

Allen & Allen Update on Securities Law

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Enacted:

Amended capital raising exemptions in all provinces, except Ontario and Quebec

Amended rule 45-103 has been (or soon will be) adopted everywhere in Canada except Ontario and Quebec. It provides harmonized exemptions as follows:

- "Private issuer" exemption;
- "Family, friends and business associates" exemption;
- "Accredited investor" exemption - paralleling the exemption in Ontario Rule 45-501; and
- Variations of an "Offering memorandum" exemption.
 - (a) In BC and Nova Scotia, any purchaser could invest under the exemption.
 - (b) In Alberta, Manitoba, Nfld, Nunavut, PEI and Saskatchewan, any purchaser could invest up to \$10,000; however, to invest more than \$10,000 the purchaser must be an "eligible investor"
 - (c) In NWT, Nanavut and Saskatchewan, no commission or finder's fee may be paid to any person or company, other than a registered dealer

The most significant changes to the Rule are:

- the restriction on payment of commissions or finders' fees to directors, officers, founders and control persons when distributing securities under the private issuer and family, friends and business associates exemptions,
- the requirement that charities receive investment advice to qualify as accredited investors,
- the inclusion of "founders" in the list of permitted placees under the private issuer and family, friends and business associates exemptions, and
- the introduction of a new forms

Also, BC will be retaining the \$97,000 exemption indefinitely.

Proposed:

Ontario Exempt Distribution Rule 45-501 - Proposed Amendments in Ontario

The Ontario Commission has proposed a number of “technical amendments” to its exempt distribution Rule 45-501, which would amend the definition of "accredited investor":

- paragraph (q) would be amended to include brothers and sisters (of an officer, director or promoter of the issuer);
- paragraph (t) would be amended to include a limited liability company (with net assets of at least \$5 million);
- paragraph (w) would be expanded to include a mutual fund or a non-redeemable investment fund that has previously distributed securities under a prospectus; and
- paragraph (y) would include trust corporations governed by the Trust and Loan Corporations Act (Canada) or under comparable legislation in any other jurisdiction.

Amend the definition of "closely-held issuer" in order that current and former directors and officers do not count towards the limit of 35 non-accredited investors, regardless of how such directors and officers acquired their securities (currently, they need to acquire securities as compensation by, or under an incentive plan of, the issuer or an affiliated entity of the issuer)

Amend the closely-held issuer exemption by deleting existing clause 2.1 (1)(b) which restricts the use of the exemption in circumstances where a promoter is participating (currently, no promoter can act as promoter of any other issuer in reliance on the same exemption during the last twelve months).

Add a new section 2.15. This exemption will allow trades in a security pursuant to an offer to acquire made by a person or company that would have been a take-over bid or issuer bid if the offer to acquire was made to a security holder in Ontario. This exemption will facilitate private company sales in circumstances where all of the selling shareholders are not resident in Ontario.

Add a new section 2.16 to allow for the purchase of "business assets" from a person or company if the fair value of the business assets purchased is not less than \$100,000. A new definition of "business assets" has been included in the Proposed Rule.

Trades to Employees, Senior Officers, Directors and Consultants - new National Rule - Proposed

The Securities Regulators in all jurisdictions except Quebec are adopting harmonized Rule 45-105 for trades to Employees, Senior Officers, Directors, and Consultants.

Section 2.1 (1) will exempt trades by an issuer of a security of its own issue and trades by a control person (or an option to acquire such securities), with the following, provided that the participation is voluntary:

- (a) an employee, senior officer, director, or consultant of the issuer or of an affiliated entity of the issuer, or
- (b) a “permitted assign” of the person, which includes:
 - (i) a trustee, custodian, or administrator acting on behalf, or for the benefit, of the employee, senior officer, director, or consultant,
 - (ii) a holding entity of the employee, senior officer, director, or consultant,
 - (iii) an RRSP or RRIF of the employee, senior officer, director, or consultant,
 - (iv) a spouse of the employee, senior officer, director, or consultant,
 - (v) a trustee, custodian, or administrator acting on behalf, or for the benefit, of the spouse of the employee, senior officer, director, or consultant,
 - (vi) a holding entity of the spouse of the employee, senior officer, director, or consultant, or
 - (vii) an RRSP or RRIF of the spouse of the employee, senior officer, director, or consultant.

If the issuer is a reporting issuer in any jurisdiction but not listed on an exchange, the exemptions in section 2.1 may not be available for trades as compensation to certain investor relations persons, senior officers, directors or associated consultants (or their trustees, custodians, etc) if the total number of securities for compensation exceeds certain thresholds, unless prior shareholder approval has first been obtained. This restriction will not apply in British Columbia.

There are other restrictions - please review the Rule.

Offering Memorandum and “qualifying issuer” amendments - proposed in all provinces except Ontario and Quebec

Multilateral Instrument (“MI”) 45-103 (being adopted in all provinces except Ontario and Quebec) currently permits “qualifying issuers”, as defined in current MI 45-102, to use a shorter form of offering memorandum because those issuers have filed an AIF.

As a result of the change to the definition of “qualifying issuer” in MI 45-102, the offering memorandum exemption in 45-103 will set other criteria for issuers to use the shorter form of offering memorandum. Under proposed MI 45-103, a “qualifying issuer” will be an issuer which:

- is a reporting issuer and SEDAR filer,
- has filed an AIF, management's discussion and analysis and annual financial statements under NI 51-102,
- has complied with any applicable continuous disclosure obligations under National Instrument 43-101 Standards of Disclosure for Mineral Projects and National Instrument 51-101 Standards of Disclosure for Oil and Gas Activities.

Under the proposed definition of qualifying issuer, a venture issuer may use the shorter form of offering memorandum by voluntarily filing an AIF under NI 51-102 and incorporating that AIF into its offering memorandum. Issuers listed on TSX Venture Exchange are venture issuers under the definition proposed in NI 51-102.

On June 21, 2002, the CSA published National Instrument 51-102 for comment, which would replace current requirements for reporting issuers with new requirements regarding financial statements, annual information forms, management discussion and analysis (MD&A), material change reporting, information circulars, proxies and proxy solicitation, restricted share disclosure, and other matters.

Comments are due September 24, 2003

TSX Venture to create a new “Inactive Board”, for certain issuers failing to maintain Tier 2 or Tier 3 status.

TSX Venture Exchange Inc. is proposing to transfer inactive issuers, who fail to meet Tier 2 or Tier 3 maintenance requirements, to a new “inactive board”, effective August 18, 2003. It will be an alternative to suspension and delisting, not an alternative for active junior issuers. No new listings will be accepted. The Launch Date is expected to be August 18, 2003.

The inactive board would have separate policies suited to the needs of issuers looking to reactivate themselves as companies carrying on an active business. Unlike the current regime, inactive issuers would not face suspension or delisting if they fail to reactivate within 18 months. Filing procedures would be simplified. Inactive issuers would, however, be subject to certain financing and share issuance restrictions.

Oil and Gas Disclosure Instrument expected to come into force Sept 30, 2003 - National

National Instrument 51-101 Standards of Disclosure for Oil and Gas Activities and Companion Policy 51-101CP has been adopted as a rule in each of British Columbia (except Form 3), Alberta, Ontario and Manitoba and as a Commission regulation in Saskatchewan, and is expected to come into force on September 30, 2003.

NI 51-101 establishes a regime of continuous disclosure for reporting issuers engaged in exploring for, developing or producing oil or gas. It establishes disclosure standards and procedures somewhat akin to those long applied to financial disclosure. It prescribes standards for the preparation and disclosure of oil and gas reserves and related estimates, requires the annual public filing of certain of those estimates and other information pertaining to oil and gas activities, and specifies responsibilities of corporate directors.

The first public filings applying the new standards will be required in 2004, containing information as at the end of the financial year that ends on, or includes, December 31, 2003.

National Instrument 51-101

Securities regulators release revised disclosure rule 51-102 - Proposed

Canadian Securities Administrators (“CSA”) have circulated amendments to proposed National Instrument 51-102. On June 21, 2002, the CSA published the Instrument for comment, which would replace current requirements for reporting issuers with new requirements regarding financial statements, annual information forms, management discussion and analysis (MD&A), material change reporting, information circulars, proxies and proxy solicitation, restricted share disclosure, and other matters.

Proposed amendments include:

- A new, transparent and easy-to-apply concept of "venture issuer" that replaces a variety of categories of junior or small issuers. Venture issuers would be subject to differing treatment in some areas, in response to comments concerning their more limited resources.
- Streamlined requirements for business acquisition reporting.
- Clarification of the process for determining when, and to which investors, disclosure documents must be sent - giving investors an opportunity each year to express their wishes, while reducing document deliveries to investors who do not wish them.”

“Investor Confidence Rules” proposed in all jurisdictions, except B.C.

All jurisdictions except British Columbia are proposing new “Investor Confidence” Rules, to maintain international confidence in response to the U.S. Sarbanes-Oxley Act. See: MI 52-108 Auditor Oversight, MI 52-109 Certification of Disclosure in Companies’ Annual and Interim Filings and MI 52-110 Audit Committees.

Proposed MI 52-108 would:

- require reporting issuers to engage auditors that (1) participate in an independent oversight program established by the Canadian Public Accountability Board (CPAB) for public accounting firms that audit the financial statements of public companies (the CPAB Oversight Program), and (2) are participants in good standing with the CPAB.

- require, other than in Alberta and Manitoba, public accounting firms that audit reporting issuers to: participate in the CPAB Oversight Program, be participants in good standing with the CPAB, and provide notice to their audit clients and securities regulators of any sanctions or restrictions imposed by the CPAB.

Proposed MI 52-109 would require chief executive officers and chief financial officers to personally certify that their issuers' annual and interim filings do not contain any misrepresentations and that the financial statements and other financial information in the annual and interim filings of their issuers fairly present the financial condition, results of operations and cash flows of the issuers for the relevant time period. The filings required to be certified include issuers' annual information forms, annual financial statements, annual MD&A, interim financial statements and interim MD&A.

Proposed MI 52-110 would require all issuers to have an audit committee to which the external auditors must report. It would be responsible for recommending to the board of directors who should be the external auditor, what compensation the auditor should be paid, overseeing the work of external auditor, pre-approving all non-audit services provided by the external auditor, and reviewing the issuer's financial statements.

Except for "venture issuers", every audit committee would require at least three members, each of whom must be "financially literate" (though not necessarily a "financial expert"). Except for venture issuers, IPOs, Controlled Companies, and for events beyond a member's control, each audit committee member must be "independent", as defined in section 1.4. A "venture issuer" means an issuer that does not have any of its securities listed or quoted on any of the TSE, the New York Stock Exchange, the American Stock Exchange, the Nasdaq National Market, the Nasdaq SmallCap Market, the Pacific Exchange or a marketplace outside of Canada or the United States.

British Columbia is not participating, at this time, in the three "Investor Confidence" rules, because in its view:

- The auditor oversight rule contains more detail than necessary
- The certificate rule adds nothing to the existing legal duty of the officers to insure that disclosure is not false or misleading
- By relying on the officer's certificate, the directors may avoid responsibility
- The proposed certificate rule focuses only on financial disclosure, which may suggest a lesser standard of compliance on other, potentially more important, disclosure
- There is no evidence that the certification will add any benefit.
- As to audit committees, it is not desirable to codify a one-size-fits-all requirement

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

ALLEN AND ALLEN

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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.