

## ALBERTA SECURITIES COMMISSION

### NOTICE

#### **PROPOSED MULTILATERAL INSTRUMENT 45-102, COMPANION POLICY 45-102CP AND FORMS 45-102F1, 45-102F2 and 45-102F3 RESALE OF SECURITIES**

The Commission, together with other members of the Canadian Securities Administrators (the “CSA”), is publishing for comment proposed Multilateral Instrument 45-102 Resale of Securities (the “Instrument”), Forms 45-102F1, 45-102F2 and 45-102F3 (collectively, the “Forms”), and Companion Policy 45-102CP (the “Policy”).

The Instrument, Forms and Policy are initiatives of the CSA. The Instrument and Forms are expected to be adopted as a rule in each of British Columbia, Alberta, Manitoba, Ontario, Nova Scotia and Newfoundland, as a Commission regulation in Saskatchewan, as a policy in New Brunswick, Prince Edward Island and the Yukon Territory, and as a code in the Northwest Territories and Nunavut. It is expected that the Policy will be implemented as a policy in British Columbia, Alberta, Saskatchewan, Manitoba, Ontario, New Brunswick, Nova Scotia, Newfoundland, Prince Edward Island, the Yukon Territory, the Northwest Territories, and Nunavut (the “adopting jurisdictions”). The Instrument, Forms and Policy will not be adopted in Québec.

#### **Substance and Purpose of the Instrument, Forms and Policy**

The purpose of the Instrument is to harmonize certain provincial and territorial resale restrictions imposed on subsequent trades in securities which were originally acquired under an exemption from the prospectus requirement. The Instrument also takes a harmonized approach to distributions from a control block and to trades in securities of a non-reporting issuer over a foreign exchange or market.

#### **Background**

The approach taken in the Instrument is based on the System for Shorter Hold Periods for Issuers Filing an AIF (the “SHAIF System”) adopted in each of British Columbia and Alberta in 1998. The SHAIF System provides for a reduced hold period for first trades of securities previously acquired under a prospectus exemption where the issuer has a current Annual Information Form (“AIF”) and has satisfied certain other conditions.

The general principle underlying both the SHAIF System and the Instrument is that where a reporting issuer provides the market with current information, securities which it may have distributed without a prospectus may be traded in the secondary market after a reduced hold period.

#### **Summary of the Instrument**

The Instrument imposes resale restrictions on

- trades of securities initially distributed under an exemption from the prospectus requirement that requires the seller to hold the securities for a specified period of time (a “private placement exemption”)
- trades of securities initially distributed under an exemption from the prospectus requirement that requires the issuer of the securities to be a reporting issuer for a specified period of time (a “seasoning exemption”)

- securities from the holdings of a control person (a “control distribution”)

Except for the resale restrictions for control distributions, the resale restrictions in the Instrument do not apply in Manitoba, New Brunswick, Prince Edward Island or the Yukon Territory (the “open system jurisdictions”). These jurisdictions do not impose resale restrictions on securities distributed under a prospectus exemption. It is intended that the Instrument will replace the resale restrictions currently set out in the securities legislation of British Columbia, Alberta, Saskatchewan, Ontario and Nova Scotia which impose resale restrictions on subsequent trades of securities initially acquired under an exemption from the prospectus requirement. The method of implementation will vary in accordance with the requirements of each jurisdiction.

The Instrument reduces, for an issuer that is a qualifying issuer at the time of the initial distribution

- the hold period applicable to securities of the issuer distributed under a private placement exemption from 12 months to four months
- the seasoning period applicable to securities of the issuer distributed under a private placement exemption from 12 months to four months
- the hold period applicable to control distributions from six months to four months

A qualifying issuer is defined in the Instrument as an issuer that, among other things

- is a reporting issuer (or equivalent) in British Columbia, Alberta, Saskatchewan, Manitoba, Ontario, Québec or Nova Scotia
- is an electronic filer under SEDAR
- has filed a current AIF
- either has a class of equity securities listed or quoted on certain specified exchanges or markets, or outstanding securities that have received an approved rating.

The bright line revenue and expenditure tests included in the definition of qualifying issuer under the SHAF System have been replaced by the requirement that an issuer must meet the continued listing requirements of the qualifying market on which its securities are listed or quoted and not be designated inactive or suspended. A qualifying issuer is required to file a certificate stating that the issuer was a qualifying issuer at the time of the initial exempt trade.

Under the Instrument, a purchaser of securities acquired under a private placement exemption may resell the securities after the expiry of the applicable hold period, if the issuer is a SEDAR filer or a reporting issuer in the jurisdiction of the purchaser. If an issuer is a SEDAR filer, a purchaser in a jurisdiction in which the issuer is *not* a reporting issuer will be able to resell the securities of the issuer, provided that the issuer has been a reporting issuer or the equivalent in any of British Columbia, Alberta, Saskatchewan, Manitoba, Ontario, Québec or Nova Scotia for at least twelve months, or four months in the case of a qualifying issuer. *This represents a departure from the current regulatory regime, which otherwise imposes an indefinite hold period on the securities if the issuer is not a reporting issuer in the jurisdiction of the purchaser.* If an issuer is neither a SEDAR filer nor a reporting issuer in the jurisdiction of the purchaser, the securities of the issuer acquired by the purchaser will be subject to an indefinite hold period.

Similarly, under the Instrument, securities of an issuer that is a SEDAR filer, acquired under a seasoning exemption, may be resold, provided that issuer of the securities has been a reporting issuer or the equivalent

in any of British Columbia, Alberta, Saskatchewan, Manitoba, Ontario, Québec or Nova Scotia for at least twelve months, or four months in the case of a qualifying issuer. If an issuer is not a SEDAR filer, the issuer must be a reporting issuer in the jurisdiction of the purchaser for the requisite period of time before the securities may be resold.

The Instrument also provides relief from the prospectus requirement for the resale of securities initially acquired under a private placement exemption or seasoning exemption from an issuer that was not a reporting issuer in any Canadian jurisdiction at the date of the distribution and that has a minimal connection to Canada, provided the securities are resold over an exchange or market outside Canada.

### **Summary of the Policy and the Forms**

The purpose of the Policy is to provide information relating to the manner in which the provisions of the Instrument are intended to be interpreted or applied by the securities regulatory authorities of the adopting jurisdictions.

The Policy clarifies that the Instrument does not restrict the ability of a purchaser to resell securities acquired under a prospectus exemption during a hold period or seasoning period in reliance upon a prospectus or a further exemption from the prospectus requirement.

The Policy advises market participants that an issuer with connections to a jurisdiction may be subject to the prospectus requirement in the jurisdiction even if the purchasers are not in the jurisdiction. A discussion of the connecting factors is set out in Companion Policy 72-101CP Distributions Outside of the Local Jurisdiction. Accordingly, a distribution may occur in more than one jurisdiction, requiring the issuer to either file a prospectus or rely on a prospectus exemption in the jurisdictions.

The Policy also advises that a trade of securities initially distributed under a prospectus exemption is a distribution, unless the resale restrictions set out in the Instrument are satisfied. Since the open jurisdictions will not adopt the resale provisions in the Instrument, the Policy explains how the hold period provisions in the Instrument apply to subsequent trades of securities acquired under a private placement exemption into the various jurisdictions, including the open system jurisdictions.

The Policy further explains that securities subject to a hold period under the prospectus exemption provided for in proposed Multilateral Instrument 72-101 Distributions Outside of the Local Jurisdiction ("MI 72-101"). MI 72-101 also imposes restricted periods (essentially equivalent to the hold periods) on the resale of securities initially distributed under a prospectus exemption. The Policy explains that the Instrument and MI 72-101 permit "tacking" of the hold period under the Instrument and the restricted period under MI 72-101.

The Policy also provides guidance regarding the calculation of holders and securities that are directly or indirectly held of record in Canada for the purposes of satisfying the conditions for resale of securities of a non-reporting issuer with minimal connection to Canada.

Finally, the Policy provides information regarding the filing and form of AIF under the Instrument, including the timing for filing, the AIF form requirements and the AIF review procedures.

Form 45-102F1 provides notice to the market that a person or company has ceased to be a private issuer or private company. Form 45-102F2 is a certificate stating that an issuer was a qualifying issuer at the time of the initial exempt trade. Form 45-102F3 provides notice to the market of an intention to sell securities from a control block.

## **Alternatives Considered**

The adopting jurisdictions considered maintaining the existing regime for regulating the resale of certain securities. However, in light of the problems encountered by stakeholders in dealing with the differing resale requirements across jurisdictions, the view was that it was advisable to develop a more harmonized approach to restrictions on resale. The decision of the adopting jurisdictions to model the Instrument on the SHAI F System was largely based on the experience of the Alberta and British Columbia Securities Commissions with the SHAI F System and the support of market participants for the reduced hold periods prescribed by the SHAI F System.

## **Related Instruments**

The CSA, other than the Commission des valeurs mobilières du Québec, will be simultaneously publishing for comment MI 72-101. MI 72-101 harmonizes the approach to distributions of securities to purchasers outside of the jurisdiction by providing exemptions from the registration and prospectus requirements and, in some cases, imposing resale restrictions.

## **Rules to be Repealed or Amended**

It is intended that the Instrument will replace the resale provisions of the jurisdictions listed in Appendix C of the Instrument. The method of implementation will vary in accordance with the requirements of the local jurisdiction.

In Alberta, the Instrument, Policy and Forms would

- make unavailable sections 109, 109.1, 110, 110.1, 110.2, 111 (as it relates to section 107(1)(u.1)) and 112 of the Securities Act
- replace sections 126, 131, 132 and 133 of the Alberta Securities Commission Rules
- replace Forms 21, 22 and 23 of the Alberta Securities Commission Rules
- replace Alberta Rule 45-501 System for Shorter Hold Period For Issuers Filing An AIF and Companion Policy 45-501CP
- replace Alberta Rule 72-501 Distributions to Purchasers Outside Alberta and Companion Policy 72-501CP

all of which, except for the provisions of the Securities Act, would be repealed concurrently with the implementation of the Instrument, Policy and Forms.

It is anticipated that the Securities Act will be amended at a future date to repeal sections 109 to 112. **Specific Request for Comment**

In addition to welcoming submissions on any provision in the Instrument, Forms, and Policy, the adopting jurisdictions seek comment on the specific matters referred to below.

### **1. Requirement that a Legended Certificate Representing the Securities Distributed Under Section 2.5 be Provided to Investors**

The Instrument provides that in order to reduce the hold period, if securities are distributed in reliance

on a private placement exemption, the certificate representing the securities must carry a legend stating that, subject to securities legislation, the holder of the securities shall not trade the securities before the expiry of the appropriate hold period. In many jurisdictions, there is currently no requirement to legend certificates. Under the SHAI System, certificates must bear a legend stating that the securities may not be traded during the hold period.

The adopting jurisdictions believe that, while the legending requirement may represent a change in current commercial practice in some jurisdictions, it will ensure better regulation of the exempt market.

Comment is sought as to whether the legending requirement is workable. Should the Instrument specify that issuers of securities could satisfy the legending requirements in any means reasonably designed to notify holders and subsequent purchasers of the applicable resale restrictions, such as notices of the restriction to investors on confirmation certificates, use of global securities held in a depository and restrictions on trading through the use of restricted CUSIP numbers?

## **2. Provision for a Four-Month Hold Period for Investment Grade Securities**

The Instrument provides for a four-month hold period for investment grade securities (i.e., debt, asset backed securities, preferred shares) acquired under exemptions from the prospectus requirement. This is broader than the relief provided for under the SHAI System and departs from the "legal for life" criteria for private placement hold periods in some jurisdictions.

### **Comments**

Interested parties are invited to make written submissions with respect to the Instrument, Forms and Policy. Submissions received by **December 8, 2000** will be considered.

Submissions should be sent to the securities regulatory authorities listed below in care of the Saskatchewan Securities Commission, in duplicate, as indicated below:

British Columbia Securities Commission  
Alberta Securities Commission  
Saskatchewan Securities Commission  
The Manitoba Securities Commission  
Nova Scotia Securities Commission  
Ontario Securities Commission

c/o Dean Murrison, Committee Chair  
Saskatchewan Securities Commission  
800, 1920 Broad Street  
Regina, Saskatchewan S4P 3V7  
Telephone: 306-787-5879  
E-mail: dmurrison@ssc.gov.sk.ca

A diskette containing the submission (in DOS or Windows format, preferably WordPerfect) should also be submitted to the Chair of the Committee.

Comment letters submitted in response to requests for comments are placed on the public file in certain jurisdictions and form part of the public record, unless confidentiality is requested. Comment letters will be circulated amongst the securities regulatory authorities, whether or not confidentiality is requested. Although

comment letters requesting confidentiality will not be placed on the public file, freedom of information legislation in certain jurisdictions may require the securities regulatory authorities in those jurisdictions to make comment letters available. Persons submitting comment letters should therefore be aware that the press and members of the public may be able to obtain access to any comment letters.

Questions may be referred to the Chair and/or any of the following members of the Committee:

Margaret Sheehy or Brenda Leong  
British Columbia Securities Commission  
865 Hornby Street, 2nd Floor  
Vancouver, British Columbia V6Z 2H4  
Telephone: (604) 899-6650 / (604) 899-6642 or (800)373-6393 (in B.C.)  
E-mail: msheehy@bcsc.bc.ca  
bleong@bcsc.bc.ca

Marsha Manolescu  
Alberta Securities Commission  
20th Floor, 10025 Jasper Avenue  
Edmonton Alberta T5J 3Z5  
Telephone: (780) 422-1914  
E-mail: Marsha.Manolescu@seccom.ab.ca

Chris Besko  
The Manitoba Securities Commission  
1130 - 405 Broadway  
Winnipeg, Manitoba R3C 3L6  
Telephone: (204) 945-2561  
E-mail: cbesko@cca.gov.mb.ca

Margo Paul or Jean-Paul Bureaud  
Ontario Securities Commission  
20 Queen Street West, Suite 1900, Box 55  
Toronto, Ontario M5H 3S8  
Telephone: (416) 593-8136/ (416)593-8131  
E-mail: mpaul@osc.gov.on.ca  
jbureaud@osc.gov.on.ca

Shirley Lee  
Nova Scotia Securities Commission  
1690 Hollis Street  
P.O. Box 458  
Halifax, Nova Scotia B3J 3J9  
Telephone: (902) 424-5441  
E-mail: leespl@gov.ns.ca

### **Instrument and Policy**

The text of the Instrument and Policy follow, together with footnotes that are not part of the Instrument or Policy, but have been included to provide background and explanation.

**Dated:** September 8, 2000