

ASC NOTICE
CHANGES TO COMPANION POLICY 45-517
PROSPECTUS EXEMPTION FOR
START-UP BUSINESSES

October 3, 2017

On July 19, 2016 the Alberta Securities Commission (ASC) adopted ASC Rule 45-517 *Prospectus Exemption for Start-up Businesses* (the **ASC Rule**) to facilitate small, local financings by Alberta-based start-up businesses.

The ASC Rule was designed to coordinate with the crowdfunding prospectus exemptions adopted in each of British Columbia, Manitoba, Nova Scotia, New Brunswick, Québec and Saskatchewan (each a **participating jurisdiction**)¹ that allows start-ups and early stage companies to conduct very small crowdfunding offerings (each a **Start-up Crowdfunding Blanket Order**).

The ASC Rule provides that an issuer conducting a distribution in Alberta may concurrently conduct a start-up business distribution under a corresponding exemption in a participating jurisdiction subject to certain conditions. However, at the time the ASC Rule was adopted it was not possible to conduct a cross-border offering in Alberta as none of the participating jurisdictions referred to Alberta as a participating jurisdiction in their Start-up Crowdfunding Blanket Orders.

On September 21, 2017, the British Columbia Securities Commission announced amendments to its Start-up Crowdfunding Blanket Order. The amendments include a recognition of Alberta as a participating jurisdiction under their order. The ASC Rule already contemplates British Columbia as a “corresponding jurisdiction” and the BC Start-up Crowdfunding Blanket Order² as a “corresponding exemption”. Accordingly, issuers in BC and Alberta are now able to concurrently rely on the ASC Rule and the BC Start-up Crowdfunding Blanket Order to raise funds from investors in both jurisdictions provided they comply with the requirements set out under both regimes.

Companion Policy 45-517 *Prospectus Exemption for Start-up Businesses* has been updated to provide additional guidance for those issuers seeking to conduct a cross-border distribution in Alberta and British Columbia.

¹ See Multilateral CSA Notice 45-316 *Start-up Crowdfunding Registration and Prospectus Exemptions*.

² BC Instrument 45-535 *Start-up Crowdfunding Registration and Prospectus Exemptions*.

Contents of Annexes

Annex A Blackline of Alberta Securities Commission Companion Policy 45-517 *Prospectus Exemption for Start-up Businesses*

Questions

Please refer your questions to the following:

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ANNEX A

COMPANION POLICY 45-517 *PROSPECTUS EXEMPTION FOR START-UP BUSINESSES*

PART 1 GENERAL COMMENTS

1. Application

Alberta Securities Commission Rule 45-517 *Prospectus Exemption for Start-up Businesses* (ASC Rule 45-517 or the Rule) has been adopted by the Alberta Securities Commission (ASC).

2. No registration exemption

ASC Rule 45-517 provides an exemption from the prospectus requirement. It is designed to facilitate capital raising by start-up or early stage businesses while still providing appropriate investor protection. It does not provide an exemption from the requirement that a person or company who is a dealer must be registered. Accordingly, a person or company acting as a dealer in respect of a distribution of securities under ASC Rule 45-517, will need to comply with the registration requirement. A condition of the prospectus exemption is that a person or company that acts or proposes to act as an intermediary in a distribution of securities under this Rule through an online platform, must be registered as an exempt market dealer or investment dealer under National Instrument 31-103 *Registration Requirements, Exemptions and Ongoing Registrant Obligations* or by being registered as a restricted dealer funding portal as defined in the Rule.

3. Purpose

The purpose of this Companion Policy is to help users of ASC Rule 45-517 understand how the ASC interprets certain provisions of the Rule. This Companion Policy includes explanations, discussion and examples of the application of various parts of ASC Rule 45-517.

4. Multi-jurisdictional distributions

ASC Rule 45-517 is available to ~~Alberta~~ issuers seeking to raise capital from Alberta investors. It is available to Alberta issuers but may only be used by an issuer in a corresponding jurisdiction ~~for a multi-jurisdictional distribution~~ if permitted under the securities legislation in ~~each jurisdiction in which the distribution occurs, i.e., in the jurisdiction of the issuer and the investor.~~ that other jurisdiction. Currently, the only jurisdiction that permits a cross-border offering with Alberta is British Columbia pursuant to BC Instrument 45-535 *Start-up Crowdfunding Registration and Prospectus Exemptions* (the **BC Order**).

Issuers conducting distributions under ASC Rule 45-517 and the BC Order are subject to the requirements set out in both regimes. An issuer seeking to conduct a cross-border offering between Alberta and British Columbia would have to comply with the limits and obligations under both ASC Rule 45-517 and the BC Order. Generally, this means that the issuer will be held to the most restrictive limit as between the two instruments. For example, to comply with the BC Order the

issuer would be required to use a funding portal and that portal would be required to be registered as either an investment dealer or an exempt market dealer.

Issuers and dealers contemplating a multi-jurisdictional distribution should review the terms of both ASC Rule 45-517 and the BC Order to ensure they understand the requirements of each.

5. Raising money under ASC Rule 45-517

An issuer wishing to raise funds can use the prospectus exemption in ASC Rule 45-517 in any of the following ways:

- to raise money through an online funding portal (provided that the portal is either a registered dealer or a restricted dealer funding portal);
- to raise money through a dealer (provided the dealer is in compliance with the registration requirement e.g., registered as an exempt market dealer or investment dealer) that will solicit investment and distribute securities through traditional distribution channels;
- to raise money through the issuer's principal's own network of contacts (provided that they are not in the business of trading securities such that the dealer registration requirement is triggered).

6. Suitability for issuers

Before commencing a distribution under ASC Rule 45-517 issuers should consider whether it is appropriate for their purposes. Issuers should assess whether they have the resources to comply with the requirements under the Rule and estimate if they have the financial and other resources necessary to manage a great number of security holders.

If the distribution is successful, the founders of the issuer may have to give up part of the ownership of the issuer to investors. The issuer will be accountable to its investors. Investors will likely expect to be informed about successes and failures of the issuer's business. The issuer may have to spend time and money to maintain contact with investors.

Within 30 days after the closing of a distribution, the issuer must file a report of exempt distribution, in the required form, with the ASC. There is a fee associated with the filing of this report.¹

An issuer that relies on ASC Rule 45-517 will likely no longer be considered a "private issuer" under National Instrument 45-106 *Prospectus Exemptions* (NI 45-106) and, as such, will likely not be able to rely on the "private issuer" prospectus exemption for future distributions of securities. As a consequence, other prospectus exemptions will need to be considered and if relied upon, a

¹ For example, as at the date of this Companion Policy, in Alberta, the minimum fee for filing a report of exempt distribution is \$120.

report of exempt distribution with the associated fee will likely be required in respect of each future distribution.

ASC Rule 45-517 is not available to reporting issuers. Reporting issuers are companies that are required to make continuous disclosure to the public of their business activities including by filing financial statements and other documents as required by securities legislation.

Relying on ASC Rule 45-517 will not make an issuer a “reporting issuer” under securities laws; however, by increasing the number of its shareholders, the issuer may become subject to certain reporting requirements under applicable corporate law. For example, under business corporations legislation an issuer is typically required to hold an annual meeting of its shareholders and is required to distribute an information circular, containing certain specified information, where it solicits proxies from more than a specified number of shareholders, e.g., more than 15. Also under business corporations legislation an issuer will often be required to deliver audited annual financial statements to shareholders, unless the shareholders unanimously resolve to dispense with the appointment of an auditor. With a large number of public shareholders obtaining such a resolution is probably not realistic.

PART 2 INTERPRETATION

7. Distribution limit

The maximum that can be raised in any one distribution under ASC Rule 45-517 is \$250 000. An issuer group is permitted to conduct up to two distributions in a calendar year. The lifetime limit also applies such that the aggregate funds raised by the issuer group through all start-up business distributions must be less than \$1 000 000.

8. Lifetime limit

Issuers using ASC Rule 45-517 are subject to a \$1 000 000 lifetime limit on the amount that they can raise under ASC Rule 45-517 and a corresponding exemption. In calculating the \$1 000 000 all funds ever raised by the issuer and other members of the “issuer group” under ASC Rule 45-517 or a corresponding exemption are included.

ASC Rule 45-517 is intended to serve the funding gap that may exist prior to an issuer being able to cost effectively use the offering memorandum prospectus exemption in NI 45-106 (the OM Exemption). Once an issuer group has raised \$1 000 000 under start-up business distribution(s) we think it should be in a position to prepare financial statements and comply with the requirements of the OM Exemption.

The term issuer group is defined in ASC Rule 45-517 and includes the issuer, each affiliate of the issuer and any other issuer that is engaged in a common enterprise with the issuer or who has a founder that is also a founder of the issuer. The term “founder” is defined in NI 45-106. It includes a requirement that, at the time of the distribution of a security the person be actively involved in the business of the issuer. Accordingly, a person who takes the initiative in founding, organizing or

substantially reorganizing the business of the issuer within the meaning of the definition but subsequently ceases to be actively engaged in the day to day operations of the business of the issuer would no longer be a “founder” for the purposes of ASC Rule 45-517, regardless of the person’s degree of prior involvement with the issuer or the extent of the person’s continued ownership interest in the issuer.

If a founder remains actively engaged with two separate businesses both of which are seeking to rely on ASC Rule 45-517, where (i) the businesses are truly separate enterprises, and (ii) the founder can demonstrate they possess adequate resources to dedicate to each business, the ASC would consider an application for exemptive relief allowing the two businesses to not be grouped together as the same issuer group.

9. Investment limits

ASC Rule 45-517 includes various limits on the amount that can be raised from any particular investor. If a registered dealer is *not* involved, for example, if an issuer accesses investors through its own network of contacts, without using a portal, no investor can invest more than \$1 500 in a single investment. As issuers are restricted to conducting no more than two start-up business distributions in a calendar year, no investor would be able to invest more than \$3 000 per issuer group in the same calendar year under all start-up business distributions.

If an issuer retains a registered dealer to access investors, whether through a portal or through traditional channels, the investment limits can be somewhat higher. Where a registered dealer provides positive suitability advice regarding an investor’s investment, recommending that the investment is suitable for the investor, then the investor can invest up to \$5 000 in a single investment. Again, issuers are restricted to conducting no more than two start-up business distributions in a calendar year, accordingly, no investor would be able to invest more than \$10 000 per issuer group in the same calendar year under all start-up business distributions.

Registered dealers are subject to know-your-product, know-your-client and suitability requirements, accordingly, if the registered dealer provides positive suitability advice, recommending that an investment is suitable for an investor, a somewhat higher investment limit is permitted. The higher investment limit allows issuers access to greater capital but is intended to still protect investors by safeguarding them from investments that are not suitable for them.

10. Concurrent distributions

An issuer can raise money using other prospectus exemptions concurrently with conducting a start-up business distribution. Other prospectus exemptions are found in NI 45-106. The funds raised under other prospectus exemptions can serve to reach the minimum offering amount stated in the offering document.

For example, NewTech Co’s goal is to raise a minimum offering amount of \$75 000. They used a funding portal that is registered as an exempt market dealer. They raised \$65 000 through the funding portal from several investors under ASC Rule 45-517. At the same time, Rebecca, an “accredited investor” as defined in NI 45-106 (e.g., annual net income of over \$200 000 for the last few years), wants to invest \$10 000 in NewTech Co. under the accredited investor exemption.

NewTech Co. cannot use ASC Rule 45-517 to sell to Rebecca since Rebecca wants to invest more than is permitted under ASC Rule 45-517. However, Rebecca qualifies as an accredited investor so NewTech Co. can sell to Rebecca under the accredited investor exemption. Together, the \$65 000 from the distribution under ASC Rule 45-517 and the \$10 000 raised under the accredited investor exemption meet the minimum offering amount. NewTech Co can ask the funding portal to release the \$65 000 raised as soon as the withdrawal period has expired for all start-up business distribution investors.

11. No commissions or fees

ASC Rule 45-517 prohibits payment of a commission, fee or similar payment to the issuer group or any of their promoters, directors, officers, control persons or founders in connection with a distribution under the Rule. This is intended to alleviate concerns related to potential conflicts of interest. However, this is not intended to deny payments to persons or companies for compensation for their services to an issuer in preparing materials in connection with a distribution under the Rule, such as accounting or legal fees.

12. Amendments to the offering document

The information contained in the offering document must be kept up to date throughout the duration of the start-up business distribution. If the information in the offering document contains any information that becomes, in a material respect, misleading or untrue at the time and in light of the circumstances in which it is made, the issuer must amend the offering document as soon as practicable and deliver the new version to investors. An updated version of the offering document does not need to be provided to investors under prior start-up business distributions that have been completed.

Investors will have 48 hours from being notified of the amendment to cancel their agreement to purchase the securities. Investors who want to withdraw their investment during this time must notify the issuer or dealer, depending on who they purchased their securities through.

In determining whether an offering document must be updated, an issuer must consider the materiality of the change in circumstances. Materiality is a matter of judgment to be made in light of the circumstances, taking into account both qualitative and quantitative factors, assessed in respect of the issuer as a whole. Consider whether a hypothetical investor, broadly representative of investors generally and acting reasonably, would be likely to be influenced, in making an investment decision to buy a security of an issuer, by an item of information or an aggregate of items of information. If so, then that item of information, or aggregate of items, is “material” in respect of that issuer. An item that is immaterial alone may be material in the context of other information, or may be necessary to give context to other information.

PART 3 FORMS

13. Offering document

Issuers are responsible for preparing the offering document to be provided to investors to enable them to make a decision whether to invest in the issuer's securities. An offering document delivered under ASC Rule 45-517 must be prepared by using Form 45-~~109~~517F1 *Start-up Business Offering Document*. The issuer must provide information for each of the items in the Form. However, certain accommodations are provided in section 14 of ASC Rule 45-517 to facilitate cross-border offerings also being made under the BC Order.

14. Risk acknowledgment

The issuer must obtain a signed risk acknowledgment from each investor prior to the investor signing the agreement to purchase any securities. A risk acknowledgment obtained under ASC Rule 45-~~517~~517, from Alberta residents, must be in the form prescribed by Form 45-~~109~~517F2 *Start-up Business Risk Acknowledgment*. However, in the case of a cross-border offering also being made under the BC Order, investors not resident in Alberta, can be provided the risk acknowledgement contemplated under the BC Order. All risk acknowledgments must evidence that the investor has read and understood the matters set out in the form.

PART 4 CLOSING OF THE DISTRIBUTION

15. Achieving the minimum offering amount

If the minimum offering amount has been raised within the determined time period, the issuer can proceed to close the distribution. The issuer will issue the securities and instruct the dealer, if any, to release the funds. However, in all cases, the issuer must not access funds until the withdrawal period for each investor under a start-up business distribution has expired.

16. Report of exempt distribution

Within 30 days after the closing of any distribution under ASC Rule 45-517, the issuer must file a completed report of exempt distribution with the ASC and any other corresponding jurisdiction in which funds were raised. The report of exempt distribution must be in Form 45-106F1 *Report of Exempt Distribution* except in the case of a multi-jurisdictional distribution as described in section 14 of the Rule.

17. Filing of offering document

Within 30 days after the closing of a distribution under ASC Rule 45-517, the issuer must file the offering document, including all applicable amendments, with the ASC and any other corresponding jurisdiction in which funds were raised.

18. Filing on the System for Electronic Document and Analysis and Retrieval (SEDAR)

The report of exempt distribution and offering document must be filed electronically through SEDAR, in accordance with National Instrument 13-101 *System for Electronic Document Analysis and Retrieval (SEDAR)*. The Canadian Securities Administrators (CSA) has information regarding the SEDAR filing requirements. Please see:

CSA Staff Notice 13-323 *Frequently Asked Questions About Making Exempt Market Offering and Disclosure Filings on SEDAR*

CSA website on *Report of Exempt Distribution*