

**ALBERTA SECURITIES COMMISSION
NOTICE**

**MULTILATERAL INSTRUMENT 45-103
CAPITAL RAISING EXEMPTIONS**

March 28, 2002

Multilateral Instrument 45-103 *Capital Raising Exemptions* is a joint initiative of the Alberta and British Columbia Securities Commissions (“BCSC”) and is intended to harmonize the key capital raising exemptions in Alberta and British Columbia.

Final Approval in Alberta

The Alberta Securities Commission (“ASC”) gave final approval of the following rules and consequential amendments, effective March 30, 2002:

- Multilateral Instrument 45-103 *Capital Raising Exemptions* (“MI 45-103”);
- Form 45-103F1 *Offering Memorandum for Non-Qualifying Issuers* (“Non QI OM”);
- Form 45-103F2 *Offering Memorandum for Qualifying Issuers* (“QI OM”);
- Form 45-103F3 *Risk Acknowledgement* (“Risk Acknowledgement”);
- ASC Rule 45-802 *Implementing Multilateral Instrument 45-103 Capital Raising Exemptions and Forms 45-103F1, F2 and F3* (“Implementing Rule”); and
- Amendments to Alberta Securities Commission Form 20 *Report Under Section 132(1) of the Securities Act* (“Form 20 Amendment”).

The ASC also adopted Companion Policy 45-103CP as a policy effective March 30, 2002.

Implementation in British Columbia

The BCSC has obtained government consent to the implementation of MI 45-103 and expects to be able to implement MI 45-103 within a week. Refer to the BCSC’s website at www.bcsc.bc.ca for further information.

Summary of MI 45-103

MI 45-103 provides four new exemptions from the prospectus and dealer registration requirements of the *Securities Act* (Alberta)(“Act”). Those exemptions are as follows:

- private issuer exemption;
- family, friends and business associates exemption;
- accredited investor exemption; and
- offering memorandum exemption.

The proposed new exemptions and some of the major differences between the statutory exemptions and the MI 45-103 exemptions are summarized in the attached Appendix A. Refer to MI 45-103, the forms and the Companion Policy for full details of the terms of the MI 45-103 exemptions.

The exemptions provided by MI 45-103 are in addition to the existing registration and prospectus exemptions provided by the Act. MI 45-103 does not modify or amend the statutory exemptions.

Statutory Amendments

Following implementation of MI 45-103, we intend to recommend that the Alberta Legislature consider certain amendments to the Act. We anticipate that the Alberta Legislature will consider these proposed amendments at the Fall, 2002 session.

We anticipate issuing a further notice when the timing of the statutory amendments is more certain. The proposed statutory amendments are described below.

(a) *Repeal of Certain Prospectus and Registration Exemptions*

None of the statutory prospectus and registration exemptions have yet been repealed. However, as indicated above, we intend to recommend to the Alberta Legislature that the statutory exemptions provided under the following sections of the Act, be repealed:

- section 87(i) - private issuer,
- sections 86(1)(c) and 131(1)(a) - financial institution and government exemption,
- sections 86(1)(d) and 131(1)(c) - exempt purchaser,
- sections 86(1)(ff) and 131(1)(bb) - directors, senior officers, family, close friends and business associates,
- sections 86(1)(y) and 131(1)(q) - initial offering memorandum exemption, and
- sections 86(1)(z) and 131(1)(r) - subsequent use of offering memorandum exemption.

(b) *\$97,000 Exemption*

As indicated in our February notice, at this time, we do not anticipate recommending to the Alberta Legislature, that the exemptions at sections 86(1)(e) and 131(1)(d), ie. the \$97,000 exemption, be repealed. We propose to retain the \$97,000 exemption until we have had an opportunity to assess who is using that exemption and why it, rather than the accredited investor exemption, is being used.

(c) *Proposed Amendment to Statutory Rights of Action*

Section 204 of the Act provides a statutory right of action to a purchaser under an offering memorandum. This statutory right applies to an offering memorandum prepared in accordance with ASC Form 43, the Non-QI OM form or the QI OM form. Currently, purchasers have a statutory right of action for damages or rescission against the issuer if the offering memorandum contains a misrepresentation. However, we intend to recommend to the Alberta Legislature that the current statutory rights of action be expanded to add a statutory right of action for damages against the issuer's directors, chief executive officer, chief financial officer and promoters in the event the offering memorandum contains a misrepresentation. We will also recommend that the limitation period be extended such that the current reference in section 211(b)(ii) be changed from one year to three years. As indicated above, these amendments will not be made until at least Fall, 2002.

Concurrent Use of Statutory Exemptions and MI 45-103 Exemptions

MI 45-103 provides exemptions that are in addition to those that exist in the Act. Until the Alberta Legislature repeals the statutory exemptions referred to above, an issuer may choose to rely on the statutory exemptions or the MI 45-103 exemptions. The issuer, of course, must strictly comply with the terms of the particular exemption.

An issuer should exercise caution in trying to conduct an offering under both the statutory exemptions and the MI 45-103 exemptions.

The two different regimes may not work well together.

- Under MI 45-103, advertising in connection with an offering is not prohibited. However, under certain of the statutory exemptions, advertising, invitations to the public, and offers to the public are specifically prohibited. Accordingly, actions such as advertising, that may be permissible under MI 45-103, may invalidate the concurrent use of certain of the statutory exemptions.
- If an offering memorandum is required under both a statutory exemption and under the MI 45-103 offering memorandum exemption, it may be difficult to prepare a single offering memorandum that complies with both ASC Form 43 and either the Non-QI OM form or the QI OM form. This may make it difficult to concurrently use the statutory exemptions and the MI 45-103 offering memorandum exemption. An issuer may be able to prepare an offering memorandum that complies with the requirements of both ASC Form 43 and the Non-QI OM form; however, it is very unlikely that an offering memorandum that complies only with the requirements of ASC Form 43 would comply with the requirements of the Non-QI OM or the QI OM form. Furthermore, it does not appear possible to prepare an offering memorandum in accordance with the QI OM form that will comply with Form 43.

MI 45-103 does not modify any of the terms applicable to the statutory exemptions.

- If an issuer voluntarily provides an offering memorandum under the statutory close friends and business associates exemption, section 127 of the ASC Rules requires that the offering memorandum be prepared in accordance with ASC Form 43. There is no requirement under the family, friends and business associates exemption in MI 45-103 for an offering memorandum to be provided. However, if an issuer is concurrently offering securities under both the statutory exemption and the MI 45-103 exemption and an offering memorandum is provided, the issuer must still provide an offering memorandum, prepared in accordance with ASC Form 43, to those purchasers purchasing under the statutory exemption.
- Advertising is not prohibited under MI 45-103 and advertising under the accredited investor exemption does not trigger the requirement for an offering memorandum. However, if an issuer is concurrently offering securities under the accredited investor exemption and the \$97,000 exemption, advertising in connection with the offering still triggers a requirement under sections 125 and 127 of the ASC rules for the issuer to provide an offering memorandum, prepared in accordance with ASC Form 43 (to the extent modified by ASC Blanket Order 87/06/04), to each purchaser to whom securities are sold under the \$97,000 exemption.

Coordination with Other Jurisdictions

Certain other provincial securities commissions have expressed interest in MI 45-103 and, over the next year, may consider adopting it. Furthermore, it is anticipated that the various provincial and territorial securities commissions will consider further harmonization of the various exemptions from prospectus and registration requirements in the context of the proposed Uniform Securities Legislation project.

Applications for Exemptive Relief

MI 45-103 sets out the terms of exemptions from the prospectus and registration requirements. If an issuer is unable to comply with the terms of an exemption provided in MI 45-103 and seeks a discretionary exemption order, application should not be made for relief from MI 45-103. Rather, the issuer would make application, under section 144 of the Act, for relief from the prospectus and dealer registration requirements of the Act. Although an issuer, strictly speaking, would not be seeking relief from MI 45-103, the basis of its application may be that the fact situation in regard to which it seeks an exemption is analogous to an exemption provided by MI 45-103.

If the application for relief is being made because the issuer is unable to comply with a financial statement requirement under the Non-QI OM, this statement should be stated in bold in the first paragraph of the application. Staff may consider recommending the application if a similar waiver would be permitted in the context of a prospectus offering.

Applications should be addressed to the Director, Legal Services & Policy Development. Refer to ASC Policy 12-601.

If you have any questions, please contact:

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**APPENDIX A
TO
ALBERTA SECURITIES COMMISSION
NOTICE**

**MULTILATERAL INSTRUMENT 45-103
CAPITAL RAISING EXEMPTIONS**

Summary of Prospectus and Registration Exemptions under MI 45-103

Private Issuer Exemption

If an issuer meets the definition of private issuer under MI 45-103, trades in the securities of the issuer can be made by the issuer, or others, to certain specified persons. Trades can be made to:

- (a) the directors, senior officers and control persons of the issuer,
- (b) spouses, parents, grandparents, siblings and children of those individuals referred to in (a),
- (c) close personal friends and close business associates of individuals referred to in (a),
- (d) spouses, parents, grandparents, siblings and children of the selling securityholder,
- (e) current holders of the issuer's designated securities,
- (f) accredited investors,
- (g) a person or company that is wholly owned by any one or more of the above, and
- (h) a person or company that is not the public.

One aspect of the definition of private issuer in MI 45-103 requires that the issuer have less than 50 "designated" securityholders (excluding employees). Since the term "designated securities" excludes debt securities, in calculating the number of designated securityholders, holders of non-convertible debt securities would generally be excluded.

The issuer can sell non-designated securities, such as debt, to purchasers who are not described in the list without losing its private issuer status. However, the private issuer exemption does not provide an exemption to permit trades of non-designated securities to these purchasers. The issuer would need to rely on another exemption, such as the accredited investor exemption or the offering memorandum exemption, in order to effect the trade.

The private issuer exemption does not require that an offering memorandum or other disclosure document be provided to a potential investor. If an offering document is provided, it is not required to be in a prescribed form nor does it trigger statutory rights of action for purchasers.

Until the Act is amended to remove the current statutory definition of private issuer, there will be two definitions of that term. The definition in MI 45-103 applies in MI 45-103. The statutory definition applies in all other cases. Multilateral Instrument 45-102 *Resale of Securities* requires that an issuer that ceases to be a private issuer file a Form 45-102F1. The Implementing Rule exempts an issuer from the requirement to file the Form 45-102F1 on ceasing to be a private issuer as defined in the Act, if the issuer is still a private issuer as defined in MI 45-103. The Implementing Rule provides that an issuer that ceases to be a private issuer as defined in MI 45-103 must file a Form 45-102F1 when it ceases to be a private issuer as defined under MI 45-103.

Family, Friends and Business Associates Exemption

This exemption permits trades in the securities of an issuer by the issuer, or others, to directors, officers and control persons of the issuer as well as certain family members, close personal friends, and close business associates of the directors, senior officers and control person. There is no prescribed limit on the number of purchasers under this exemption. However, the issuer must still ensure that the purchaser, in fact, has the necessary relationship with a director, senior officer or control person.

This exemption, unlike the statutory close friends and business associates exemption, does not permit sales to persons who are close friends or business associates of a promoter of the issuer.

The exemption does not require that an offering memorandum or other disclosure document be provided to an investor. If an offering document is provided, it is not required to be in a prescribed form nor does it trigger statutory rights of action for purchasers.

Accredited Investor Exemption

This exemption permits trades in the securities of an issuer by the issuer, or others, to any person or company that qualifies as an “accredited investor”. There is no minimum or maximum dollar subscription. The term “accredited investor” exemption is a defined term and refers to a list of persons and companies, including a variety of institutions, registered investment dealers, certain entities with \$5 million in net assets and certain wealthy individuals.

The exemption does not require that an offering memorandum or other disclosure document be provided to an investor. If an offering document is provided, it is not required to be in a prescribed form nor is it required to provide statutory rights of action for purchasers.

The definition of accredited investor in MI 45-103 was drafted to harmonize as much as possible with the definition in Ontario Securities Commission (“OSC”) Rule 45-501 *Exempt Distributions* (“OSC Rule”). Certain differences in terminology were necessary because the OSC used terms defined in Ontario securities legislation and interpretation statutes. Because MI 45-103 is to be effective in more than one jurisdiction, it cannot use definitions in local securities legislation. Instead, MI 45-103 relies on definitions provided by National Instrument 14-101 *Definitions*. Other minor differences between MI 45-103 and the OSC Rule are referred to in our February notice.

Offering Memorandum Exemption

(a) General

The exemption permits trades in the securities of an issuer by the issuer to a purchaser who obtains an offering memorandum in the required form and who completes a risk acknowledgement form in the required form. The exemption does not allow trades from anyone other than the issuer.

The Act provides exemptions that permit purchasers who purchased securities under one of the statutory offering memorandum exemptions to trade securities to other persons or companies who also acquired securities under the same statutory offering memorandum exemption. However, there is no specific exemption to permit trades from one purchaser who acquired securities under the MI 45-103 offering memorandum exemption to another purchaser who also acquired securities under the MI 45-103 offering memorandum exemption.

(b) Additional condition to use of exemption in Alberta

Under Alberta securities law, if an issuer is offering securities under the MI 45-103 offering memorandum exemption, a purchaser cannot acquire more than \$10,000 of securities in a particular distribution unless the purchaser is an “eligible investor”. Generally, the term eligible investor refers to a person or company that either:

1. meets certain financial tests (eg. \$75,000 pre-tax net income or \$400,000 net assets), or
2. has obtained advice regarding the suitability of the investment from a registered investment dealer.

The requirement that a purchaser be an eligible investor to purchase more than \$10,000 of securities is a requirement of Alberta securities legislation. The requirement does not exist under British Columbia securities legislation.

(c) Required form of offering memorandum

If an issuer is relying on the offering memorandum exemption in MI 45-103, it must prepare an offering memorandum in accordance with the Non-QI OM form unless the issuer is a “qualifying issuer” as defined under Multilateral Instrument 45-103 *Resale of Securities*. A qualifying issuer can use either the Non-QI OM form or the QI OM form.

An issuer preparing an offering memorandum in accordance with the QI OM form must incorporate by reference specified documents from the issuer’s continuous disclosure base. For example, the issuer is not required to include financial statements in its offering memorandum but is required to incorporate by reference into its offering memorandum, the financials statements it has filed via SEDAR

(d) Updating an Offering Memorandum

There is no limit on the number of purchasers that may purchase under the MI 45-103 offering memorandum exemption. Once created, an offering memorandum may be used repeatedly for various offerings. However, the offering memorandum must be updated to incorporate annual financial statements and, in the case of a qualifying issuer, the current AIF (annual information form). The offering memorandum must also be updated if circumstances change such that the information in the offering memorandum contains a misrepresentation. This could occur, for example, if there was a material change in the issuer’s business or affairs. An issuer cannot accept a subscription from a potential purchaser who was provided an earlier version of an offering memorandum until the update is provided.

An issuer must file each update with the ASC.

(e) Financial Statements for Acquisitions

The Non-QI OM form requires that if an issuer has made an acquisition of a business or intends to make an acquisition of a business that meets the specified tests, separate financial statements for that business may be required. The QI OM does not contain this requirement.

(f) *Rights of action for purchasers under the MI 45-103 offering memorandum exemption*

1. An issuer must contractually provide a two day right of withdrawal to a purchaser who is sold securities under the MI 45-103 offering memorandum exemption.
2. An issuer must disclose in its offering memorandum any statutory rights of action available to a purchaser in the event that the offering memorandum contains a misrepresentation.
3. If a purchaser under the MI 45-103 offering memorandum exemption is in a jurisdiction that does not provide statutory rights of action (for example, BC, until BC introduces statutory rights of action), the issuer must provide the purchaser with contractual rights of action.

MI 45-103 requires that the contractual right of action refer to a three year limitation period. The *Limitations Act* (Alberta) may restrict contractual limitation periods to two years unless the person or company adversely effected by the extended limitation period acknowledges and agrees in writing to the longer limitation period. If an issuer is required to provide contractual rights of action, in order to validly comply with MI 45-103, it may also need to provide the acknowledgement required under the *Limitations Act* (Alberta).

(g) *Exclusion of Mutual Funds in Alberta*

MI 45-103 provides that, in Alberta, certain mutual fund issuers cannot rely on the offering memorandum exemption. The mutual fund issuers that are precluded from using the MI 45-103 offering memorandum exemption are those issuers that, if they were conducting a prospectus offering, would be subject to National Instrument 81-101 *Mutual Fund Prospectus Disclosure*. MI 45-103 was conceived of as an initiative to assist small to medium-sized enterprises and consequently, the forms of offering memoranda are not well suited for mutual funds. We will be considering whether it is appropriate to design a form of offering memorandum more suitable for mutual fund issuers and whether other exemptions for mutual fund issuers would be appropriate.

Purchases by Trust Corporations and Portfolio Managers

The various exemptions under MI 45-103 require that the purchaser purchase as principal. Section 131(2) of the Act deems trust corporations and portfolio managers trading for accounts fully managed by them to be purchasing as principal in certain circumstances when purchasing under exemptions referred to in section 131(1) of the Act. This provision also applies to the exemptions in MI 45-103. The exemptions in MI 45-103 are considered to be exemptions referred to in section 131(1) of the Act because section 131(1)(cc) of the Act refers to trades “in respect of a matter for which the regulations provide that a prospectus is not required”. The definition in the Act of the term regulations includes ASC rules, such as MI 45-103.

Offering Documents and Advertising

It is an offence under the Act for a person or company to make a statement, with the intention of effecting a trade, that the person or company knows or ought reasonably to know is a misrepresentation. Accordingly, although an offering document is not required to be provided to purchasers under the MI 45-103 private issuer, family friends and business associates, or accredited investor exemption, if an offering document is provided, it must not contain a misrepresentation. The prohibition against misrepresentations extends to verbal representations made to a purchaser with the intention of effecting a trade.

Advertising in connection with distributions under MI 45-103 is not prohibited. However, an issuer should exercise caution in preparing advertising documents. If advertising is conducted with the intention of effecting a trade in securities and there is a misrepresentation in the advertising that could constitute an offence under the Act. Furthermore, if an issuer is conducting an offering under the MI 45-103 offering memorandum exemption and includes important information in its advertising documents that is not contained in its offering memorandum, this may suggest that there is a misrepresentation by omission in the offering memorandum.

Non-Registered Salespersons

None of the exemptions in MI 45-103 restrict the payment of commissions to registered dealers. Furthermore, none of the exemptions under MI 45-103 require that a registered investment dealer or securities dealer be involved in the sale of securities under the exemption. (Although the involvement of a registered dealer is one method of establishing that a purchaser is an eligible investor under the offering memorandum exemption.) However, issuers should always exercise caution in retaining a salesperson and should investigate the salesperson's qualifications, experience and past securities regulatory track record. Misrepresentations and other inappropriate behaviour of a salesperson, acting as agent of the issuer, may create liability for both the salesperson and the issuer. (Refer to Part 7 of the Act.)

Dealers who are registered in limited capacities, such as mutual fund dealers and scholarship plan dealers, are not prohibited by MI 45-103 from acting as salespersons for offerings made under exemptions in MI 45-103. However, those dealers may be prohibited by sections 16 and 41 of the ASC rules or by the terms of their registration, from being employed outside the scope of that registration and this would prohibit their sale of securities under a private placement. Refer to ASC Policy 3.10.