

# ALBERTA SECURITIES COMMISSION

## NOTICE

### **PROPOSED NATIONAL INSTRUMENT 45-101, FORM 45-101F AND COMPANION POLICY 45-101CP *RIGHTS OFFERINGS***

The Commission, together with other members of the Canadian Securities Administrators (the "CSA"), is publishing for comment proposed National Instrument 45-101 *Rights Offerings*, Form 45-101F *Information Required in a Rights Offering Circular* and Companion Policy 45-101CP (referred to in this Notice respectively as the "Instrument", the "Form" and the "Policy" and collectively as the "Proposal").

The Proposal is an initiative of the CSA. The Instrument is expected to be adopted as a rule in Alberta, British Columbia, Manitoba, Ontario and Nova Scotia, as a Commission regulation in Saskatchewan and as a policy in all other jurisdictions represented by the CSA. The Form and Policy are also expected to be implemented in all jurisdictions represented by the CSA.

#### **Substance and Purpose of the Proposal**

The Proposal sets out harmonized terms under which an issuer may offer additional securities of its own issue for sale to holders of its securities (a "rights offering") in reliance on rights offering exemptions from registration and prospectus requirements of Canadian securities legislation. The Proposal would implement, in part, the recommendation of the CSA Task Force on Operational Efficiencies that Canadian securities regulatory authorities increase the coordination of securities regulation and standardize requirements.

#### **Background: Current Rights Offering Regime**

In order to utilize the rights offering registration and prospectus exemptions (which, in Alberta, are set out in paragraphs 65(1)(o) and 107(1)(h) of the *Securities Act*), an issuer must send to the Canadian securities regulatory authority or regulator (the "reviewing authority") information, acceptable to the reviewing authority, about the securities that it proposes to offer. The reviewing authority may object to the issuer's use of the rights offering prospectus or registration exemption.

Uniform Act Policy 2-05 (the "UAP") expands on the conditions for use of the rights offering registration and prospectus exemptions, making specific reference to the exemptions under Ontario legislation. In Alberta, Commission Policy 5.2 *Rights Offerings* ("ASC Policy 5.2") incorporates and supplements the UAP. Among other restrictions and conditions, ASC Policy 5.2 requires that a rights offering circular be filed and delivered as a condition of reliance on the rights offering prospectus exemption.

## **Changes from 1997 Proposal**

An earlier version of the Proposal (the "1997 Proposal") was published on November 21, 1997. Public comments received by the CSA in response to the 1997 Proposal, and the CSA's responses, are summarized in the Appendix to this Notice.

The revised Proposal incorporates changes from the 1997 Proposal, many of which respond to public comments. Among the changes are lengthened periods during which a rights offering may remain open, broadened categories of persons or companies who may act as depositories, elimination of the prohibition on rights offerings priced above the market, redefined restrictions on certain securityholders' ability to take up under a rights offering in excess of their current proportionate share if the rights offering is priced above the market or if there is no market from which to derive a price for the underlying securities, and nonsubstantive drafting and definitional changes. The revised Form incorporates modified disclosure requirements and no longer includes a certificate.

## **Summary of the Proposal**

Key aspects of the Proposal are summarized below. The texts of the Instrument, Form and Policy published with this Notice are accompanied by footnotes that provide further background and explanation.

The Proposal is derived from, and is substantially similar to, current administrative practices and policies of the Canadian securities regulatory authorities, including the UAP, ASC Policy 5.2, British Columbia Securities Commission Local Policy Statement No. 3-05 and Ontario Securities Commission Policy Statement No. 6.2, which the Proposal would replace.

### **(a) The Instrument**

The Instrument requires issuers that seek to use the rights offering prospectus exemption to provide the reviewing authority in a jurisdiction in which the rights offering is effected with information about the issuer, including information previously delivered to the issuer's securityholders but not available through SEDAR, to permit the reviewing authority to confirm that securityholders have been provided with current information about the affairs of the issuer and are not in need of a prospectus for the rights offering. This information will allow the reviewing authorities to assess if the rights offering is being made in compliance with the Instrument and that the terms of the offering are clearly stipulated, and to ensure that the offering has not been structured for the purpose of allowing an insider to increase its proportionate ownership interest in the issuer's securities.

The Instrument provides that the rights offering prospectus exemption is unavailable in certain circumstances including the following:

- 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;
- the rights are exercisable for securities of a class not previously outstanding;
- there is an agreement to compensate dealers in a manner which encourages solicitation of the exercise of rights by rightsholders who were not securityholders of the issuer immediately prior to the rights offering;
- 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;
- the issuer is not a reporting issuer in any jurisdiction and the offering is open for more than 60 days;  
or
- the issuer is a reporting issuer in any jurisdiction and the offering is open for more than 90 days.

The Instrument prohibits an issuer from filing a prospectus or an amendment to a prospectus for a rights offering, or conducting a rights offering in reliance on the rights offering prospectus exemption, if the issuer or the rights offering does not comply with the Instrument. However, the Instrument provides an exemption from compliance if there is minimal connection of the issuer to the jurisdiction, or to Canada, based on number of securityholders and percentage of capital held by securityholders.

Finally, the Instrument advises issuers that approval by the reviewing authority of the listing representations required in the Form will be evidenced by the acceptance of the rights offering circular, and that approval by the reviewing authority of listing representations in a rights offering prospectus will be evidenced by the prospectus receipt.

**(b) The Form**

The disclosure required by the Form includes: a summary of the offering; a brief description of the business of the issuer; details of the rights and securities being offered; information concerning transferability of the rights; instructions for the exercise of the rights; identification of the managing dealer and soliciting dealers, depository, subscription agent and transfer agent; descriptions of any stand-by commitments and arrangement for escrow of proceeds; and information relating to ownership or changes of ownership of the securities of the issuer, the intended use of proceeds and investors' statutory rights.

**(c) The Policy**

The Policy provides information on the factors that reviewing authorities will consider in determining whether to object to use of the rights offering prospectus exemption or to refuse to issue a receipt for a rights offering prospectus. The Policy also provides guidance on aspects of the Instrument including the determination of certain numerical thresholds, evidence that may be used to establish the ability of the provider of a stand-by commitment to meet its commitment, and the use of the rights offering registration exemption independently from the rights offering prospectus exemption.

The Policy advises that the regulators may, in certain circumstances, refuse to issue a receipt for a prospectus under which rights are issued if the rights are exercisable into convertible securities if the securities underlying the convertible securities are not qualified by the prospectus.

The Policy also notifies issuers that, in certain circumstances, they may need to implement a mechanism to "claw back" securities subscribed for by insiders.

Finally, the Policy cautions issuers that the exclusion of securityholders resident in a particular jurisdiction from participation in a rights offering, if there is sufficient connection to the jurisdiction, may cause the Canadian securities regulatory authority in the jurisdiction to consider taking action against the issuer and its directors and officers.

**Significant Changes to Existing Regime**

For rights offerings made in reliance on a rights offering prospectus exemption, the most significant change to the current regulatory regime concerns the rights offering circular. At present in Alberta, the content of a rights offering circular is prescribed in ASC Policy 5.2. Under the proposed Instrument, an issuer proposing to conduct a rights offering without a prospectus must prepare an offering circular in accordance with the Form. The Form must be delivered initially in draft form to the reviewing authorities in the jurisdictions in which the rights offering is effected, together with various documents that will allow the reviewing authorities to determine that the use of the rights offering prospectus exemption is appropriate in the circumstances.

For rights offerings made under a prospectus, the most significant change to the regulatory regime would be the codification of the requirement that the prospectus qualify the distribution of securities issuable upon the exercise of rights as well as the rights issued under the prospectus.

The Instrument would also harmonize practice of certain Canadian securities regulatory authorities concerning stand-by commitments, additional subscription privileges and the appointment of a depository for a rights offering.

## **Rescission of Policies**

The Proposal would replace, in Alberta, the UAP and ASC Policy 5.2, which would be rescinded with effect at the same time as implementation of the Proposal.

## **Related Proposal**

The CSA, with the exception of the Commission des valeurs mobilières du Québec, will be publishing shortly for comment a proposed multilateral instrument that would harmonize resale requirements for securities issued under exemptions, including the rights offering exemption. Under this proposed multilateral instrument, broader relief is expected to be provided for resales of securities of issuers that are SEDAR filers.

## **Comments**

Interested parties are invited to make written submissions with respect to the Proposal. Submissions received by November 10, 2000 will be considered.

Submissions should be sent to all of the Canadian securities regulatory authorities listed below in care of the Ontario Securities Commission, in duplicate, as indicated below.

British Columbia Securities Commission  
Alberta Securities Commission  
Saskatchewan Securities Commission  
The Manitoba Securities Commission  
Ontario Securities Commission  
Office of the Administrator, New Brunswick  
Registrar of Securities, Prince Edward Island  
Nova Scotia Securities Commission  
Securities Commission of Newfoundland  
Registrar of Securities, Northwest Territories  
Registrar of Securities, Nunavut  
Registrar of Securities, Yukon

*c/o* John Stevenson, Secretary  
Ontario Securities Commission  
20 Queen Street West  
Suite 800, Box 55  
Toronto, Ontario M5H 3S8

Submissions should also be addressed to the Commission des valeurs mobilières du Québec as follows:

Claude St Pierre, Secrétaire  
Commission des valeurs mobilières du Québec  
800 Victoria Square  
P.O. Box 246, 17th Floor  
Montréal, Québec H4Z 1G3

A diskette containing the submissions (in Windows format, preferably WordPerfect 6/8) should also be submitted. As securities legislation in certain provinces requires that a summary of written comments received during the comment period be published, confidentiality of submission cannot be maintained.

Questions may be referred to any of:

Agnes Lau  
Deputy Director, Capital Markets  
Alberta Securities Commission  
(780) 422-2191  
agnes.lau@seccom.ab.ca

Stephen Murison  
Legal Counsel  
Alberta Securities Commission  
(403) 427-4233  
stephen.murison@seccom.ab.ca

Wayne Redwick  
Director, Corporate Finance Division  
British Columbia Securities Commission  
(604) 899-6500  
wredwick@bcsc.bc.ca

Dean Murrison  
Deputy Director, Legal  
Saskatchewan Securities Commission  
(306) 787-5645  
dmurrison@ssc.gov.sk.ca

Margo Paul  
Manager, Corporate Finance  
Ontario Securities Commission  
(416) 593-8136  
mpaul@osc.gov.on.ca

Erez Blumberger  
Legal Counsel, Corporate Finance  
Ontario Securities Commission  
(416) 593-3662  
eblumberger@osc.gov.on.ca

Ann Leduc  
Regulation  
Commission des valeurs mobilières du Québec  
(514) 940-2199  
ann.leduc@cvmq.com

August 11, 2000.

## APPENDIX

to

## NOTICE

### **PROPOSED NATIONAL INSTRUMENT 45-101, FORM 45-101F AND COMPANION POLICY 45-101CP *RIGHTS OFFERINGS***

#### **Public Comments on 1997 Proposal and CSA Responses**

The CSA received comments on the 1997 Proposal from five commenters:

- McDermid St. Lawrence Securities Inc.
- Thomson Kernaghan & Co. Ltd.
- Davies, Ward & Beck
- Osler, Hoskin & Harcourt
- Stikeman, Elliott

The CSA consider the comments to have been generally favourable, with the objective of harmonization acknowledged as a positive step. However, some of the commenters were concerned that the 1997 Proposal would not result in complete harmonization, which could be problematic for issuers.

More specific comments on the 1997 Proposal, and the CSA's responses, follow:

- *No new class of securities*

Three commenters expressed concern about the provision stating that an issuer cannot rely on the rights offering prospectus exemption to issue rights that are exercisable into a class of securities not already in existence.

*This has always been the position of staff of the Canadian securities regulatory authorities and is not a new restriction on the use of the rights offering prospectus exemption. The provision in most of the local policy statements relating to the denial of the use of the statutory exemption if capital was increased by more than 25% of a particular class of securities is evidence of that position. The provision is consistent with the underlying policy of the rights offering exemption that it should not be used as a major financing initiative. Since this staff position has prevailed for several years and has not caused grave concerns*



*with issuers in respect of the use of the rights offering prospectus exemption, the CSA have determined not to change this position.*

- Offering period – "best efforts" offerings

Two commenters suggested that the 30 day maximum offering period specified in the 1997 Proposal for a rights offerings if a minimum amount of funds is required to fund a specified purpose would be too short for a "best efforts" rights offering. A 45 day period was suggested.

*The CSA propose to increase the offering period for best efforts offerings to 45 days. In light of this change, the CSA also propose to extend the offering period, for non-reporting issuers, to 60 days.*

- Information requested by regulator

One commenter suggested that the requirement in the 1997 Proposal that issuers provide such information as the reviewing authority may request was too broad.

*This provision essentially reflects the language in most of the Canadian securities legislation relating to whether or not the particular securities regulatory authority would object to the use of a rights offering exemption. For this reason, the CSA have determined to retain this requirement.*

- Information to all securityholders

One commenter suggested that the 1997 Proposal's requirement that information be sent to all securityholders rather than only to those securityholders entitled to receive rights was unduly onerous.

*The CSA concur that the requirement would be unduly onerous, given that the information to be delivered can be found in general continuous disclosure documents which should be available through SEDAR.*

- Amendments

One commenter expressed concern about the practicality of a four day review of amendments, while two commenters suggested that the proposed blanket prohibition on amendments to the terms of an offering was inappropriate.

*The CSA propose to shorten the review period to two days to accord with the provisions in Canadian securities legislation in Québec.*

*The CSA are of the view that market pricing of rights reflects two specific elements, the subscription price and the expiry date. For that reason, in the view of the CSA, rightsholders who have made an investment decision in respect of rights could be adversely affected by a change in these terms of the rights offering. The CSA have therefore determined to maintain their position that amendments to the terms of a rights offering are not permitted. Issuers retain the ability to abandon a rights offering and commence a new rights offering on different terms.*

- Maximum pricing

One commenter suggested that maximum pricing should not be regulated.

*The CSA propose to permit "above-market pricing" provided that insiders do not take more than their pro rata portion of the offering.*

- Standby commitment – financial resources

One commentator criticized the 1997 Proposal's call for evidence of the financial resources of the provider of a standby commitment as unnecessary.

*The CSA disagree with the criticism because the failure of the standby commitment could affect rightsholders who exercise rights in reliance on the standby commitment.*

- "Related parties"

Two commenters expressed concern about the difficulty in identifying who is a "related party" for purposes of the 1997 Proposal.

*The CSA acknowledge the difficulty and propose to substitute reference to "insiders".*

One commentator suggested that aggregation relief should be provided to certain "related parties" to permit them to increase their pro rata share in a rights offering in certain circumstances.

*The change from "related parties" to "insiders" should address the concern.*

- Certification

One commentator considered the certificate requirement on the Form too onerous.

*This certificate requirement has been removed from the Proposal.*

- Qualifying Depositories

One commentator suggested permitting a junior issuer to use a registrant as a depository in all jurisdictions.

*The Instrument has been revised accordingly.*

- Drafting

Several commentators provided drafting comments, some of which have been reflected in the revised Proposal.