

# Allen & Allen Update on Securities Law

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July 1, 2001

## Enacted:

### **OSC junior resource Policy 5.2 lapses July 1<sup>st</sup> 2001 – Ontario**

Ontario policy 5.2 has regulated Ontario junior natural resource reporting issuers not listed on the TSE since 1988. The Policy lapsed on July 1<sup>st</sup> 2001.

### **CSA guidelines to allow existing escrows to reflect uniform escrow regime – National**

The Canadian Securities Administrators (CSA) introduced new guidelines allowing existing escrow agreements to be amended to the release terms of the proposed uniform escrow regime. The CSA expect to implement the uniform escrow regime this summer of 2001. Since 1998, IPO issuers have been able to choose either the proposed uniform escrow regime or the escrow regime of their local jurisdiction. The new guidelines permit the same choice for all issuers, provided certain conditions are met, including the consent of the directors, the escrowed shareholders, the relevant exchange, and the majority of unescrowed shareholders.

Under the uniform escrow regime, an issuer is classified as either an “exempt issuer”, an “established issuer” or an “emerging issuer”.

For exempt issuers — those conditionally listed or listed on the TSE in its exempt category, and those conditionally listed or listed on the TSE, the ME, or the CDNX that raise minimum gross proceeds of \$75 million in their IPO: no escrow;

For established issuers — those conditionally listed or listed on the TSE in its non-exempt category, on Tier 1 of the CDNX, or on the ME that meet requirements equivalent to the CDNX's Tier 1 requirements: escrow releases in equal tranches at 6-month intervals over 18 months (i.e., 25% of each principal's holding released in each tranche) with 25% of each principal's holding exempt from escrow; and

For emerging issuers — those conditionally listed or listed on Tier 2 of the CDNX, or on the ME that meet requirements equivalent to the CDNX's Tier 2 requirements but not Tier 1 requirements — escrow releases in equal tranches at 6-month intervals over 36 months (i.e., 15% of each principal's holding released in each tranche) with 10% of each principal's holding exempt from escrow.

Additional escrow requirements can be imposed if no underwriter is involved in an IPO, the issuer's securities are/will not be listed on a Canadian exchange upon completion of its IPO, or in other circumstances.

### **Implementation of Zimmerman Amendments regarding Take-over and Issuer Bids**

The "Zimmerman Amendments" to the Securities Act governing the conduct of take-over bids and issuer bids come into effect on March 31, 2001 in most provinces, except Quebec. Among other things, the amendments:

- ! extend the minimum time that a take-over bid or issuer bid must be open for acceptance, from 21 days to 35 days;
- ! change the deadline for payment for securities taken up under a bid from three days to three business days after the take up;
- ! extend the time in which an initial directors' circular must be delivered, from 10 days to 15 days after the date of the take-over bid; and
- ! permit a take-over bid to be commenced by advertisement provided that: (a) on or before the date of the ad, the bidder files the bid and delivers it to the target; (b) on or before the date of the ad, the bidder requests a shareholders' list from the target; and (c) the bid is delivered to the target's shareholders within two business days of receipt by the bidder of the shareholders' list.

## **Proposed:**

### **Shortened 4 month hold periods – National - *Proposed***

On September 8, 2000, all jurisdictions, except Quebec, proposed Rule 45-102 - a harmonization of resale restrictions in exempt distributions. Ontario submitted the proposed Rule to the Minister on April 17, 2001, and then, “due to implementation issues”, withdrew the proposal until certain issues could be resolved. Under the proposed Rule:

Securities of a “qualifying issuer” shall be held for 4 months. A “qualifying issuer” would be a reporting issuer (or equivalent), who is an electronic filer under SEDAR, who has filed a current AIF (annual information form), and either has a class of equity securities listed or quoted on certain specified exchanges or markets, or outstanding securities that have received an approved rating.

Securities of a “non-qualifying” issuer must be held for 12 months from the later of the date of the distribution and the date the issuer becomes a “reporting issuer”.

Securities in issuers that are not “reporting issuers” can never be resold, absent a further exemption.

### **Few changes to new exemptions for smaller businesses – Ontario - *Proposed***

In response to comments received, on April 6, 2001 the OSC made minor changes to its proposed Rule 45-501, to replace the private company exemption, private issuer exemption, \$150,000 exemption, seed capital exemption and government incentive security exemption with the following proposed new exemptions:

The “Closely-Held Issuer Exemption”, permitting issuers to raise a total of \$3.0 million, through any number of financings, from up to 35 investors (excluding employees who acquire securities under a compensation or incentive plan) without concern for the investor’s “qualifications” or “sophistication”.

The “Accredited Investor Exemption”, permitting issuers to raise any amount at any time from any person or company that meets certain qualifications, including: (1) officers, directors of promoters of the issuer and certain family members, (2) individuals who, either alone or jointly with a spouse, beneficially owns financial assets having an aggregate realizable value that, before taxes but net of any related liabilities, exceeds \$1.0 million; or whose net income before taxes exceeded \$200,000 in each of the two most recent years; or whose net income before taxes combined with that of a spouse exceeded \$300,000 in each of those years and who, in either case, has a reasonable expectation of exceeding the same net income level in the current year.

Resale restrictions would apply – see proposed Rule 45-501 and 45-501 CP

### **New prospectus exemptions proposed in BC and Alberta - *Proposed***

On May 17, 2001 comment was sought by the B.C. and Alberta Commissions regarding a harmonization of four prospectus exemptions, as follows:

(1) The existing "private issuer" exemption. This exemption allows a private issuer to raise capital from individuals who are not "the public". A private issuer is an issuer that is not reporting under the Securities Act, and whose securities are subject to restrictions on transfer and are beneficially owned by not more than 50 persons, excluding employees.

(2) “Family, Friends and Business Associates” exemption - to be harmonized between BC and Alberta. Consideration will be given to whether there should be a limit on the number of investors or the amount raised in any period.

(3) “Accredited Investor Exemption”. Similar to the accredited investor definition proposed by the OSC. Includes financial institutions, pension and investment funds, substantial corporations and certain wealthy individuals.

(4) A new “Offering Memorandum Exemption”, under which an issuer can raise capital on the following conditions: (a) delivery of an offering memorandum in a new and simplified prescribed form. Non-reporting and reporting issuers will have different forms. The form for a reporting issuer will allow incorporation by reference of existing public disclosure. (b) The

investor must sign an acknowledgement containing a clear, blunt, risk warning. Any person can invest any amount under this exemption, with a two-day withdrawal right.

### **New Rights Offering Rule – National - *Proposed***

The Instrument prescribes 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 Ontario, unless the Minister rejects the proposed Rule or returns it for further consideration, the Rule will be in effect on July 25, 2001.

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(3);
- (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.

**Deeming An Issuer From Other Canadian Jurisdictions to be a Reporting Issuer In Ontario - Proposed**

Pursuant to section 83.1 of the Ontario Act, the OSC can deem an issuer to be a “reporting issuer” in Ontario. (An issuer is no longer automatically a reporting issuer simply by filing a securities exchange take-over circular because of the 1999 More Tax Cuts for Jobs, Growth and Prosperity Act.)

Under Proposed Policy 12-602, the OSC will generally grant the order if the issuer has been a reporting issuer or equivalent, in good standing, for at least 12 months in one or more of British Columbia, Alberta, Saskatchewan, Manitoba, Quebec or Nova Scotia. In addition, the OSC will generally grant the order to an issuer, in good standing, who has securities listed and posted for trading on CDNX. (Absent Ontario's participation in the Capital Pool Company Program administered by CDNX, the proposed Policy would not apply to an issuer who obtained a listing on CDNX through the Capital Pool Company Program until at least 12 months after its Qualifying Transaction, as defined in CDNX Policy 2.4).

The proposed Policy provides that, in reviewing an application under section 83.1(1), Commission staff may review the applicant's continuous disclosure record from another jurisdiction and require any deficiencies to be addressed before recommending the application.

**Accounting standards discussion paper – National Concept Release - Proposed**

The CSA are considering whether to relax current accounting rules to allow some or all Canadian and foreign reporting issuers to use, for all filings in Canada - U.S. Generally Accepted Accounting Principles (GAAP) or the new International Accounting Standards (IAS), recently endorsed by the International Organisation of Securities Commissions, or, perhaps, other bases of accounting, with limited or no reconciliation to Canadian GAAP.

"We want to determine if the current rules requiring foreign issuers to reconcile their financial statements to Canadian GAAP deter companies from public offerings in Canada," said Doug Hyndman, CSA Chair.

### **Draft Policy on Corporate Disclosure – National - *Proposed***

Canadian securities regulators published a draft policy statement on May 25, 2001 that provides guidance and best practices on corporate disclosure, and assists public companies in avoiding “selective disclosure”.

The draft recommends public companies consider the following best disclosure practices:

- (a) Establish a written disclosure policy that promotes informative, timely and broadly disseminated disclosure of material information to the market place.
- (b) Establish a committee of company personnel – or an individual with senior rank – to monitor the effectiveness of the company’s disclosure policy.
- (c) Limit the number of people authorized to speak on behalf of the company to analysts, the media and investors.
- (d) Adopt an “open access” policy for analyst conference calls by permitting any interested party to listen by telephone and/or through a webcast.
- (e) Establish a policy on commenting on draft analyst reports. Issuers should recognize that there is a serious risk of violating the tipping provisions if any direct or indirect earnings guidance is given.
- (f) Observe a “quiet period” around the end of the quarter and prior to the release of quarterly earnings announcements.
- (g) Adopt an insider trading policy to monitor the trading of insiders in the company’s securities.
- (h) The policy should include trading “blackout periods”, which may mirror quiet periods.
- (i) Ensure the company’s website is up to date and accurate and use current technology to improve investor access to corporate information.
- (j) Do not participate in, host or link to internet chat rooms or bulletin boards.
- (k) Adopt a “no comment” policy on market rumours that are not attributable to the company and ensure that the policy is applied consistently. If the rumours relate to information that has leaked, the CSA recommends companies disclose the information broadly and on a timely basis.

**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](http://www.quicklaw.com)), a fee-based legal database service.