



A renewed focus on NI 52-109

What this means to you

Introduction

For the past three years, public companies have been certifying their disclosure controls and procedures (DC&P) and internal controls over financial reporting (ICFR) under National Instrument 52-109 (NI 52-109) with relatively light regulatory enforcement. However, this appears to be changing as securities regulators are renewing their focus on NI 52-109 following the recent Canadian Securities Administrators (CSA) report on certification compliance which found issues with over 50% of companies' disclosure. Subsequently, the Ontario Security Commission (OSC) has begun performing in-depth reviews of NI 52-109 programs including extensive documentation reviews and interviews with certifying officers and members of the audit committee. In cases where companies do not measure up to regulatory expectations, the OSC will have the authority to initiate enforcement proceedings.

Securities regulatory activity

Staff Notice 52-327

The recent certification compliance report summarized the results of the CSA desk review of ICFR and DC&P disclosure and key findings include:

- Companies with restatements were not disclosing material weaknesses or were concluding that controls were effective when remediation had not taken place
- Companies were not disclosing changes in controls that were made to remediate material weaknesses
- Misleading disclosure was provided in the MD&A, such as qualifying conclusions that controls were effective (e.g. effective "but for a weakness in . . .")
- MD&A disclosure was incomplete or lacked conclusions on ICFR and/or DC&P
- Some companies amended the wording of the certificates

Although the CSA described its findings as a "moderate improvement" from 2009, they were only satisfied with disclosure for less than half the companies reviewed. This staff notice includes examples of appropriate and inappropriate disclosure and can be found at: www.osc.gov.on.ca/documents/en/Securities-Category5/csa_20101015_52-327-cert-comp-update.pdf.

On-site regulatory reviews

The scope of these reviews appears to include both disclosure controls and internal controls over financial reporting, and involves a review of a significant volume of information, including documentation to support the following:

- scoping and risk assessment
- design of controls
- testing of controls for operating effectiveness
- evaluation and assessment of control deficiencies
- governance over ICFR and DC&P efforts including board and audit committee oversight

At these on-site regulatory reviews, the OSC interviews certifying officers and the audit committee chair, or equivalent. Among other things, these reviews also focus on:

- The control environment such as the code of ethics and whistle-blower line
- How management keeps abreast of regulatory developments
- Sufficiency and qualifications of staff
- Data integrity
- Fraud risk including risk of management override
- Segregation of duties
- How service organizations are being addressed

Next Steps

While these regulatory reviews are relatively nascent, parallels can be drawn to the OSC's well-established reviews of financial services firms such as portfolio and investment fund managers. Depending on the issuer's compliance with regulations, in particular NI 52-109 and its Companion

Policy, the OSC could take the following possible actions:

- No action where regulatory guidance is followed
- Requirement for prospective action to address particular issues
- Referral to enforcement in cases of serious regulatory breach

How you should address regulatory risk

To avoid potential regulatory breaches, companies should re-evaluate their ICFR and DC&P programs now to ensure that they are following the guidance laid out in NI 52-109 and its Companion Policy and confirm that their programs are up-to-date and relevant. Companies should ensure that all major areas of the guidance are addressed, updated on an on-going basis, and appropriately evidenced to support management's conclusions over the design and operation of controls, including:

- Selecting an appropriate control framework and applying it
- Performing a top down risk assessment
- Ensuring DC&P and ICFR are designed effectively and documented
- Addressing fraud risk
- Performing and documenting testing
- Evaluating weaknesses in DC&P and ICFR
- Addressing service organizations and use of specialists
- Identifying and reporting changes in ICFR
- Ensuring oversight by the board and audit committee

How PwC can help

Our Canadian Risk practice has extensive experience assisting a wide variety of companies in meeting the requirements of NI 52-109 and Sarbanes-Oxley. We work with large and small companies to establish and implement ICFR and DC&P programs, providing support to certifying officers, boards and audit committees.

We perform "52-109 Health Checks" for companies who want to know how they measure up. Our Health Check program draws on our significant experience of leading practices in ICFR and DC&P, including the practical application of regulatory standards and guidance. This includes identifying areas of regulatory risk (e.g. where you may be missing components) as well as areas where programs can be optimized and made more efficient. We provide observations and recommendations that are tailored to your company's size and operations and that can be implemented in practice.

For more details on our NI 52-109 Health Check Program and our other internal controls services, please contact us.

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