

2.3 Notice-National Instrument 71-101

NOTICE

**NATIONAL INSTRUMENT 71-101,  
COMPANION POLICY 71-101CP,  
FORM 71-101F1  
RULE 71-801 AND  
DETERMINATION**

**THE MULTIJURISDICTIONAL DISCLOSURE SYSTEM**

The Alberta Securities Commission (the "Commission") has approved, as *Alberta Securities Commission Rules*, National Instrument 71-101 *The Multijurisdictional Disclosure System* ("NI 71-101"), Form 71-101F1 (the "Form") and Rule 71-801. The Commission also approved Companion Policy 71-101CP (the "Companion Policy") as a Commission policy and made a related determination (the "Determination") under the *Business Corporations Act* (the "ABCA"). NI 71-101, the Companion Policy, the Form, the Determination and Rule 71-801 deal with the multijurisdictional disclosure system (the "MJDS").

NI 71-101, the Companion Policy and the Form are initiatives of the Canadian Securities Administrators (the "CSA"). Rule 71-801 serves to implement NI 71-101 in Alberta and the Determination accommodates the MJDS under the ABCA.

NI 71-101, the Form, the Determination and Rule 71-801 will come into force, and the Companion Policy will become effective, on November 1, 1998. On that date, National Policy Statement No. 45 ("NP 45"), the blanket order and resolution of the Commission dated June 6, 1991 (the "1991 Order") and the July 24, 1991 determination of the Commission under the ABCA (the "1991 Determination"), all relating to the MJDS, will cease to have effect in Alberta. It is expected that NI 71-101 and the Form will take effect as rules in British Columbia, Ontario and Nova Scotia, as Commission regulations in Saskatchewan and as policies in each of the other jurisdictions represented by the CSA, and that the Companion Policy will take effect as a policy in each of the jurisdictions represented by the CSA.

**Substance and Purpose of NI 71-101, Companion Policy, Form, Rule 71-801 and Determination**

The purpose of NI 71-101, the Companion Policy, the Form, the Determination and Rule 71-801 is to reformulate the MJDS, a joint initiative implemented in 1991 by the CSA and the Securities and Exchange Commission of the United States (the "SEC") to reduce duplicative regulation in cross-border offerings, issuer bids, take-over bids, business combinations, continuous disclosure and other filings. The MJDS in Canada is intended to remove unnecessary obstacles to certain distributions of securities of U.S. issuers in Canada and to facilitate take-over and issuer bids and business combinations involving securities of U.S. issuers having less than a specified percentage of Canadian securityholders, while maintaining adequate protection of Canadian investors.

NI 71-101, the Companion Policy and the Form are derived from and substantially similar to NP 45 and elements of the order or ruling implementing NP 45 in a jurisdiction. Rule 71-801 is substantially similar to the 1991 Order which implemented NP 45 in Alberta, and the Determination has substantially the same effect as the 1991 Determination.

NI 71-101 contains mandatory aspects of NP 45 and the local implementing order or ruling. The non-mandatory aspects of NP 45 that are interpretive in nature or describe the administrative processes of the Canadian securities regulatory authorities are included in the Companion Policy. Rule 71-801 contains exemptions from the requirements of the *Securities Act* (Alberta) and the *Alberta Securities Commission Rules* necessary to implement NI 71-101. The Determination has the effect of exempting specified distributions under NI 71-101 from requirements of the ABCA.

The CSA are of the view that the regulatory regime established by NP 45 has operated efficiently and with minimal difficulty since its inception. NI 71-101, the Companion Policy, the Form, the Determination and Rule 71-801 are, therefore, generally consistent with the existing MJDS regulatory regime for issuers eligible to use the MJDS. The substance of the existing MJDS has not been materially altered other than to remove a current alternative for certain reconciliations of financial statements and, in the Companion Policy, to clarify the procedures for U.S. only offerings under the U.S. multijurisdictional disclosure system.

Terms used in the Companion Policy that are defined or interpreted in NI 71-101 or a definition instrument in force in the jurisdiction and not otherwise defined in the Companion Policy should be read in accordance with NI 71-101 or the definition instrument, unless the context otherwise requires.

### **Summary of NI 71-101, Companion Policy, Form, Determination and Rule 71-801**

The MJDS permits public distributions of securities of U.S. issuers that meet specified eligibility criteria to be made in Canada on the basis of disclosure documents prepared in accordance with U.S. federal securities laws (with certain additional Canadian disclosure). A public distribution of securities of a U.S. issuer may be made under the MJDS in both Canada and the United States or in Canada only.

The MJDS also reduces disincentives to the extension to Canadian securityholders of rights offerings by U.S. issuers by permitting such rights offerings to be made in Canada on the basis of U.S. disclosure documents. Similarly, it facilitates the extension of take-over bids, issuer bids and business combinations to Canadian securityholders of U.S. issuers in the circumstances contemplated by NI 71-101. The MJDS permits such transactions to be made in Canada generally in the same manner as in the U.S. and on the basis of U.S. disclosure documents.

Further, the MJDS permits U.S. issuers to use U.S. continuous disclosure documents in Canada in lieu of Canadian documents and exempts insiders of U.S. issuers from the requirement to file insider reports provided that the required filings are made with the SEC.

Distributions effected in compliance with NI 71-101 will be exempt from certain proposed national instruments including those identified in section 11.3 of NI 71-101: National Instrument 41-101 *Prospectus Disclosure Requirements*, which was published for comment on May 16, 1997; National Instrument 43-101 *Standards of Disclosure for Mineral Exploration and Development and Mining Properties*, which was published for comment on July 3, 1998; National Instrument 43-102 *Guide for Engineers and Geologists Submitting Oil and Gas Reports*, a proposed successor to National Policy Statement No. 2-B in the early stages of preparation; and National Instrument 45-101 *Rights Offerings*, which was published for comment on November 21, 1997.

The Companion Policy describes in detail the procedures available in Canadian jurisdictions for offerings in the U.S. by Canadian issuers under the U.S. multijurisdictional disclosure system.

### **Differences from NP 45 or Published Proposal**

#### *Financial Statement Reconciliation*

The only significant substantive difference between NI 71-101 and NP 45 relates to the reconciliation of financial statements in prospectuses. NP 45 allowed the reconciliation of financial statements to international accounting standards ("IAS") as an alternative to reconciliation to Canadian generally accepted accounting principles ("Canadian GAAP") for distributions of equity securities and non-investment grade debt and preferred shares. NI 71-101 permits only reconciliation to Canadian GAAP in similar circumstances. As the Companion Policy indicates, however, an issuer may apply under NI 71-101 for permission to reconcile to IAS.

#### *Underwriting Conflicts of Interest*

NI 71-101 and the Companion Policy differ from the versions published for comment in their treatment of distributions under NI 71-101 involving potential underwriting conflicts of interest, namely distributions of

securities of registered dealers or of connected or related issuers of registered dealers. The CSA do not consider the difference to be material.

Proposed Multi-Jurisdictional Instrument 33-105 - Underwriting Conflicts ("MI 33-105"), which would replace current blanket orders and policies in a number of jurisdictions and was published for comment on February 6, 1998, would require disclosure of such relationships and, in some cases, participation by independent underwriters.

As published for comment, proposed NI 71-101, referring specifically to MI 33-105, prescribed minimum levels of independent underwriter participation in an MJDS distribution and provided an exemption from the disclosure requirements of MI 33-105. However, because MI 33-105 is not at present in force or proposed for implementation in all jurisdictions, specific reference to MI 33-105 is not appropriate in NI 71-101. Moreover, the levels of independent underwriter participation contemplated in MI 33-105 would in many circumstances be less than required under NI 71-101 as published for comment.

NI 71-101, as approved, preserves the exemption from requirements for specific disclosure of underwriting conflicts but makes more general reference to Canadian securities legislation. Section 3.2(16) of the Companion Policy now explains that requirements of Canadian securities legislation (which would include MI 33-105 upon its implementation) applicable to underwriting conflicts, other than disclosure requirements, will apply to distributions under NI 71-101. Participation by an independent underwriter may, therefore, be required in some jurisdictions. The regulation of underwriting conflicts in multi-jurisdictional distributions is likely to be considered further in connection with MI 33-105.

#### **Determination under *Business Corporations Act***

In connection with NI 71-101 becoming an *Alberta Securities Commission Rule* in Alberta, the Commission has made the Determination, under section 3(3) of the ABCA, that debt obligations issued or guaranteed under a trust indenture are not part of a "distribution to the public" for the purpose of that Act if a prospectus, take-over bid circular or issuer bid circular is filed under the *Securities Act* and the distribution is effected in compliance with NI 71-101. As a result, trust indenture requirements under the ABCA would not apply to such distributions.

This Determination will take effect, in place of the 1991 Determination, on the same date as NI 71-101, the Form and Rule 71-801.

#### **Summary of Written Comments Received and CSA Responses**

The proposed texts of NI 71-101, the Companion Policy and the Form, with explanatory notes, and Rule 71-801 were published with a request for comment in the Commission Summary for the week ended December 5, 1997 at (1997) 6 ASCS 3395.

The CSA received and has considered three comments on NI 71-101. The names of the commenters are set out in Appendix "A" to this Notice. All comments were in respect of financial statement reconciliations and the requirements of section 4.6 of NI 71-101.

#### **Reconciliation to IAS**

Subsection 4.6(1) of NI 71-101 applies to MJDS distributions of specified eligible securities, including non-investment-grade debt and preferred shares of qualifying issuers. For such distributions, the preliminary MJDS prospectus and MJDS prospectus must contain a reconciliation of prospectus financial statements to Canadian GAAP. As noted above, NP 45 allowed the reconciliation of financial statements to IAS (international accounting standards) as an alternative to reconciliation to Canadian GAAP.

Two of the three commenters asked the CSA to reconsider the removal of this alternative. One commenter felt that the elimination of the option of reconciliation to IAS would be inappropriate, given the stated intention of the Canadian Institute of Chartered Accountants (the "CICA") to promote convergence of international standards.

Both commenters suggested that removal of the alternative of reconciliation to IAS might be viewed as a rejection by Canada of efforts by the International Organization of Securities Commissions ("IOSCO") and the International Accounting Standards Committee ("IASC") to develop an IOSCO-endorsed core of accounting standards, in turn (in the view of one of the commenters) unfairly prejudicing securities regulators in their assessment of the quality of IAS and compromising ultimate harmonization of Canadian GAAP and IAS.

One of the commenters also expressed the view that a future reintroduction of the alternative of reconciliation to IAS, if not included in NI 71-101 from the beginning, would be extremely difficult. The commenter also objected to the CSA's stated reasons for removal of the alternative and expressed the view that reconciliation to IAS has become more, rather than less, consistent with reconciliations to Canadian GAAP.

The CSA determined not to alter NI 71-101 to provide the option of reconciliation to IAS. The CSA remain committed to furthering the agreement between IOSCO and the IASC to develop a core set of IAS suitable for use in cross border offerings. The CSA consider that the IASC's efforts to date have already contributed significantly to improving the quality and consistency of financial reporting internationally. However, any decision by IOSCO and the members of the CSA regarding acceptance of IAS must await finalization by the IASC of the agreed standards, which is expected to occur by the end of 1998. At such time as IOSCO recommends to its members that IAS should be accepted for purposes of cross border offerings of securities, the members of the CSA will review comprehensive changes that may be appropriate for financial reporting requirements relating to foreign issuers. The CSA consider that permitting reconciliation to IAS at this time is premature, but that removal of the option from NI 71-101 does not preclude its reinstatement at an appropriate time.

### Verification of Reconciliations

The remaining comment letter received by the CSA addresses subsection 4.6(2) of NI 71-101. As published for comment, the provision called for the reconciliation under subsection 4.6(1) to explain and quantify, as a separate reconciling item, any significant differences between the principles applied in the financial statements, including note disclosure, and Canadian GAAP. It also called for reconciliations of annual financial statements to be verified by an auditor's report.

The commenter questioned the wording of the latter requirement, suggesting that the word "verified" might be misinterpreted to mean that the auditor is expected to report separately on the reconciliation. In the commenter's view, the words "covered by an auditor report" used in NP 45 are preferable and consistent with the recommendations in the CICA Handbook. The commenter was also of the view that the concept might be clearer if the provision made the reconciliation of the annual financial statements an integral part of the financial statements, for which specific wording was suggested.

The CSA agree with the substance of this comment letter and have amended NI 71-101 substantially as suggested by the commenter.

### **Texts of NI 71-101 and Related Instruments**

The texts of NI 71-101, the Form, the Companion Policy, Rule 71-801 and the Determination follow.

DATED: August 14, 1998.

**APPENDIX "A"  
TO  
NOTICE**

**THE MULTIJURISDICTIONAL DISCLOSURE SYSTEM**

**List of Commenters**

1. *Association of Investment Management and Research -- by letter dated February 24, 1998.*
2. *The Canadian Institute of Chartered Accountants -- by letter dated March 5, 1998.*
3. *International Accounting Standards Committee -- by letter dated March 6, 1998.*