample included:

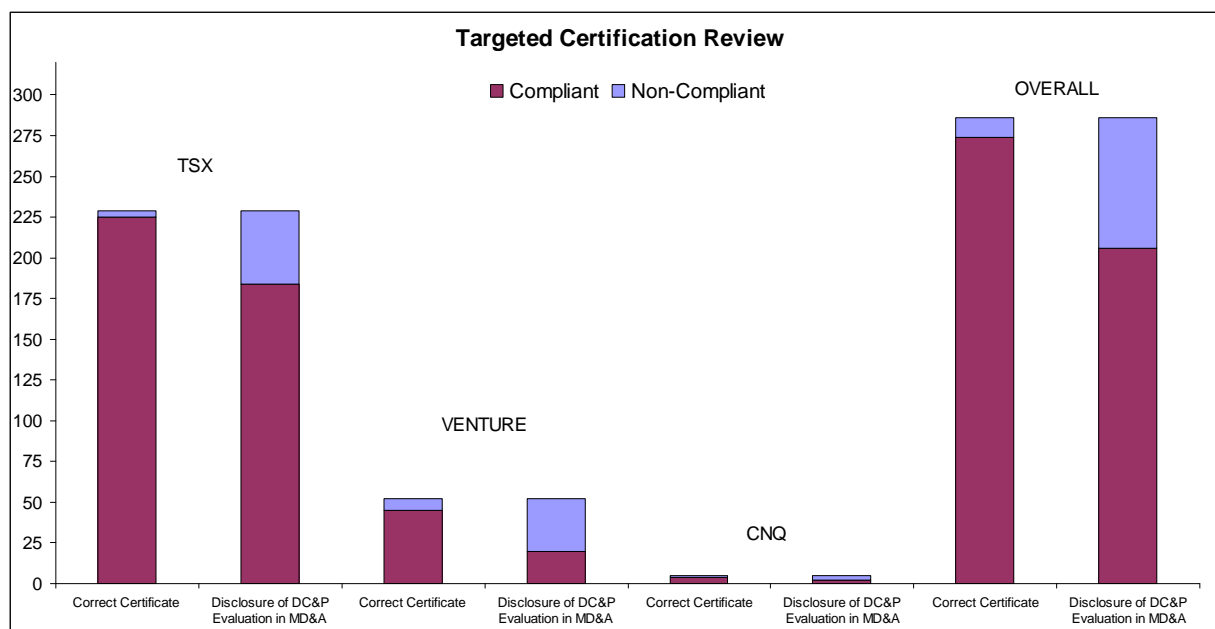
- 229 issuers (together the TSX Issuers) listed on the Toronto Stock Exchange (the TSX);
- 52 issuers (together the Venture Issuers) listed on the TSX Venture Exchange; and
- 5 issuers (together the CNQ Issuers) listed on the Canadian Trading and Quotation System Inc.

We reviewed the annual certificates of the issuers in our sample for the most recently completed financial year. Our review focused on the following two aspects of compliance with the Certification Instrument:

- whether the issuer filed the correct form of certificate, which in all cases was either the modified annual certificate or the full annual certificate;<sup>6</sup> and
- whether the issuer's annual MD&A contained disclosure regarding the certifying officers' conclusions about the effectiveness of disclosure controls and procedures, as represented in the modified annual certificate and the full annual certificate.<sup>7</sup>

## **Results of the review**

The results of the review are summarized below:



Overall, 96% of issuers in our sample filed the correct form of certificate. However, 4% of issuers filed bare annual certificates when modified annual certificates or full annual certificates were required. Most of the issuers that filed the incorrect form of certificate were either Venture Issuers, of which 87% filed the correct form of certificate, or CNQ Issuers, of which 80% filed the correct form of certificate. In contrast, 98% of the TSX Issuers filed the correct form of certificate.

<sup>5</sup> See sections 3.1 and 5.2 of the Certification Instrument.

<sup>6</sup> See sections 2.1 and 5.2 of the Certification Instrument.

<sup>7</sup> See paragraph 4(c) of the full annual certificate and the modified annual certificate.

Overall, 72% of issuers in our sample included disclosure in their annual MD&A regarding the certifying officers' conclusions about the effectiveness of disclosure controls and procedures. This included 80% of the TSX Issuers, 38% of the Venture Issuers and 40% of the CNQ Issuers. Approximately 28% of issuers in our sample, however, failed to include this disclosure in their annual MD&A. This widespread non-compliance with such a clear and basic requirement shows that many issuers are not paying adequate attention to their disclosure obligations. We are particularly concerned by the failure to include the disclosure regarding disclosure controls and procedures in the annual MD&A given that, in most cases, the certifying officers specifically represented in their certificates that they had caused the issuer to include this disclosure in the annual MD&A.

### **Our response to review results**

Although most of the issuers in our sample appeared to comply with the certification requirements, there was a significant percentage of issuers that did not comply. This shows that many issuers need to pay greater attention to their obligations under the Certification Instrument.

We will actively follow up on the deficiencies identified during our review and will take action where we decide it is appropriate.

We will conduct additional reviews of compliance by issuers with the Certification Instrument as part of our ongoing continuous disclosure review program. Issuers and certifying officers should review their certificates and annual MD&A, both those that have been filed and those that are to be filed, to ensure that they comply with the requirements of the Certification Instrument.

### **Reminders for issuers and certifying officers**

Issuers and certifying officers should note the following:

- ***Correct form of certificates:*** Issuers and certifying officers may refer to CSA Staff Notice 52-311 *Regarding the Required Forms of Certificates under Multilateral Instrument 52-109 Certification of Disclosure in Issuers' Annual and Interim Filings* dated December 16, 2005 for guidance on the correct forms of certificates. The notice is on various CSA websites, including the Ontario Securities Commission's website at the following link: [http://www.osc.gov.on.ca/Regulation/Rulemaking/Current/Part5/csa\\_20051216\\_52-311\\_not-reg-req-forms.jsp](http://www.osc.gov.on.ca/Regulation/Rulemaking/Current/Part5/csa_20051216_52-311_not-reg-req-forms.jsp)

The transition period in section 5.2 of the Certification Instrument for annual certificates is now over. Issuers and certifying officers should note that the required form of certificate for financial years ending on or after June 30, 2006 is the full annual certificate, which includes the certifications regarding internal control over financial reporting.

- ***Date of certificates:*** Certifying officers must certify that they have reviewed their issuer's financial statements, MD&A and AIF, if applicable (each a CD document).<sup>8</sup> As a result, certificates should not be dated earlier than the date of those CD documents. Certificates should be dated the date that they are filed.
- ***AIFs voluntarily filed by venture issuers:*** If a venture issuer voluntarily files an AIF for a financial year after the issuer has filed its annual financial statements, annual MD&A and annual certificates for that financial year, it must file new annual certificates for that financial year separately but concurrently with the filing of its AIF.<sup>9</sup>

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<sup>8</sup> See paragraph 2 of the full annual certificate and the modified annual certificate.

<sup>9</sup> See section 2.2 of the Certification Instrument.

- ***Disclosure in the issuer's annual MD&A:*** Instruction to Item 1.15 of Form 51-102F1 *Management's Discussion & Analysis* states that "Your company may also be required to provide additional disclosure in its MD&A as set out in Form 52-109F1 *Certification of Annual Filings* and Form 52-109F2 *Certification of Interim Filings*". In the modified annual certificate, certifying officers are required to certify that they have evaluated the effectiveness of the issuer's disclosure controls and procedures as of the end of the period covered by the annual filings and have caused the issuer to disclose in the annual MD&A their conclusions about the effectiveness of the disclosure controls and procedures as of the end of the period covered by the annual filings based on such evaluation. Issuers and certifying officers should ensure that their conclusions about the effectiveness of disclosure controls and procedures are in fact disclosed in the annual MD&A.
- ***Refiled continuous disclosure documents:*** An issuer may refile a CD document for a financial period. If the original CD document was required to be certified, then the revised CD document should be certified under the same form of certificate that was required to be filed for the original CD document. As a result, the issuer must file new certificates for that financial period separately but concurrently with the filing of the revised CD document.<sup>10</sup>

## **Questions**

Please refer your questions to any of the following individuals:

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<sup>10</sup> See section 2.2 of the Certification Instrument.

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