Cassels

Heightened Insider Trading Risks

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The COVID-19 pandemic has created novel challenges for market participants. In this rapidly changing environment, it is imperative that directors and officers of public companies be mindful of their insider trading responsibilities and take an overly conservative approach to compliance.

Insider trading regulations have been adopted across Canada in furtherance of the fundamental premise that all persons should have equal access to material information when trading in securities. In particular, Section 76 of the *Securities Act* (Ontario) provides, amongst other matters, that anyone in a "special relationship" with an issuer is prohibited from trading or "tipping" with respect to securities of an issuer if they have knowledge of a material fact or material change with respect to the issuer that has not been generally disclosed. The definition of "special relationship" is broad, and includes the following:

(a) an insider, affiliate or associate of (i) the issuer; (ii) a party proposing or considering whether to make a take-over bid for the issuer; or (iii) a party proposing or considering whether to enter into a business combination with the issuer or acquire a substantial portion of its property;

(b) a party engaging or considering whether to engage in any business or professional activity with the issuer or a party described in (a)(ii) or (iii) above;

(c) a director, officer or employee of: (i) the issuer; (ii) a subsidiary of the issuer; (iii) a party directly or indirectly controlling the issuer; or (iv) a party described in (a)(ii) or (ii) or (b) above; and

(d) a party that learns of a material fact or material change from any other party in a "special relationship" with the issuer, and who knows or ought reasonably to have known of the existence of such a relationship.

In the United States, the co-directors of the United States Securities and Exchange Commission (SEC) Division of Enforcement recently issued a statement emphasizing the SEC's commitment to ensuring market integrity during this global health crises and reminding market participants of their insider trading obligations.[1] While Canadian regulators have not yet published any specific guidance related to insider trading in the context of COVID-19, the SEC statement is instructive for participants on both sides of the border.

The SEC noted that undisclosed material information during the COVID-19 crises "may hold even greater value than under normal circumstances." For example, operations which have been curtailed due to the pandemic may have an impact not only an issuer's current quarter, but also on its future condition due to seasonal changes, availability of skilled labour, availability of financing and permit expiration, amongst other

matters. These exponential consequences may ultimately lead to adjustments to an issuer's operational and development plans, thereby heightening the value of present-day undisclosed material information.

Further, the SEC noted that a greater number of people may have access to undisclosed material information during this period than in less challenging times. For example, the increase in the number of employees working from home may raise concerns about potential access to information by family members and others sharing remote working environments. In addition, certain issuers may currently avail themselves of extensions to usual filing deadlines for financial statements and MD&A pursuant to Ontario Instrument 51-502 - *Temporary Exemption from Certain Corporate Finance Requirements* (Instrument 51-102),[2] which was adopted in response to the pandemic. As a result, material undisclosed information which would otherwise be disseminated pursuant to such filings may need to be secured by issuers for a longer period of time than usual during the COVID-19 crises, thereby further increasing the risk of inadvertent disclosure.

With these heightened risks in mind, issuers should consider the following in order to better secure their material undisclosed information and avoid inadvertent insider trading during this period:

- Take this opportunity to review and update insider trading policies, codes of ethics and disclosure controls and procedures as necessary;
- Impose management/insider blackouts on trading for companies availing themselves of emergency extensions to filing deadlines, in accordance with Instrument 51-102 and Part 9 of National Policy 11-207 – *Failure-to-File Cease Trade Orders and Revocations in Multiple Jurisdictions*;
- Cease purchases under normal course issuer bids if applicable;
- Ensure that employees and others are aware of insider trading regulations and policies, including familiarity with what constitutes undisclosed material information and the broad definition of "special relationship"; and
- Remind employees to be aware of cybersecurity issues to protect against hacking.

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[1] See Statement from Stephanie Avakian and Steven Peikin, Co-Directors of the SEC's Division of Enforcement, Regarding Market Integrity, US Securities and Exchange Commission (Mar. 23, 2020), https://www.sec.gov/news/public-statement/statement-enforcement-co-directors-market-integrity.

[2] See Instrument 51-102, https://www.osc.gov.on.ca/en/SecuritiesLaw_sn_20200323_51-502_general-order-temporary-exemption-certain-corporate-finance-requirements.htm.

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