# Allen & Allen Update on Securities Law

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**Short Form Prospectus for all Issuers being considered**

The Canadian Securities Administrators ("CSA") have published for comment revised National Instrument 44-101 ("Short Form Prospectus Distributions"), with its related form and policy, to replace the current rule which has been in force since December 2000. The amendments take into account new continuous disclosure requirements, including:

- the adoption of National Instrument 51-102 on March 30, 2004, which has enhanced and harmonized continuous disclosure requirements for reporting issuers other than investment funds;
- the anticipated adoption of National Instrument 81-106 early in 2005, which will achieve the same result for investment funds;
- the implementation and continued refinement of the harmonized continuous disclosure review program by many CSA jurisdictions; and
- advances in technology and investor access to continuous disclosure filings, including the CSA's System for Electronic Document Analysis and Retrieval ("SEDAR").

One alternative being considered is to allow TSX and TSX Venture issuers with an operating business and with up-to-date SEDAR filings access to Short Form Prospectus Distributions, regardless of their market capitalization or the amount of time they have been reporting issuers. This is consistent with the 2000 Concept Proposal for an Integrated Disclosure System. The goal is to create a universal, seamless, integrated and expedited offering system.

Proposed NI 44-101 retains the requirement that an issuer - including a venture issuer - have a current AIF to be eligible to use the short form prospectus distribution system, but effectively incorporates the AIF form and filing requirements provided for under the continuous disclosure rules.

**Trading during Distributions, Formal Bids and Share Exchange Transactions - Ontario Rule 48-501 adopted**

Ontario Rule 48-501 -- Trading during Distributions, Formal Bids and Share Exchange Transactions (the "Rule") and its Companion Policy is expected to come into force on May 9, 2005.

The Rule governs the activities of dealers, issuers and others in connection with a distribution of securities, securities exchange take-over bid, issuer bid or amalgamation, arrangement, capital reorganization or similar transaction. The rule is intended to prescribe what is acceptable activity and otherwise restricts trading activities to preclude manipulative conduct by persons with an interest in the outcome of the distribution of securities or other transactions set out above.

As a result of comments received, several changes have been made to the proposed Rule. One of the key purposes of the reformulation of the Rule was to harmonize with the United States Securities and Exchange Commission's (SEC) Regulation M (Reg M) as well as the Universal Market Integrity (UMIR) amendments. The SEC published for comment on December 9, 2004 proposed amendments to Reg M, after having proposed amendments to the provisions regarding research reports on November 3, 2004. The OSC will consider any amendments to Reg M when adopted and may revise the rule at a future date if appropriate.

**Internal Controls over Financial Reporting and Enhanced Certification – CSA proposals**

The Canadian Securities Administrators (CSA), other than British Columbia, are publishing for comment Instrument 52-111 (internal controls over financial reporting) and Instrument 52-109 (enhanced certification of interim and annual filings), and related Policies.

Instrument 52-111 would require all reporting issuers, other than investment funds and venture issuers, to:

- evaluate the effectiveness of internal control over financial reporting against a suitable control framework;
- maintain evidence providing reasonable support for the evaluation of the effectiveness of internal control over financial reporting;
- report material weaknesses in internal control over financial reporting; and
- audit internal controls over financial reporting.

These requirements are similar to those under the U.S. Sarbanes Oxley Rules.

The current officer’s certification Instrument 52-109 would be amended. Except for investment funds and venture issuers, and except for certain “transition issuers”, form 52-109F1 would include a representation that an issuer's certifying officers have disclosed, based on their most recent evaluation of internal control over financial reporting, to the issuer's auditors and audit committee:

- all significant deficiencies and material weaknesses in the design or operation of internal control over financial reporting which are reasonably likely to adversely

affect the issuer's ability to record, process, summarize and report financial information; and

- any fraud, whether or not material, that involves management or other employees who have a significant role in the issuer's internal control over financial reporting.

Venture issuers, and certain “transition issuers” would file form 52-109FVT1, which would include representations about establishing and maintaining disclosure controls and procedures and internal controls over financial reporting, but would also include the statement that it is not required to comply with the requirements of Multilateral Instrument 52-111

Comments are due June 6, 2005

British Columbia is proposing not to adopt the Internal Control Rule 52-111 because it is not convinced that it is the right way to achieve the underlying objective of improving the quality of financial reporting, and because it thinks compliance with the Internal Control Rule would be too costly relative to the benefits. In its view:

“An “internal control culture” is a worthwhile goal, but we are concerned that the Internal Control Rule might instead promote a “box-ticking” approach to controls, rather than one that focuses both on the needs of the business and on regulatory compliance. We are also concerned that compliance with the Rule could consume an excessive amount of issuers' scarce resources. In our view, a simple recommendation to issuers to design and maintain appropriate internal control over financial reporting, coupled with the normal market forces (especially shareholder action) that are already focusing increased attention on controls, would do a better job of delivering value to investors.

BCN 2005/08

**Deferral of certifications regarding internal control over financial reporting**

Except in British Columbia, under the Certification Instrument 52-109, issuers are required to file annual certificates for each financial year beginning on or after January 1, 2004. The form of annual certificate is Form 52-109F1 (the full annual certificate) and Form 52-109F2 (the full interim certificate). However, issuers are permitted to file annual certificates in Form 52-109FT1 (the bare annual certificate) and Form 52-109FT2 (the bare interim certificate) for financial years ending on or before March 30, 2005.

The Proposed Amendments allow certifying officers to omit the following certifications from their full annual certificates filed for financial years ending on or before June 29, 2006 (permitted financial years) and their full interim certificates filed for permitted interim periods:

(a) the certification that the certifying officers are responsible for establishing and maintaining internal control over financial reporting;

(b) the certification that the certifying officers have designed internal control over financial reporting, or caused it to be designed under their supervision, to provide reasonable assurance regarding the reliability of financial reporting and the preparation of financial statements for external purposes in accordance with GAAP; and

(c) the certification that the certifying officers have caused the issuer to disclose in the issuer's MD&A any change in the issuer's internal control over financial reporting that occurred during the issuer's most recent period that materially affected, or is reasonably likely to materially affect, the issuer's internal control over financial reporting.

The permitted interim periods are those interim periods that occur before the end of the first financial year for which an issuer is required to file full annual certificates that include the certifications described in paragraphs (a), (b) and (c) above.

The Proposed Amendments will allow additional time for certifying officers to satisfy themselves that they have an appropriate basis for providing the certifications regarding internal control over financial reporting in their full annual certificates and full interim certificates.

Proposed Amendments to Multilateral Instrument 52-109
April 1, 2005

**British Columbia audit committees Rule proposed**

The British Columbia Commission expects to adopt BC Instrument 52-509 Audit Committees effective July 1, 2005. The Instrument requires that a majority of the audit committee members be independent as determined by an objective test. The Instrument also requires disclosure about the composition of the audit committee and the steps taken to ensure that the auditor is independent of the issuer. The disclosure requirements would take effect for issuers' financial years ending on or after June 30, 2005.

British Columbia passed a new Securities Act. Draft Securities Rules under the new Act were published for comment in June 2004. In November 2004, the government decided to delay implementation of the new legislation to allow market participants more time to prepare. Because the Commission believes it is important for British Columbia to have an audit committee rule, the Commission has decided to proceed with the Instrument. When the new legislation is implemented, the provisions in the Securities Rules will replace the Instrument.

On March 30, 2004, other members of the Canadian Securities Administrators adopted Multilateral Instrument 52-109 Certification of Disclosure in Companies' Annual and Interim Filings (MI 52-109) and Multilateral Instrument 52-110, which is also entitled Audit Committees (MI 52-110). On June 27, 2003, the Commission published BC Notice 2003/25 setting out its reasons for proposing not to adopt these instruments. Most British

Columbia reporting issuers must comply with MI 52-110. However, to avoid duplication, the Instrument recognizes the independence test in MI 52-110 and exempts issuers that comply with MI 52-110.

British Columbia Notice 2005/07

**"Forward-looking information" broadened, and new safe harbour, in Ontario**

The definition of "forward-looking information" in the Ontario Securities Act has been amended to specify that it includes all disclosure regarding possible events, conditions or results of operations, not just future-oriented financial information. New section 132.1 of the Act provides that a person or company is not liable for a misrepresentation in forward-looking information if the person or company proves all of the following things:

1. The document with the forward-looking information contained, proximate to that information:

    i. reasonable cautionary language identifying the forward-looking information as such, and identifying material factors that could cause actual results to differ materially from a conclusion, forecast or projection in the forward-looking information, and

    ii. a statement of the material factors or assumptions that were applied in drawing a conclusion or making a forecast or projection set out in the forward-looking information.

2. The person or company had a reasonable basis for drawing the conclusions or making the forecasts and projections set out in the forward-looking information.

Exception

(2) Subsection (1) does not relieve a person or company of liability respecting forward-looking information in a financial statement or forward-looking information in a document released in connection with an initial public offering.

**National Registration System – to be in force in April, 2005**

The Canadian Securities Administrators (CSA) have revised proposed National Instrument 31-101 -- the National Registration System -- to improve its clarity and consistency. As the revisions are not viewed by the CSA as material, it will not be subject to a further comment period.

Under the proposed Rule, a firm filer or individual filer may register with the National Registration System in any Canadian jurisdiction solely under the rules of its principal regulator. The principal regulator will review the application for registration in accordance with its securities legislation requirements regarding suitability for registration (also known as fit and proper requirements). The non-principal regulators will rely on the principal regulator's review to accept or refuse the application. Filers will continue to be subject to the conduct rules applicable in each jurisdiction where they are registered.

Notice of National Instrument 31-101

## Please call if you have any questions - 416-865-0303


## Allen and Allen

**WILLIAM ALLEN**: A graduate of the University of Toronto, Bill was called to the Bar in 1954. He later obtained a Masters of Law (LL.M.) from Osgoode Hall. He has lectured for the Canadian Bar Association and the Law Society of Upper Canada. He is the author of the Estate Planning Handbook (with three editions, published in 1985, 1991 and 1999) and has worked in the area of securities law since the early 1960s.

**JOHN ALLEN**: A graduate of law from Queen's University, John was called to the Bar in 1991, clerked with the Ontario Superior Court, and has a Masters of Law in securities law from Osgoode Hall. He is a graduate of the "Canadian Securities Course", "Financial Planning Course", and has all academic requirements for the designation of Certified Financial Planner (CFP). He is also the author of a monthly securities "Netletter" available only on Quicklaw (www.quicklaw.com), a fee-based legal database service.