

# Allen & Allen Update on Securities Law

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## **Exempt market - National Rule proposed**

The Canadian Securities Administrators (CSA), including Ontario, are proposing national, harmonized, prospectus and registration exemptions in Instrument 45-106. Currently, most jurisdictions have similar, but not identical, exemptions, adding to the complexity and cost of exempt, multi-jurisdictional distributions.

Some of the more significant exemptions proposed for small issuers are:

- Accredited Investor (section 2.3) - The definition is taken from both MI 45-103 and Ontario Securities Commission Rule 45-501 with certain modifications. In addition, an investment fund that is managed by a registered adviser would be an additional category of "accredited investor".
- Private Issuer (section 2.4) - All jurisdictions are participating in a common private issuer exemption. It would modify the current private issuer exemption in MI 45-103 and would replace the closely-held issuer exemption in OSC rule 45-501 and the closed company exemption in the Securities Act (Quebec).
- Family, Friends and Business Associates (section 2.5) and Family, Founder and Control Person - Ontario (section 2.7). The exemption in section 2.5 would be available to certain individuals who are considered to be close to an issuer (executive officers, directors and control persons) and certain of their close family, friends and business associates. This exemption would be available in all jurisdictions except Ontario. Saskatchewan would require a signed risk acknowledgment from close friends and business associates (section 2.6).
- Section 2.7 of the Instrument contains an Ontario-only exemption for founders, affiliates of founders, control persons and certain family members of founders, executive directors and officers.
- Affiliates (section 2.8) Most jurisdictions do not currently have this exemption, which is found in OSC Rule 45-501 where affiliated entities of an issuer are included in the definition of "accredited investor".
- Offering Memorandum (section 2.9) - The Instrument contains two versions of the offering memorandum exemption, one for British Columbia, New Brunswick, Nova Scotia and Newfoundland and Labrador and one for Alberta, Manitoba, Northwest Territories, Nunavut, Prince Edward Island, Quebec and Saskatchewan. The primary difference between the two versions is that the second one requires that purchasers either

be "eligible investors" as defined in the Instrument or purchase securities at an aggregate acquisition cost that is less than \$10,000. Ontario is not adopting the offering memorandum exemption.

- Minimum Amount Investment (section 2.10) - All jurisdictions are participating in this exemption, which currently exists in most jurisdictions but in slightly different forms and for different prescribed minimum amounts. Under the Instrument the prescribed minimum amount for all jurisdictions is \$150,000, payable in cash at the time of the trade.
- Asset Acquisition (section 2.12) - All jurisdictions are participating in this exemption, which currently exists in most jurisdictions but in slightly different forms and for different prescribed minimum amounts. The prescribed minimum amount for all jurisdictions under the Instrument is \$150,000.
- Securities for Debt (section 2.14) - This is a new exemption for most jurisdictions. The exemption is based on the exemption in British Columbia with some modifications.
- Employee, Executive Officer, Director and Consultant Exemptions (sections 2.22 to 2.29) – These include the exemptions from MI 45-105 for trades to employees, executive officers, directors and consultants. It does not carry forward the exception for trades to "investor relations persons" (defined term) if the compensation or other remuneration paid to such persons is dependent on the trading price or trading volume of the security being traded.

CSA Notice and Request for Comment on Proposed National Instrument 45-106. Comments are due March 17, 2005.

### **Exempt market - Ontario proposed consolidation**

Ontario is proposing new Rule 45-501, to consolidate its local exemptions not included in proposed multilateral instrument 45-106 (see above)

Some of the more significant exemptions proposed for small issuers in Ontario would be:

- Section 2.4 -- Private issuer: The private issuer exemption replaces, in the interest of harmonization, the closely-held issuer exemption currently set out in the Existing 45-501.
- Section 2.5 - Family, friends and business associates: Ontario is not adopting the family, friends and business associates exemption as Ontario does not believe that an exemption that allows securities to be issued to an unlimited group of non-accredited investors is appropriate for the Ontario market.
- Section 2.7 - Family, founder and control person – Ontario: Section 2.7 contains an Ontario-only exemption for founders, affiliates of founders, control persons and certain family members of founders, directors and executive officers.

- Section 2.9 -- Offering memorandum: Ontario is not adopting the offering memorandum exemption.

Comments are due March 17, 2005

### **Standards of Disclosure for Mineral Projects – Proposed amendments - National**

In September 2004, the Canadian Securities Administrators (the "CSA") published for a 90-day comment period an amended National Instrument 43-101 -- Standards of Disclosure for Mineral Projects, Form 43-101F1 -- Technical Report, and Companion Policy 43-101CP.

The purpose of the amendments are to: reflect changes that have occurred in the mining industry, correct errors, simplify the drafting, provide exemptions in specified circumstances, and generally make the Current Mining Rule more user-friendly and practical.

Some of the key changes in the Rule include:

- changed definition of "mineral project" to clarify that Amended NI 43-101 also applies to a royalty, net profits interest, or similar interest in a property.
- changed definition of "preliminary assessment" and expanded it to be an early stage study that includes an economic evaluation using inferred, indicated, or measured mineral resources, or any combination of these.
- added "annual management's discussion and analysis" to the annual information form and annual report triggers under section 4.2(1) 6. By this change, a venture issuer that does not file an annual information form to file a technical report annually at the same time as the management's discussion and analysis (MD&A) when its annual financial statements are due if the MD&A discloses material information concerning mining projects on material properties not contained in a previously filed technical report.
- changed subsection 5.3(1) 1 to require an independent technical report only for the first time an issuer becomes a reporting issuer in any one Canadian jurisdiction.

### **Audit Committee Rule – Proposed Amendments**

The CSA have proposed amendments to Multilateral Instrument 52-110 Audit Committees and its Companion Policy, in force in most Canadian jurisdictions except British Columbia since March 30, 2004.

The purpose of the current Audit Committee Rule is to encourage reporting issuers to establish and maintain strong, effective and independent audit committees. The proposed amendments would (1) clarify and update the definition of "independence" to parallel, as much as possible, the definitions of independence applicable to members of audit committees of US listed companies, (2) require venture

issuers to provide additional disclosure regarding the education and experience of their audit committee members, and (3) harmonize the treatment of income trusts with that proposed in the Governance Disclosure Rule and Governance Policy (proposed National Policy 58-201)

Comments are due January 27, 2005

### **Certification of Disclosure in Issuers' Annual and Interim Filings – Additional Time proposed**

Additional time is proposed for certifying officers to satisfy themselves that they have an appropriate basis for providing the representations regarding internal control over financial reporting in their full annual certificates and full interim certificates in Instrument Multilateral Instrument 52-109.

Under the current certification, 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); however, issuers are permitted to file annual certificates in Form 52-109FT1 (the bare annual certificate) for financial years ending on or before March 30, 2005. Issuers are also required to file interim certificates for each interim period beginning on or after January 1, 2004. The form of interim certificate is Form 52-109F2 (the full interim certificate); however, issuers are permitted to file interim certificates in Form 52-109FT2 (the bare interim certificate) for interim periods that occur before the end of the first financial year for which issuers are required to file full annual certificates.

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

- (a) the representation that the certifying officers are responsible for establishing and maintaining internal control over financial reporting;
- (b) the representation 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 representation that they 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.

Comments are due February 24, 2005.

## **Communication with Beneficial Owners – Amendments - National**

Each member of the Canadian Securities Administrators (the CSA) is amending National Instrument 54-101 Communication with Beneficial Owners of Securities of a Reporting Issuer (the Instrument) and Companion Policy 54-101CP.

54-101 ensures that beneficial owners of securities of a reporting issuer can receive proxy-related materials and provide instructions on how the securities they beneficially own are to be voted. To achieve this purpose, the Instrument sets out detailed procedures by which proxy-related materials are provided to the beneficial owner, and the beneficial owner provides voting instructions. The Instrument also imposes obligations on the reporting issuer, the depository and intermediaries who hold on behalf of the beneficial owner.

Amendments to the Instrument and Policy were proposed in October 2003. They would

- amend the definition of "legal proxy" to clarify that a beneficial owner may designate a person to have voting power under a legal proxy
- allow beneficial owners to decline to receive all proxy-related materials. Also, allow beneficial owners to choose to receive only proxy-related materials relating to special meetings, i.e. meetings where shareholder approval of fundamental changes to the issuer is being sought
- clarify the obligations of persons or companies that are not reporting issuers
- a new Part 7 that sets out both permitted uses for a NOBO list and the permitted uses of the indirect delivery scheme

Minor changes have been made to the October 2003 amendments, which are expected to come into force on February 9, 2005.

## **Income Trusts and Other Indirect Offerings – Policy 41-201 in force - National.**

The Canadian Securities Administrators (CSA) have approved National Policy 41-201, Income Trusts and Other Indirect Offerings (the Policy), effective December 3, 2004. The Policy was originally proposed in October 2003. Having received comments, the CSA made non-material changes.

The Policy provides guidance and clarification to market participants, within the existing regulatory framework, about income trusts and other indirect offering structures, which issue securities entitling the holder to substantially all of the net cash flows generated by: (i) an underlying business owned by the trust or other entity, or (ii) the income-producing properties owned by the trust or other entity.

The Policy provides guidance on prospectus and continuous disclosure relating to distributable cash, short-term debt, stability ratings, determination of unit offering price, and executive compensation. The Policy also outlines the CSA concerns about those who may possess material undisclosed information about the income trust, and outlines concerns about sales and marketing materials, particularly relating to use of the term "yield". CSA Notice

## ALLEN AND ALLEN

**WILLIAM ALLEN** has a general practice including estate planning, estate administration, business law, and securities law. A graduate of law from the University of Toronto, William became a lawyer in 1954. He later obtained a Masters of Law (LL.M.) from Osgoode Hall. He is a co-author of all three editions of the Estate Planning Handbook (Carswell 1985, 1991, 1999). He has lectured extensively in estate planning for the Canadian Bar Association and the Law Society of Upper Canada and is a director of a number of public companies. William was the 2004 recipient of the Ontario Bar Association's "Award of Excellence" for exceptional lifetime contributions and achievements in trusts and estates law.

**JOHN ALLEN** has a general practice including business law and litigation. John became a lawyer in 1991. He has a Bachelor of Arts, a Bachelor of Science, a Bachelor of Laws (LL.B.) and a Masters of Law (LL.M.) in securities law from Osgoode Hall. John completed the "Canadian Securities Course", the "Financial Planning Course", and has been a Certified Financial Planner (CFP). In 1991, he was a Law Clerk to the Ontario Superior Court. John authored "Defending Provincial Offence Cases in Ontario" (Carswell 1995), co-authored the 3rd Edition of the Estate Planning Handbook, has written articles for the Advocates Journal and the Criminal Law Quarterly, and is the author of the "securities netletter" available only on Quicklaw (LexisNexis), the largest computer library service for lawyers in Canada. He is a Part-time Professor of Contracts, Torts and Evidence Law in the university degree program in Paralegal Studies at Toronto's Humber Institute.