

Alberta Securities Commission Notice
Multilateral Instrument 45-103 *Capital Raising Exemptions*

Publication for Comment

The Alberta Securities Commission (“ASC”) together with the British Columbia Securities Commission (“BCSC”) have published for comment:

- z Multilateral Instrument 45-103 *Capital Raising Exemptions* (the “Rule”),
- z Companion Policy 45-103CP (the “Policy”),
- z Form 45-103F1 *Offering Memorandum for Non-Qualifying Issuers*,
- z Form 45-103F2 *Offering Memorandum for Qualifying Issuers*, and
- z Form 45-103F3 *Risk Acknowledgement*.

The proposed Rule will provide harmonized new exemptions from the prospectus and registration requirements in Alberta and British Columbia. The exemptions are designed to make it easier for issuers to access capital, reducing the time and costs usually associated with a financing, while still providing appropriate investor protection.

Proposed Capital Raising Exemptions

1. Private Issuer Exemption

The proposed Rule broadens and harmonizes the existing “private issuer” exemptions in Alberta and B.C. Generally, under the new Rule, a private issuer will be an issuer that is not a reporting issuer, whose “designated securities” (eg. common shares) are subject to transfer restrictions, that has not distributed its designated securities to anyone other than those in the list of permitted purchasers, and whose designated securities are held by not more than 50 shareholders, excluding employees.

The new exemption will allow a private issuer to raise capital from purchasers who are:

- (a) directors, officers, control persons (ie. principals) or employees of the issuer
- (b) in specified relationships with a principal of the issuer (eg. family members, close friends or business associates),
- (c) certain family members of the selling security holder,
- (d) accredited investors, or
- (e) not “the public”.

The Policy provides guidance on the meaning of “the public”.

The exemption will allow trades not only from the issuer, but from others to the list of permitted purchasers and will allow the permitted purchasers to trade among themselves. Because only the “designated

securities” of a private issuer are restricted, a private issuer will be permitted to sell non-designated securities (eg. debt) to the public without losing its ability to rely on the private issuer exemption. However, in that situation, the issuer would need to rely on another exemption.

An issuer relying on the private issuer exemption will not be required to provide an offering document to purchasers or file a report with the securities commission to report trades made under the exemption.

2. Family, Friends and Business Associates Exemption

The proposed Rule will broaden and harmonize the existing exemptions in Alberta and B.C. Under the new exemption an issuer will be allowed to raise money from:

- (a) its directors, senior officers and control persons,
- (b) spouses, parents, siblings and children of those in (a), and
- (c) close personal friends and close business associates of those in (a).

The Policy provides guidance as to who is a “close personal friend” or a “close business associate”. Promoters of the issuer have been excluded from the list of permitted purchasers. Trades to and between promoters will continue to be available under other exemptions.

There will be no limit on the number of purchasers nor a limit on the amount of money that can be raised using this exemption. Trades will be permitted not only from the issuer to the list of permitted purchasers but also from others and will allow the permitted purchasers to trade among themselves. The Policy clarifies that although the exemption may be used concurrently with an offering to the public under another exemption, a person purchasing under this exemption will be considered to lack the necessary relationship if they have been solicited through advertising or a registrant.

No offering document will be required to be provided to purchasers under this exemption. If an offering document is provided, it is not required to be in a prescribed form or to provide rights of action. The issuer will be required to file reports of trades made under the exemption with the applicable securities commission.

3. Offering Memorandum Exemption

(a) Exemption

The new offering memorandum exemption will allow issuers to raise money from an unlimited number of purchasers provided that each purchaser obtains an offering memorandum in a prescribed form. Purchasers will not be required to be “sophisticated” nor will they be required to retain a registrant; however, a prescribed form of risk acknowledgment, acknowledging, among other things, that the investment is risky and that the investor may lose all of the money invested will be required from each investor.

The offering will not be required to be completed within a specified period of time nor will there be a

required interval between offerings. Information in the offering memorandum will be kept current by a requirement that the certificate to the offering memorandum, which indicates it contains no misrepresentation, be true when it is signed by the issuer, delivered to the purchaser and when the purchaser signs the agreement to purchase the securities. The offering memorandum will be required to be re-certified and re-dated within a certain time frame after the issuer completes a new financial year.

(b) Offering Memorandum Forms

There are two forms of proposed offering memoranda, both intended to provide a concise statement of material facts relating to the issuer and the securities offered. Form 45-103F1 *Offering Memorandum for a Non-Qualifying Issuer* will be available for any issuer. Form 45-103F2 *Offering Memorandum for a Qualifying Issuer*, which is an abbreviated form, will only be available for “qualifying issuers” (as defined under Multilateral Instrument 45-102 *Resale of Securities*). Generally, a “qualifying issuer” is a listed issuer that is a SEDAR (System for Electronic Document Analysis and Retrieval) filer and has filed a current annual information form under securities legislation with a securities regulatory authority.

i. Form 45-103F1 Offering Memorandum for Non-Qualifying Issuers- Form 45-103F1 will be the only form of offering memorandum available for non-reporting issuers and other issuers that are not “qualifying issuers”. Form 45-103F1 will require disclosure of the issuer’s business plan, long term and short term objectives, management, share capital, debt, prior sales, use of available funds, terms of the offering, risk factors, statutory rights of action and resale restrictions. The financial statement requirements for an issuer using Form 45-103F1 will be basically the same as those required under an offering memorandum today, with the exception of two new requirements:

- z if audited financial statements have been prepared they must be included in the offering memorandum even if unaudited financial statements would otherwise be permissible, and
- z if an issuer has acquired or proposes to acquire a business and that business will account for 50% or more of the issuer’s assets or expenditures, financial statements for the business acquired or to be acquired must be included in the offering memorandum. Financial statements for a proposed acquisition will only be required if the issuer is obligated to acquire the business or has a right to and has decided to acquire it.

ii. Form 45-103F2 Offering Memorandum for Qualifying Issuers - Because qualifying issuers already have a significant continuous disclosure base, they will be permitted to use an abbreviated form of offering memorandum. Issuers using Form 45-103F2 are required to incorporate by reference certain documents from their existing continuous disclosure base on the SEDAR (System for Electronic Document Analysis and Retrieval) website. Form 45-103F2 requires disclosure of the use of available funds, terms of the offering, risk factors, statutory rights of action and resale restrictions. Documents incorporated by reference include the issuer’s most recent annual information form and annual financial statements and any material change report, interim financial statement, management information circular and mining technical report required to be filed since the issuer’s most recent annual information form was filed. Documents incorporated by reference, such as financial statements, will not be attached to the offering

memorandum. The purchaser will be referred to the SEDAR website; however, a purchaser may obtain copies of any of the documents from the issuer without charge.

(c) Corresponding Legislative Amendments

In connection with adoption of the final Rule, the ASC proposes to recommend legislative amendments that will provide purchasers under an offering memorandum with expanded statutory rights of action. Purchasers will have an automatic two day right to cancel the agreement. This is intended to provide a cooling off period similar to that available to investors under a prospectus. Also, in the event the offering memorandum contains a misrepresentation, purchasers will have the right to sue to cancel the agreement, or for damages. The right to sue for damages will be extended so that it is available against the issuer, its directors and anyone who signs the offering memorandum.

The issuer will be required to file both the offering memorandum and a report of trades made under the exemption with the applicable securities commission.

4. Accredited Investor Exemption

The Rule introduces a proposed new exemption that will allow an issuer to sell securities to an unlimited number of purchasers purchasing as principal, provided that each purchaser is an “accredited investor”. There will be no minimum or maximum investment limit. The definition of accredited investor will be substantially the same as the definition provided in the Ontario Securities Commission’s new Rule 45-503 *Exempt Market Distributions*. The proposed definition of accredited investor includes financial institutions, pensions and investment funds, corporations with \$5 million in net assets and certain wealthy individuals. An individual will be considered an accredited investor if he or she, together with his or her spouse has:

- z financial assets (cash and securities) exceeding \$1 million, or
- z pre-tax net income of at least \$300,000 (or \$200,000 without a spouse) in each of the last two years and a reasonable expectation of exceeding that amount in the current year.

Issuers will not be required to provide an offering document to accredited investors and if one is provided it will not be required to be in a prescribed form or to provide rights of action. Advertising to accredited investors will be permitted and will not trigger an obligation to provide an offering document or rights of action. An issuer will be required to file reports of trades made under the exemption.

5. Consequential Amendments

In connection with the adoption of the proposed new Rule, we have proposed that certain of the existing exemptions be repealed and that certain other consequential amendments be made. Certain of the amendments may be implemented at a later date to provide a transitional period. The proposed consequential amendments include:

(a) Repeal of Certain Exemptions and Related Provisions in the Securities Act

- z s.1(p.1) - definition of private issuer
- z s.1(m.2) - definition of offering memorandum
- z s.66(j) - private issuer exemption
- z ss. 65(1)(c) and 107(1)(a) - exemptions for trades to certain institutions and governments
- z ss. 65(1)(d) and 107(1)(c) - exempt purchaser exemption
- z ss. 65(1)(e) and 107(1)(d) - \$97,000 exemption
- z ss. 65(1)(v) and 107(1)(p) - initial offering memorandum exemption
- z ss. 65(1)(v.1) and 107(1)(q) - subsequent use of offering memorandum exemption
- z ss. 65(1)(y) and 107(1)(z) - directors, senior officers, family, close friends and business associates exemption

(b) Repeal of Certain Sections of the ASC Rules

- z ss.122.1(3), (4) - 50 person limits under ss.107(1)(p) and (q) of the *Securities Act*
- z s.122.1(5) - 50 person limit under s.107(1)(z) of the *Securities Act*
- z s.123(a) - private issuer exemption
- z s.125 - advertising under \$97,000 exemption
- z s.127 - offering memorandum requirements

(c) Repeal of ASC Form and Blanket Order

- z Form 43 - *Offering Memorandum*
- z Blanket Order 87/05/21 - *Certain Statutory Exemptions at Sections 65(1)(v)(v.1) and 107(1)(p) and (q) of The Act*

(d) Other Amendments

We anticipate that the statutory rights in section 168.1 of the *Securities Act* will be amended as described in 3(c) above. The limitation period in section 175 of the *Securities Act* may also be extended to harmonize with the limitation periods in British Columbia and Ontario. In addition, we anticipate introduction of new provisions prohibiting unconscionable acts and unfair practices in connection with the sale of securities.

We also expect to repeal ASC Policy 5.1 - *Statutory Exemptions* and ASC Notice 13 - *Guide to Raising Capital Without the Need of a Prospectus*.

We are considering whether to adopt a new form to replace the current Form 20 - *Report Under Section 108(1) of the Securities Act*. In addition, we are considering whether to retain or amend section 122(d) of the *ASC Rules* which allows additional purchases of mutual fund securities provided that the purchaser's initial investment was at least \$97,000.

Request for Comment

We invite you to comment on any aspect of:

- z Multilateral Instrument 45-103 *Capital Raising Exemptions*,
 - z Companion Policy 45-103CP,
 - z Form 45-103F1 *Offering Memorandum for Non-Qualifying Issuers*,
 - z Form 45-103F2 *Offering Memorandum for Qualifying Issuers*, and
 - z Form 45-103F3 *Risk Acknowledgement*
- each of which is attached to this Notice.

We also seek specific comment on whether proposed Form 45-103F3 *Risk Acknowledgement* provides adequate warning of the risks of investing and whether there are additional steps we can take to ensure that it is adequately brought to the attention of a purchaser.

Please submit your comments in writing on or before **November 30, 2001**, to:

Denise Hendrickson
Legal Counsel,
Alberta Securities Commission
4th Floor, 300-5th Avenue S.W.
Calgary, Alberta, T2P 3C4
Fax: (403) 297-6156
E-mail: denise.hendrickson@seccom.ab.ca

Comment letters will be placed in a public file and will form part of the public record unless you request confidentiality. Although we will not place comment letters requesting confidentiality in the public file, freedom of information legislation may require us to make comment letters available. If you submit a comment letter you should be aware that the press and members of the public may be able to obtain access to your letter.

If you have any questions, please contact:

Patricia Johnston
Director, Legal Services & Policy Development
Alberta Securities Commission
(403) 297-2074

Denise Hendrickson
Legal Counsel
Alberta Securities Commission
(403) 297-2648

Leslie Rose
Senior Legal Counsel, Exemptions and Orders
British Columbia Securities Commission
(604) 899-6654

September 27, 2001