

IIROC NOTICE

Rules Notice Guidance Note

UMIR

Please distribute internally to:
Legal and Compliance
Trading

Contact:

Timothy Ryan
Director, Market Regulation Policy
Telephone: 416.646.7266
Fax: 416.646.7265
e-mail: tryan@iiroc.ca

10-0121
April 28, 2010

Guidance on “Insider” and “Significant Shareholder” Markers

Summary

This Rules Notice provides guidance on specific questions relating to the requirement under the Universal Market Integrity Rules (“UMIR”) to mark an order entered on a marketplace to purchase or sell a security for the account of a person who is an “insider” or “significant shareholder” of that security. This guidance reflects the adoption, effective April 30, 2010, of a new insider reporting regime by the Canadian Securities Administrators (“CSA”) as set out in National Instrument 55-104 - *Insider Reporting Requirements and Exemptions* (“NI 55-104”).¹

This Rules Notice repeals and replaces, effective as of April 30, 2010, guidance previously issued by Market Regulation Services Inc. as Market Integrity Notice 2006-014 – Guidance Note – “Insider” and “Significant Shareholder” Markers (June 16, 2006) and Market Integrity Notice 2007-016 – Guidance Note – Specific Questions Related to “Insider” Marking Requirements (August 10, 2007).

Background

Rule 6.2 of UMIR requires that each order for the purchase or sale of a particular security

¹ (2010) 33 OSCB 645.



entered on a marketplace for the account of an “insider”² or “significant shareholder”³ of the issuer of that security shall contain a designation acceptable to the Investment Industry Regulatory Organization of Canada (“IIROC”). These order designations, “IA” for insiders and “SS” for significant shareholders, are commonly referred to as the “Regulation ID Order Markers”. The Regulation ID Order Markers enable IIROC to monitor the trading activity on Canadian marketplaces of insiders and significant shareholders. Such monitoring allows IIROC to assist securities regulatory authorities by providing initial detection of possible violations of securities legislation principally related to insider trading.

Questions and Answers

The following is a list of the most frequently asked questions regarding the UMIR obligations relating to the use of Regulation ID Order Markers and the response of IIROC to each question:

1. Must every order entered on a marketplace for an “insider” of the particular security contain a Regulation ID Order Marker?

No. An order only needs to be marked with a Regulation ID Order Marker if the insider is also:

- **a “reporting insider”⁴ as defined in NI 55-104; and**

² Rule 1.1 of UMIR defines the term “insider” as a person who is an insider of an issuer for the purpose of applicable securities legislation. For further clarification, reference must be made to the securities legislation of every jurisdiction in which the issuer is a reporting issuer or equivalent. Reference should be made to CSA Staff Notice 55-308 – *Questions on Insider Reporting*.

³ Rule 1.1 of UMIR defines the term “significant shareholder” as a person who holds separately, or in combination with any other persons, more than 20 per cent of the outstanding voting securities of an issuer. The term “significant shareholder” was also adopted in NI 55-104 for the distinct purpose of defining a category of “reporting insider”, namely a person or company with ownership, control or direction of 10 per cent or more of the voting rights in an issuer’s securities. For clarity, NI 55-104 does not change order marking obligations arising under Rule 6.2 of UMIR the order of a person who holds separately, or in combination with any other persons, more than 20 per cent of the outstanding voting securities of an issuer must contain the Regulation ID Order Marker designation “SS”. IIROC intends to propose an amendment to change the defined term in UMIR to avoid the possibility of confusion between the definition of “significant shareholder” under UMIR and NI 55-104.

⁴ See s. 1.1 of NI 55-104. Generally, a person or company would be considered to be a “reporting insider” under NI 55-104 if the person or company is:

- the CEO, CFO, COO and the directors of the reporting issuer, a significant shareholder of the reporting issuer or a major subsidiary of the reporting issuer;
- a person or company that is responsible for a principal business unit or function of the reporting issuer;
- a person or company that performs functions similar to those described above;
- a person or company that has beneficial ownership of, or control or direction over, whether direct or indirect, or any combination of beneficial ownership and control or direction, of more than 10 per cent of the voting rights in an issuer’s securities; and
- any other insider who has both access to undisclosed material information and can exercise “significant power or influence” over the business, operations, capital or development of the reporting issuer.

In the Companion Policy to NI 55-104, the CSA states that the determination as to whether a person is a “reporting insider” by virtue of both access to undisclosed material information and an ability to exercise “significant power or influence” over the business, operations, capital or development of the reporting issuer requires the exercise of reasonable judgement as to whether the insider exercises, or has the ability to exercise, influence over the reporting issuer which is comparable to the influence exercised by the other categories included within the definition of “reporting insider”.



- **they are not otherwise exempt from insider reporting obligations under the applicable securities legislation in respect of the particular transaction.**

To establish whether a particular transaction is exempt from insider reporting obligations, reference must be made to the applicable securities regulation, including, but not limited to:

- NI 55-104 which sets out exemptions from “insider reporting requirements”, as defined, including acquisitions under automatic securities purchase plans (for example, employee stock purchase plans and dividend reinvestment plans) and certain issuer events (such as stock splits); and
- NI 62-103 which provides an exemption, under specified conditions, for certain “eligible institutional investors” and others from some of the insider reporting obligations set out in NI 55-104.

2. May a Participant rely on “know your client” information when establishing whether an order must contain a Regulation ID Order Marker?

Yes, a Participant may rely on the “know your client” information which the Participant has collected from the account holder, provided such information is “current” in accordance with IIROC’s rules relating to the periodic reviews and updates of client information.⁵ Having said that, IIROC would expect Participants to review, by July 31, 2010, the status of client accounts previously identified as being on behalf of an “insider” of a reporting issuer in order to determine if the account holder is a “reporting insider” under NI-55-104 and for which orders would have to continue to be marked with a Regulation ID Order Marker for the purposes of UMIR.⁶

When acting for an institutional client, a Participant will not be expected to inquire, prior to accepting or executing an order, whether the institutional client owns or has direction or control over more than 10 per cent or 20 per cent of the voting rights in an issuer’s securities. However, if the Participant has actual knowledge that a client, including an institutional client, does exceed these levels of ownership or control of an issuer (for example, through the Participant’s monitoring of news releases required under “early warning” requirements), the Participant will be under an obligation to ensure the proper marking of any order by that client in securities of that issuer, subject to any applicable exemptions.

3. Does it matter how an order is marked if the reporting insider fits into more than one of the categories requiring a Regulation ID Order Marker?

⁵ Market Integrity Notice 2002-012 – *Guidance - Regulation ID Order Markers* (July 9, 2002).

⁶ The provision of additional time for a Participant to review the status of its client’s accounts does not vary or alter in any way the requirement of the client to comply with the insider reporting requirements under NI 55-104 as of April 30, 2010.



Yes. The order of a person who is an “insider” who holds separately, or in combination with any other persons, more than 20 per cent of the outstanding voting securities of an issuer should contain the most restrictive applicable Regulation ID Order Marker, which in this case would be the “SS” or “significant shareholder” designation.

4. *Must an order contain a Regulation ID Order Marker if it is for the account of a person who is exempt under the applicable securities regulation from aggregating its holdings for the purposes of “early warning requirements” or “control block distributions”?*

Not necessarily. For example, if a person holds securities in separate business units and is, therefore, granted relief from aggregating securities owned or controlled for the purposes of determining whether a transaction involving those securities constitute a “control block distribution” or give rise to “early warning requirements” under the applicable securities legislation, the order may not need to contain a Regulation ID Order Marker **provided** the person is also exempt from insider reporting requirements. To establish whether a person is granted relief from the aggregation requirement, reference should be made to Part 5 of NI 62-103. To determine if a particular transaction is exempt from insider reporting requirements, reference must be made to the applicable securities legislation, including Part 9 of NI 62-103.

5. *Should an order for the account of a spouse of, or other persons related to, a reporting insider contain a Regulation ID Order Marker?*

Not necessarily. The order should only contain the appropriate Regulation ID Order Marker if the reporting insider has “control or direction” over the securities in the account of the spouse or related person. Reference should be made to the Companion Policy to NI 55-104 for guidance as to when a “reporting insider” is considered to have “control and direction” over securities.

6. *Do purchases under a normal course issuer bid need to be marked “insider”?*

Yes. Under Part 7 of NI 55-104, an issuer is subject to an alternative reporting requirement when acquiring securities of its own issue under a normal course issuer bid (“NCIB”). The issuer must file an insider report disclosing each acquisition of the securities under the NCIB within 10 days following the month end in which the acquisition occurred. As such, orders entered onto a marketplace for the account of the issuer under a NCIB bid must be marked with the Regulation ID Order Marker for an “insider”.

7. *May an order which must contain a Regulation ID Marker be bundled together with orders for persons who are not reporting insiders?*



Yes. From the perspective of facilitating an accurate audit trail as required by Rule 10.11 of UMIR, IIROC generally discourages the bundling of such orders. Nonetheless, if a Participant or Access Person enters a bundled order on a marketplace, the entire bundled order must be marked with the most “restrictive” applicable Regulation ID Order Marker. In the case of an order for an “insider” or “significant shareholder” that is bundled with a non-“insider” or non-“significant shareholder” order, the entire bundled order is to be marked “insider” or “significant shareholder”, as appropriate. The obligation to mark a bundled order with the most restrictive applicable designation ensures that orders are not intentionally bundled to avoid marking an order with the applicable Regulation ID Order Marker.

A Participant or Access Person that has entered a bundled order that has executed in whole or in part must file with IIROC a “*Regulatory Marker Correction Form*” indicating the volume of the trades which were applicable to persons other than insiders and significant shareholders. The *Regulatory Marker Correction Form* should be filed as soon as practicable after the execution of the trade and, in any case, by the later of 5:00 p.m. and 15 minutes following the close of trading on the marketplace on which the trade was executed. For details on the use of the Regulatory Marker Correction Form in these circumstances see “Specific Guidance on the Reporting of Order Marker Correction Involving Insiders and Significant Shareholders” in IIROC Notice 08-0050 – Rules Notice – Guidance Note – UMIR – *User Guide for the Regulatory Marker Correction Form* (July 30, 2008).

8. *Is there a requirement to mark an order by an issuer to purchase securities of the issuer for a “non-independent” employee stock purchase plan or other similar plan”?*

Yes. Under applicable provisions of the Toronto Stock Exchange and TSX Venture Exchange rules and policies,⁷ a trustee or other purchasing agent (the “Plan Trustee”) for a pension, stock purchase plan or other plan in which employees or shareholders of a listed company may participate is deemed to be making an offer to acquire securities on behalf of the listed issuer if the Plan Trustee is deemed to be “non-independent”. A Plan Trustee is considered to be “non-independent” if the issuer, directly or indirectly, has control over the time, price, amount or manner of purchases or the choice of the broker through which the purchases are to be made. If a Plan Trustee is deemed to be “non-independent”, an order entered onto a marketplace for the account of the issuer must contain the Regulation ID Order Marker for an “insider”.

If a Plan Trustee is deemed to be “independent” under applicable exchange rules and policies, orders entered onto a marketplace do not need to contain a Regulation ID Order Marker. Generally, a Plan Trustee would be considered independent if the issuer

⁷ Reference should be made to TSX Rule 6-501 and TSXV Policy 5.6 for applicable procedures and policies. Canadian National Stock Exchange (“CNSX”) and does not have rules governing purchases by an issuer of its own securities on the CNSX marketplace.



is not making discrete investment decisions for acquisitions under such plan or the acquisitions are established by written formula or criteria set out in a plan document.