

COMPANION POLICY 45-103CP TO MULTILATERAL INSTRUMENT 45-103 CAPITAL RAISING EXEMPTIONS

Application

Multilateral Instrument 45-103 *Capital Raising Exemptions* ("MI 45-103") has been implemented in British Columbia and Alberta.

Background

Securities legislation applies to any trade of a security in the local jurisdiction, whether or not the issuer of the security is a reporting issuer in that jurisdiction. The registration requirement prohibits a person or company from trading in a security or acting as an underwriter or an adviser unless the person or company is registered in the appropriate category. The prospectus requirement requires the use of a prospectus for any distribution of securities.

Securities legislation provides exemptions from the registration requirement and prospectus requirement in certain circumstances. In addition, the securities regulatory authority has the power to make discretionary orders to exempt trades, intended trades, securities and persons or companies from the registration requirement and the prospectus requirement when it is not prejudicial to the public interest to do so.

Purpose

MI 45-103 provides four exemptions from the registration and prospectus requirements to assist issuers in raising capital. Issuers may also use other exemptions available to them to raise capital.

MI 45-103 does not provide an exemption from the requirement to register as an underwriter or as an adviser in connection with trades of securities that are made under the exemptions in MI 45-103.

This Policy provides guidance on the use of the exemptions in MI 45-103.

Part 1 Private issuer exemption

1.1 Meaning of "the public"

Section 1.1 of MI 45-103 provides exemptions from the registration and prospectus requirements for trades in securities of a private issuer to, among others, persons or companies that are not the public. These include persons or companies that, because of their close connection to the principals of the issuer, do not need the protection or information provided by the registration and prospectus requirements. In British Columbia, a current security holder of a private issuer is not considered to be a member of the public for the purposes of this exemption.

The courts have interpreted "the public" very broadly in the context of securities trading. Consult legal counsel if you need further guidance.

1.2 Meaning of "close personal friend"

A close personal friend is an individual who has known the director, senior officer or control person for a number of years and who, through personal knowledge gained through friendship, is in a position to assess the capabilities and trustworthiness of the director, senior officer or control person.

An individual is not a close personal friend simply because the individual is a member of the same organization, association or religious group.

An individual is not a close personal friend simply because the individual is a client or former client. For example, an individual is not a close personal friend of a registrant or former registrant simply because the individual is a client or former client of that registrant or former registrant.

The relationship between the purchaser and the director, senior officer or control person must be direct. For example, the exemption is not available for a close personal friend of a close personal friend of the director, senior officer or control person.

1.3 Meaning of “close business associate”

A close business associate is an individual who has known the director, senior officer or control person for a number of years and who, through personal knowledge gained through prior business dealings, is in a position to assess the capabilities and trustworthiness of the director, senior officer or control person.

A casual business associate or a person introduced or solicited for the purpose of purchasing securities is a member of the public, not a close business associate.

An individual is not a close business associate simply because the individual is a client or former client. For example, an individual is not a close business associate of a registrant or former registrant simply because the individual is a client or former client of that registrant or former registrant.

The relationship between the purchaser and the director, senior officer or control person must be direct. For example, the exemption is not available for a close business associate of a close business associate of a director, senior officer or control person.

1.4 Soliciting purchasers

A distribution where registrants, finders, telemarketing or advertising in any form (for example, Internet, e-mail, direct mail, newspaper or magazine) are used to solicit or find purchasers, is an offering to the public. In these circumstances, the exemption is not available, even if the purchasers are family members, close personal friends or close business associates of a director, senior officer or control person of the issuer.

1.5 Distribution of debt securities

A private issuer may distribute any type of securities under the private issuer exemption as long as the sales are made only to the persons or companies described in section 1.1(1) of MI 45-103. However, a private issuer may also distribute to the public under another exemption securities that are not designated securities, such as debt securities, without losing its private issuer status.

1.6 Merger of private issuers

Securities distributed in an amalgamation, merger, reorganization, arrangement or other statutory procedure involving two private issuers to holders of securities of those private issuers is not a distribution to the public provided the resulting issuer is a private issuer. Securities distributed by a private issuer in a share exchange take over bid for another private issuer is not a distribution to the public provided the offeror remains a private issuer after completion of the bid.

1.7 Ceasing to be a private issuer

The meaning of private issuer is set out in section 1.2 of MI 45-103. A private issuer can distribute designated securities only to the persons or companies described in section 1.1(1) of MI 45-103. If a private issuer distributes designated securities to a member of the public, even under another exemption, it will no longer be a private issuer and will no longer be able to use the private issuer exemption. The issuer may be able to use the

other exemptions provided under securities legislation, including the family, friends and business associates exemption, the accredited investor exemption and the offering memorandum exemption, but will generally be required to report the distributions to the securities regulatory authority in each jurisdiction in which the distribution took place.

Part 2 Family, friends and business associates exemption

2.1 Meaning of close personal friends and close business associates

For the purposes of the family, friends and business associates exemption, the meaning of close personal friend and close business associate is the same as in the private issuer exemption.

2.2 Number of purchasers

There is no restriction on the number of persons that the issuer may sell securities to under the family, friends and business associates exemption. However, if the issuer sells securities to a large number of persons under this exemption, this may indicate that not all of the purchasers are family, close personal friends or close business associates and that the exemption may not be available.

2.3 Soliciting purchasers

The relationship required for use of the family, friends and business associates exemption is not present where an issuer uses registrants, finders, telemarketing or advertising in any form (for example, Internet, e-mail, direct mail, newspaper or magazine) to solicit or locate the persons who purchase securities under this exemption. However, an issuer may use registrants, finders, telemarketing or advertising to solicit or locate purchasers under another exemption that permits these activities, such as the offering memorandum exemption, while concurrently trading securities under the family, friends and business associates exemption.

Part 3 Offering memorandum exemption

3.1 Form of offering memorandum

MI 45-103 prescribes two forms of offering memorandum. Form 45-103F2 is for qualifying issuers under Multilateral Instrument 45-102 *Resale of Securities* ("MI 45-102") and Form 45-103F1 is for all other issuers. Form 45-103F2 permits qualifying issuers to incorporate by reference their annual information form and subsequent specified continuous disclosure documents.

3.2 Date of certificate

The issuer must ensure that the information provided to the purchaser is current and does not contain a misrepresentation. For example, if a material change occurs in the business of the issuer after delivery of an offering memorandum to a potential purchaser, the issuer must give the potential purchaser an updated offering memorandum before the potential purchaser signs the agreement to purchase the securities. The updated offering memorandum may take the form of an amendment describing the material change, a new offering memorandum containing up to date disclosure or a material change report, whichever the issuer decides will most effectively inform purchasers. Whatever form the issuer uses, it must include a newly signed and redated certificate as required in section 3.3 of MI 45-103.

3.3 Consideration to be held in trust

The purchaser has the right to cancel the agreement to purchase the securities until midnight on the second business day after signing the agreement.

It is up to the issuer to decide what arrangements are necessary to preserve the consideration received from the purchaser. The requirement to hold the consideration in

trust may be satisfied if, for example, the issuer keeps the purchaser's cheque, without cashing or depositing it, until the expiration of the two business day cancellation period.

It is also the issuer's responsibility to ensure that the consideration is promptly returned to the purchaser if the purchaser cancels the agreement to purchase the securities.

3.4 Prohibited activities

The definition of trade in securities legislation includes any act, advertisement, solicitation, conduct or negotiation directly or indirectly in furtherance of a trade. A person who engages in such activities must comply with the securities legislation of each jurisdiction in which the trade occurs.

For example, section 50 of the *Securities Act* (B.C.) and sections 70 and 70.1 of the *Securities Act* (Alberta) prohibit any person or company from making certain representations to a purchaser, including an undertaking as to the future value or price of the securities. The sections also prohibit a person or company from making any statement that the person or company knows, or reasonably ought to know, is a misrepresentation. Misrepresentation is defined in the securities legislation. The use of exaggeration, innuendo or ambiguity in an oral or written representation about a material fact, or other deceptive behaviour relating to a material fact, might be a misrepresentation.

These sections also prohibit any person or company from engaging in unconscionable acts or unfair practices. Unconscionable acts or unfair practices include, but are not limited to, the following:

- (a) putting undue pressure on the purchaser to enter into the transaction,
- (b) taking advantage of the purchaser's physical or mental infirmity, ignorance, illiteracy, age, or inability to understand the character, nature or language of the purchase agreement, offering memorandum, risk acknowledgement, or any matter relating to the transaction, or
- (c) imposing such harsh or adverse terms or conditions in the purchase agreement as to make the agreement inequitable.

Persons or companies who sell exempt market securities should also be aware that they must be registered in order to act as an adviser. The offering memorandum exemption does not provide an exemption from this requirement.

3.5 Responsibilities of registrants

Registrants are not relieved from their responsibilities to purchasers under the securities legislation because a trade is exempt from the registration requirements. In particular, the prohibitions against certain activities described in section 3.4, the know your client and suitability rules, and the duty to deal fairly, honestly and in good faith with their clients still apply to registrants in the exempt market. If the relationship between a registrant and his or her client is a fiduciary relationship, additional responsibilities apply under common law.

3.6 Advertising

Advertising to solicit or find purchasers is not restricted under the offering memorandum exemption. However, any advertising or marketing communications must be consistent with the issuer's offering memorandum and must not contain misrepresentations. Issuers should review the policies of the securities regulatory authorities for guidelines on advertising intended to promote interest in an issuer or its securities.

3.7 Filing of offering memorandum

The issuer is required to file the offering memorandum with the securities regulatory authority in each of the jurisdictions in which the issuer distributes securities on or before

the 10th day after the distribution. For purposes of this requirement, the distribution occurs when both the purchaser and the issuer have signed the agreement to purchase the securities or where the issuer has otherwise accepted the purchaser's offer to purchase the securities. If the issuer is conducting multiple closings, the offering memorandum must be filed on or before the 10th day after the first closing. Once the offering memorandum is filed, there is no need to file it again after subsequent closings, unless it has been updated.

3.8 Purchasers' rights

Under securities legislation, a purchaser has certain rights when purchasing securities under the offering memorandum exemption.

The purchaser has the right to cancel the agreement to purchase the securities. The purchaser can exercise this right by delivering a notice to the issuer not later than midnight on the 2nd business day after signing the agreement.

The purchaser also has a right of action against the issuer for damages or to cancel the agreement to purchase the securities if the purchaser did not receive the offering memorandum before signing the agreement.

If the offering memorandum contains a misrepresentation, the purchaser has a right of action regardless of whether the purchaser relied on the misrepresentation when deciding to purchase the securities. This right is similar to that given to a purchaser under a prospectus. The purchaser can sue the issuer, any director of the issuer at the date of the offering memorandum and any other person who signed the certificate in the offering memorandum. The purchaser may claim damages or ask that the agreement be cancelled.

The purchaser can exercise the right of action for misrepresentation for a limited period of time. If the purchaser wants to cancel the agreement, the purchaser must commence the action within 180 days after signing the agreement to purchase the securities. If the purchaser is seeking damages, the purchaser must commence the action within the earlier of 180 days after learning of the misrepresentation or 3 years after signing the agreement to purchase the securities.

Part 4 Accredited investor exemption

4.1 Individuals as accredited investors

An accredited investor who is an individual must satisfy either the financial asset test or the net income test set out in paragraphs (l) and (m) of section 4.2 of MI 45-103.

If the combined financial assets or combined net income of spouses exceeds the thresholds, either spouse (or both spouses together) qualifies as an accredited investor.

Part 5 Resale of securities

5.1 Resale restrictions

Securities distributed under an exemption are usually subject to restrictions on their resale. The resale restrictions depend on the status of the issuer and the exemption that was relied upon to distribute the securities. Part 5 of MI 45-103 sets out the applicable resale restrictions for securities distributed under the capital raising exemptions. These resale restrictions refer to specific sections of MI 45-102. Sellers of securities may also rely on other exemptions from the prospectus requirement to sell their securities.