

**ALBERTA SECURITIES COMMISSION
NOTICE**

**NATIONAL INSTRUMENT 44-102
*SHELF DISTRIBUTIONS***

and

**REPEAL OF
NATIONAL POLICY STATEMENT NO. 44**

Implementation of Instrument and Repeal of National Policy Statement No. 44

The Alberta Securities Commission (the "Commission") and other members of the Canadian Securities Administrators (the "CSA") have approved National Instrument 44-102 *Shelf Distributions* ("NI 44-102") and related Companion Policy 44-102CP (the "Policy", NI 44-102 and the Policy being together referred to in this Notice as the "Instrument"). The Commission has also approved related implementing Rule 44-802. In Alberta, NI 44-102 and Rule 44-802 have been made Commission Rules and the Policy has been made a Commission policy.

NI 44-102, the Policy and Commission Rule 44-802 will take effect on December 31, 2000.

In conjunction with the implementation of the Instrument and National Instrument 44-103 *Post-Receipt Pricing*, discussed separately in a notice published contemporaneously with this Notice, the Commission has repealed, also with effect on December 31, 2000, National Policy Statement No. 44 *Rules for Shelf Prospectus Offerings and for Pricing Offerings after the Final Prospectus is Received* ("NP 44") and the related blanket order of the Commission dated May 9, 1991.

Purpose and Substance of the Instrument

The Instrument will regulate Canadian shelf prospectus distributions. It reformulates and replaces the provisions of NP 44 relating to shelf distributions, with which it is largely consistent.

The shelf distribution regime under the Instrument involves three main changes from the shelf provisions of NP 44:

- First, through the interaction of the Instrument with National Instrument 44-101 *Short Form Prospectus Distributions* ("NI 44-101", discussed separately in a notice published contemporaneously with this Notice), access to the shelf procedures has been expanded to permit the use of the shelf procedures for distributions of cash settled derivatives and

asset-backed securities, with specific requirements applicable if the securities to be distributed are "novel".

- Second, the Instrument permits a shelf prospectus that contemplates both equity and debt offerings without specific allocation between them. This added flexibility is balanced by provision for early disclosure of an equity offering under an unallocated shelf prospectus. A news release must be issued when an issuer or selling security holder has discussions with an underwriter concerning the distribution of a tranche of equity securities under an unallocated shelf prospectus, of sufficient specificity that it is reasonable to expect that the distribution will proceed.
- Third, the Instrument includes an expiry mechanism for a shelf prospectus receipt, making clear that the receipt expires if, prior to the issuance of securities under the shelf prospectus, the conditions relating to the issuer's qualification to file a prospectus in the form of a short form prospectus are not satisfied.

The Policy sets out the views of the Canadian securities regulatory authorities on various issues concerning the shelf procedures, including the qualification criteria, information that may be omitted from a base shelf prospectus, distributions of derivatives and asset-backed securities, use of an unallocated shelf prospectus, shelf prospectus supplements and amendments, and firm commitment and best efforts distributions.

Prior Publication, Public Comment and CSA Responses

The Commission and other CSA members published a draft version of the Instrument (the "1998 Draft Instrument") for comment on October 2, 1998. The accompanying notice summarized and solicited comment on the 1998 Draft Instrument.

The CSA received one comment letter on the 1998 Draft Instrument. The CSA have considered the comments received and thank the commenter. A summary of the comments and the CSA's responses is contained in the Appendix to this Notice.

Changes to the Instrument

Changes from the 1998 Draft Instrument are discussed below. Because the changes are not material, the Instrument is not being republished for comment.

A change has been made to section 6.5 of NI 44-102 that prescribes the manner in which the provisions of securities legislation that regulate conflicts of interest in connection with a distribution of securities using the shelf procedures are to be satisfied. NI 44-102 stipulates that the requirements concerning the participation of independent underwriters are to be satisfied, in the

case of medium term note programs or other continuous distributions, on the basis of the total dollar amount of securities that, at any given time, have been or are being distributed under the program. This requires the independent underwriter participation requirements to be satisfied on a "rolling" basis. The 1998 Draft Instrument referred only to the total dollar amount of securities that are being distributed under the program, thus implying that the requirements need only be satisfied at the end of the distribution of all of the securities to be distributed under the program.

Other changes have been made to conform the substance, terminology and drafting style of the Instrument to NI 44-101, as the shelf qualification criteria in the Instrument parallel the criteria under NI 44-101 for qualification to file a short form prospectus. Further changes of a minor nature have been made for clarification.

October 13, 2000.

APPENDIX
to
NOTICE

Summary of Comments Received on
Proposed National Instrument 44-102
Shelf Distributions
and
Responses of the Canadian Securities Administrators

The CSA received one submission on the 1998 Draft Instruments. The CSA considered the comments received and thank the commenter for its comments.

The following is a summary of the comments received, together with the CSA's responses. Unless otherwise provided, references to section numbers in this Appendix are to section numbers in the 1998 Draft Instruments.

1. *Comment:* The commenter recommends the use of term sheets as a precursor to the preparation of a shelf prospectus supplement.

Response: The current prospectus regime does not contemplate the use of a term sheet as an offering document to be given to prospective purchasers. To permit the use of a term sheet would be a fundamental change to the shelf procedures which the CSA do not propose to make at this time. Section 1.3 of the Policy currently contemplates a preliminary form of shelf prospectus supplement that may be used to market securities before the offering price has been determined.

2. *Comment:* The commenter suggested that it would be helpful if the Instrument would address who the issuer is in various structured finance distributions using special purpose vehicles.

Response: The identity of the "issuer" is very fact specific to each offering. While the CSA recognize that it may involve a complex legal analysis, it is beyond the scope of the Instrument to provide the kind of guidance sought.

3. *Comment:* The commenter thought it would be helpful if:
 - (a) the Policy provided greater guidance as to how the definition of "novel" would apply to an offering of derivatives or asset-backed securities;
 - (b) the consequences of a disagreement between the issuer and the regulator as to what is novel were clarified; and

- (c) the CSA indicated its willingness to discuss with issuers and, where appropriate, provide comfort that securities proposed to be distributed are, or are not, novel.

Response:

- (a) The CSA recognize that the concept of "novel" may be difficult to apply in certain circumstances. In subsection 3.4(4) of the Policy, the CSA express their view that the definition of the term "novel" should be read relatively restrictively. The CSA have also clarified that a security would not be novel merely because a new underlying interest was used. At this point, the CSA do not propose to attempt to provide additional explanation in the Policy as to the interpretation and application of the definition of "novel" because the application of the definition in a particular case is highly fact specific.
- (b) The consequences of a disagreement between the issuer and the regulator as to what is novel will vary depending on the circumstances. Whether a breach of an undertaking not to distribute novel derivatives or asset-backed securities without pre-clearing the supplement has occurred is a legal determination, not an exercise of regulatory discretion. In some jurisdictions, breach of an undertaking filed with the securities regulatory authority is an offence under securities legislation and may therefore be the subject of enforcement action. Furthermore, the public interest power of Canadian securities regulatory authorities to cease trade issuers is available in appropriate circumstances.
- (c) The CSA are always prepared to discuss with issuers matters of concern and appreciate the potential difficulty of applying the definition of "novel" in certain cases. The CSA would require an issuer that wishes to discuss whether an offering is novel to make written submissions describing the proposed distribution in detail and analyzing the aspects in which the distribution is similar to and different from other analogous distributions. For distributions in more than one jurisdiction, issuers should use the pre-filing procedures set out in Part 9 of National Policy 43-201 *Mutual Reliance Review System for Prospectuses and Annual Information Forms* to make their submissions. Issuers should not expect CSA staff to perform this analysis for them; rather staff may be able to guide issuers as to how the definition, in their view, should be applied to a distribution in the context of the issuer's analysis of the facts. The CSA also caution issuers and underwriters against routinely seeking comfort on this issue as a matter of due diligence.
4. *Comment:* The commenter suggests that no independent underwriter should be required in cases where a special purpose vehicle distributing asset-backed securities is owned by

an underwriter, given that the securities to be distributed must have received an approved rating.

Response: This comment falls within the purview of Multilateral Instrument 33-105 *Underwriting Conflicts*. In that context, the CSA did not consider an approved rating to be a sufficient proxy for the participation of an independent underwriter.

5. *Comment:* The commenter requested that the Instrument exempt from the definition of "distribution" the sale of asset-backed securities by an owner underwriter in the course of its market making activities on the basis that the Ontario Securities Commission has been prepared to grant this relief in the past.

Response: The CSA are not prepared to do so at this time as they are of the view that applications for this relief should be considered on a case by case basis.