

**NOTICE OF PROPOSED CHANGES TO
PROPOSED NATIONAL INSTRUMENT 45-101
RIGHTS OFFERINGS, COMPANION POLICY 45-101CP
AND FORM 45-101F AND RESCISSION OF CERTAIN POLICIES**

Substance and Purpose of Proposed National Instrument and Companion Policy

On November 21, 1997 the Ontario Securities Commission together with certain other members of the Canadian Securities Administrators (the "CSA") published proposed National Instrument 45-101 (the "Instrument"), proposed Companion Policy 45-101CP (the "Policy") and proposed Form 45-101F (the "Form") and the Ontario Securities Commission published notice of its intention to rescind certain policies. The CSA received several comments on the Instrument, Policy and Form and is today republishing them. The republication includes proposed amendments to the Instrument and Policy relating to changing the period during which a rights offering may remain open, expanding the list of persons or companies who may act as depositories, deleting the prohibition on rights offerings priced above the market, redefining the restrictions on certain securityholders' ability to take up under a rights offering in excess of their current proportionate share if the rights offering is priced above the market or if there is no market from which to derive a price for the underlying securities, as well as some minor drafting and definitional changes.

The republication includes proposed changes to the Form regarding the amount of disclosure relating to the issuer to be included and deleting the certificate.

The substance and purpose of the Instrument is to prescribe the basis on which an issuer may, by way of a rights offering, sell additional securities of its own issue to holders of its securities either by way of a prospectus or in reliance on the rights offering prospectus exemptions found in Canadian securities legislation. In order to utilize the exemptions in the Canadian securities legislation, the issuer must send to the Canadian securities regulatory authority or regulator (the "reviewing authority") information about the securities that it proposes to offer which the reviewing authority determines to be acceptable. A reviewing authority may object to the use of the rights offering prospectus exemption and rights offering registration exemption.

The Instrument requires that issuers seeking to use the rights offering prospectus exemption provide the reviewing authority in a jurisdiction in which the rights offering is effected with information about the issuer, including information previously delivered to the issuer's securityholders but not available through SEDAR, to permit the reviewing authority to confirm that securityholders have been provided with current information about the affairs of the issuer and are not in need of a prospectus for the rights offering. This information will allow the reviewing authorities to assess if the rights offering is being made in compliance with the Instrument and that the terms of the offering are clearly stipulated, and to ensure that the offering has not been structured for the purpose of allowing an insider to increase its proportionate ownership interest in the issuer's securities. The Instrument also requires issuers to provide information to securityholders in accordance with the Form prescribed.

The Instrument provides that the rights offering prospectus exemption is unavailable in certain circumstances including where:

- (a) as a result of the exercise of the rights under the offering and the exercise of rights issued within the previous 12 months there would be an increase of more than 25 percent in the number, or, in the case of debt, the principal amount, of the outstanding securities of the class to be issued upon the exercise of the rights;
- (b) the rights are exercisable for securities of a class which were not previously outstanding;
- (c) there is an agreement to compensate dealers in a manner which encourages solicitation of the exercise of rights by holders of rights that were not securityholders of the issuer immediately prior to the rights offering;
- (d) there is a minimum amount of proceeds necessary to conduct the purpose for which the funds are being raised and the offering is open for more than 45 days;
- (e) the issuer is not a reporting issuer in any jurisdiction and the offering is open for more than 60 days; and
- (f) the issuer is a reporting issuer in any jurisdiction and the offering is open for more than 90 days.

Finally, the Instrument advises issuers that approval by the reviewing authority of the listing representations required in the Form will be evidenced by the acceptance of the rights offering circular, and that the approval by the reviewing authority of listing representations contained in a prospectus will be evidenced by a receipt for the prospectus.

The purpose of the Policy is to provide information on the factors that the reviewing authorities will consider in determining whether to object to the offering proceeding under the rights offering prospectus exemption or in refusing to issue a receipt for a prospectus used for a rights offering. The Policy also provides guidelines relating to a number of provisions found in the Instrument including how to calculate certain numerical thresholds, the various types of evidence that may be used to establish that a person or company supplying a stand-by commitment will be positioned to meet its obligations under the commitment, and the use of the rights offering registration exemption independently from the rights offering prospectus exemption. The Policy also provides notice that the issuer may, in certain circumstances, need to implement a mechanism to "claw back" securities subscribed for by insiders.

Finally, the Policy cautions issuers that excluding securityholders resident in a particular jurisdiction, if there is sufficient connection to the jurisdiction, may cause the Canadian

securities regulatory authority in the jurisdiction to consider taking action against the issuer and its directors and officers.

The Instrument, Policy and Form are initiatives of the CSA. The Instrument is expected to be adopted as a rule in British Columbia, Alberta, Manitoba, Ontario and Nova Scotia, as a Commission regulation in Saskatchewan and as a policy in all other jurisdictions represented by the CSA. The Policy is expected to be implemented as a policy in all of the jurisdictions represented by the CSA. The Instrument and Policy are substantially similar to administrative practices and policies of the Canadian securities regulatory authorities including Uniform Act Policy Statement No. 2-05, British Columbia Securities Commission Policy Statement No. 3-05, Alberta Securities Commission Policy Statement No. 5.2 and Ontario Securities Commission Policy Statement No. 6.2, which they replace.

The Instrument and Policy implement, in part, the recommendation of the CSA Task Force on Operational Efficiencies that Canadian securities regulatory authorities increase the co-ordination of regulation, including standardization of requirements.

Terms used in the Policy that are defined or interpreted in the Instrument or a definition instrument in force in the jurisdiction should be read in accordance with the Instrument or definition instrument, unless the context otherwise requires.

Summary of the Instrument, Policy and Form

Under Canadian securities legislation the issuer must send to the reviewing authority information about the securities offered under the rights offering. A reviewing authority may object to the use of the rights offering prospectus exemption and rights offering registration exemption.

For rights offerings made in reliance on a rights offering prospectus exemption, the most significant change to the regulatory regime is the requirement to prepare and deliver to the reviewing authorities an offering circular in accordance with the Form. The Form must be delivered initially in draft form to the reviewing authorities in the jurisdictions in which the rights offering is effected together with various documents that will allow the reviewing authorities to determine that the use of the rights offering prospectus exemption is appropriate in the circumstances.

For rights offerings made under a prospectus, the most significant change to the regulatory regime is the codification of the requirement that the prospectus qualify the distribution of securities issuable upon the exercise of rights as well as the rights issued under the prospectus.

The Instrument also harmonizes the practice of some of the Canadian securities regulatory authorities on stand-by commitments, the additional subscription privilege and the appointment of a depository for a rights offering.

The Instrument prohibits an issuer from filing a prospectus or an amendment to a prospectus or relying on the rights offering prospectus exemption for a rights offering if the issuer or the rights offering do not comply with the requirements of the Instrument.

The Instrument provides that the rights offering prospectus exemption is unavailable in certain circumstances. These circumstances include:

- (a) as a result of the exercise of the rights under the offering and the exercise of rights issued within the previous 12 months there would be an increase of more than 25 percent in the number, or, in the case of debt, the principal amount, of the outstanding securities of the class to be issued upon the exercise of the rights;
- (b) the rights are exercisable for securities of a class which were not previously outstanding;
- (c) there is an agreement to compensate dealers in a manner which encourages solicitation of the exercise of rights by holders of rights that were not securityholders of the issuer immediately prior to the rights offering;
- (d) there is a minimum amount of proceeds necessary to conduct the purpose for which the funds are being raised and the offering is open for more than 45 days;
- (e) the issuer is not a reporting issuer in any jurisdiction and the offering is open for more than 60 days; and
- (f) the issuer is a reporting issuer in any jurisdiction and the offering is open for more than 90 days.

The Instrument provides an exemption from compliance with it if there is minimal connection of the issuer to the jurisdiction or to Canada based on number of securityholders and percentage of capital held by securityholders.

Finally, the Instrument advises issuers that the approval of the reviewing authority to the listing representations required in the Form will be evidenced by the acceptance of the rights offering circular, and the approval of the reviewing authority to listing representations in a prospectus will be evidenced by the prospectus receipt.

The Policy sets out some factors that the reviewing authorities will consider in determining whether to object to the offering proceeding under the rights offering prospectus exemption.

The Policy also provides guidelines as to how certain thresholds are to be calculated as well as the types of evidence suggested to establish the financial ability of a person or company supplying a stand-by commitment to meet its obligations under the commitment.

The Policy advises that the regulators may, in certain circumstances, refuse to issue a receipt for a prospectus under which rights are issued if the rights are exercisable into convertible securities and the securities underlying the convertible securities are not qualified by the prospectus.

The Policy also provides notice of the position of the Canadian securities regulatory authorities on using the rights offering registration exemption independently from the rights offering prospectus exemption.

The Policy provides notice that the issuer may need a mechanism such as an escrow to "claw back" securities subscribed for by insiders.

The Policy advises issuers that excluding securityholders resident in a particular jurisdiction, if there is sufficient connection to the jurisdiction, may cause the Canadian securities regulatory authority in the jurisdiction to consider taking action against the issuer and its directors and officers.

The Form requires disclosure of the name of the issuer, a summary of the offering, a brief description of the business of the issuer, details of the rights and securities being offered, details of the registration and delivery of security certificates under the offering, identification of the depository, subscription agent and the transfer agent, a description of how to exercise the rights, a description of any stand-by commitments and escrowing of proceeds and depository arrangements, identification of the managing dealer and soliciting dealers, information relating to ownership or changes of ownership of the securities of the issuer as well as the use of proceeds and statements relating to transferability of rights. The Form also requires that certain statutory rights be set out.

Related Instruments

The Instrument, Policy and Form are related. The Policy is related, in Ontario, to subparagraph 35(1)14(i) and subclause 72(1)(h)(i) of the *Securities Act* (Ontario)(the "Ontario Act") and Ontario Securities Commission Rule 45-501 - *Exempt Distributions*.

The CSA, other than the CVMQ, will be publishing shortly for comment a proposed multi-lateral instrument that would harmonise resale requirements for securities issued under exemptions, including the rights offering exemption. Under this proposed Instrument, broader relief is expected to be provided for re-sales of securities of issuers that SEDAR filers.

Summary of Written Comments Received by the CSA

The CSA received five comments on the original publication of the Instrument, Policy and Form. The commentators were:

- (i) McDermid St. Lawrence Securities Inc.
- (ii) Thomson Kernaghan & Co. Ltd.

- (iii) Davies, Ward & Beck
- (iv) Osler, Hoskin & Harcourt
- (v) Stikeman, Elliott

The commentators were generally positive with respect to the Instrument and Policy. Generally speaking, the concept of harmonization to the extent possible was acknowledged as a positive step. However, some of the commentators were concerned that there is not complete harmonization in the Instrument which may lead to problems for issuers using the Instrument in jurisdictions in which there is disharmony.

Three of the commentators were concerned about the provision stating that an issuer cannot rely on the rights offering prospectus exemption to issue rights that are exercisable into a class of securities which are not already in existence.

This has always been the position of staff of the Canadian securities regulatory authorities and is not a new restriction on the use of the rights offering prospectus exemption. The provision in most of the local policy statements relating to the denial of the use of the statutory exemption if capital was increased by more than 25% of a particular class of securities is evidence of that position. The provision is in line with the underlying policy of the rights offering exemption in that it should not be used as a major financing initiative. Since the position has been in effect for several years and has not caused grave concerns with issuers in respect of the use of the rights offering prospectus exemption, the CSA has determined not to make any changes to that staff position.

Two of the commentators suggested that the 30 day offering period for best efforts offerings was too short and suggested a 45 day period.

The CSA has considered this comment and has determined to increase the offering period for best efforts offerings to 45 days. In light of this change, the CSA has also changed the offering period to 60 days for non-reporting issuers.

One commentator suggested that the requirement that issuers provide such information as the Commission may request was too broad.

This provision basically reflects the language in most of the Canadian securities legislation relating to whether or not the particular securities regulatory authority would object to the use of a rights offering exemption. In light of this, the CSA has determined not to make a change in this provision.

One commentator suggested that the requirement to send information to shareholders generally rather than just to securityholders entitled to receive rights was an onerous provision on the issuer.

The CSA has determined that the requirement was onerous in light of the fact that all of the information that is required to be delivered is generally continuous disclosure documents which should be available through SEDAR.

One commentator raised a concern over the practicality of a four day review for amendments while two suggested that the blanket prohibition on amendments to the terms was inappropriate.

Given that rights have only two specific elements on which to price their trading in the market (i.e. the subscription price and the expiry date), it was determined by the CSA that a change to these two provisions could adversely affect holders who had previously traded the securities on the basis of that market information. Therefore the CSA will retain its position that amendments to the terms of the rights offering are not permitted and that an issuer wishing to abandon a rights offering and commence a new rights offering based on different terms should do so in that way. The timing for review has been shortened to two days to accord with the provisions in Canadian securities legislation in Quebec.

One commentator suggested that maximum pricing should not be regulated.

The CSA has considered this position and determined that, so long as insiders do not take more than their pro rata portion of the offering, above market pricing will not be prohibited. The National Instrument has been amended to reflect this position.

One commentator suggested that evidence of the financial resources of a standby commitment is unnecessary.

The CSA disagree with this position as the failure of the standby commitment could affect the securityholders who exercise their rights on the basis of this commitment being available.

Two commentators suggested that obtaining information on who is a "related party" under the National Instrument is a difficult task.

The CSA realizes that this is a difficult task and has changed this test to insiders.

Finally, one commentator was concerned that the certificate requirement on the Form was too onerous.

The CSA has determined to delete the certificate requirement.

In respect of the Policy, one commentator suggested expanding to all jurisdictions the provision relating to junior issuers using registrants to act as depository.

The CSA has considered this position and has accepted it. The National Instrument has been revised accordingly.

One commentator suggested that aggregation relief should be provided to certain "related parties" to permit them to increase their pro rata share in a rights offering in certain circumstances.

The CSA has considered this and has changed the test to insiders so the comment is no longer applicable.

Several commentators provided drafting comments, some of which have been reflected in the Instrument and others which have not.

Regulations to be Revoked

The adoption of the Instrument as a rule does not require any regulation to be revoked.

Comments

Interested parties are invited to make written submissions with respect to the proposed changes to the Instrument and Policy. Submissions received by November 10, 2000 will be considered.

Submissions should be sent to all of the Canadian securities regulatory authorities listed below in care of the Ontario Securities Commission, in duplicate, as indicated below.

British Columbia Securities Commission
Alberta Securities Commission
Saskatchewan Securities Commission
The Manitoba Securities Commission
Ontario Securities Commission
Office of the Administrator, New Brunswick
Registrar of Securities, Prince Edward Island
Nova Scotia Securities Commission
Securities Commission of Newfoundland
Securities Registry, Government of the Northwest Territories
Registrar of Securities, Government of the Yukon Territory
Nunavut Legal Registries

c/o John Stevenson, Secretary
Ontario Securities Commission
20 Queen Street West
Suite 800, Box 55
Toronto, Ontario M5H 3S8

Submissions should also be addressed to the Commission des valeurs mobilières du Québec as follows:

Claude St Pierre, Secrétaire
Commission des valeurs mobilières du Québec
800 Victoria Square
P.O. Box 246, 17th Floor
Montréal, Québec H4Z 1G3

A diskette containing the submissions (in Windows format, preferably WordPerfect 6/8) should also be submitted. As securities legislation in certain provinces requires that a summary of written comments received during the comment period be published, confidentiality of submission cannot be maintained.

Questions may be referred to any of:

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Text of Instrument, Policy and Form

The text of the Instrument, Policy and Form follow, together with footnotes which are not part of the Instrument, Policy or Form, as applicable, but have been included to provide background and explanation.

Rescission of Policies

The Instrument, Policy and Form will replace, in Manitoba, Uniform Act Policy Statement No. 2-05. The Manitoba Securities Commission proposes to rescind this Policy. The text of the proposed rescission is as follows:

“The policy of the Manitoba Securities Commission entitled
_Uniform Act Policy Statement No. 2-05 is rescinded”

Dated: August 11, 2000