

Securities Law Update

The Canadian provincial and territorial securities regulators continue their push towards a Canadian harmonized, enhanced continuous disclosure regime by introducing a new resale rule and a new continuous disclosure rule.

New Multilateral Instrument 45-102 Resale Of Securities

Effective March 30, 2004, the securities regulatory authorities in British Columbia, Alberta, Saskatchewan, Manitoba, Ontario, New Brunswick, Nova Scotia, Prince Edward Island, Newfoundland and Labrador, the Yukon, Northwest Territories and Nunavut are rescinding existing Multilateral Instrument 45-102 Resale of Securities, Forms 45-102F1, 45-102F2 and 45-102F3 and Companion Policy 45-102CP (collectively, the "Current Resale Rule") and replacing them with:

- Multilateral Instrument 45-102 Resale of Securities (the "Instrument"), which contains Form 45-102F1 (the "Form"), and
- Companion Policy 45-102CP (the "Policy") (collectively, "New MI 45-102").

The Instrument, Form and Policy will not be adopted in Québec.

The Ontario Securities Commission (the "Commission" or "OSC") has, under section 143 of the *Securities Act* (Ontario) (the "Act"), made the Instrument (which contains the Form) as a rule under the Act and adopted the Policy as a policy under section 143.8 of the Act.

The Instrument, the Form and the other material required by the Act to be delivered to the Minister of Finance (Ontario) were delivered on December 18, 2003. If the Minister does not reject the Instrument and the Form or return them to the Commission for further consideration by February 16, 2004, the Instrument and the Form will come into force on *March 30, 2004*. The Policy will come into force on the date that the Instrument and the Form come into force. The coming into force of New MI 45-102 will result in the rescission of the Current Resale Rule (which came into effect in all jurisdictions except Québec on November 30, 2001).

Four-Month Hold For All Issuers

Under the Current Resale Rule, securities acquired in a private placement are subject to a four-month hold period if the issuer is a qualifying issuer (that is, its securities are listed on a specified exchange and it has filed a current AIF). If the issuer is not a qualifying issuer, resale is restricted for twelve months. The four-month/twelve-month regime also applies to seasoning periods and control block distributions.

The New MI 45-102 eliminates the qualifying issuer concept in the Instrument and replaces it with a four-month hold/seasoning regime for all reporting issuers. The Securities regulatory authorities have timed the implementation of New MI 45-102 to coincide with the effective date of the harmonized continuous disclosure rules, which require all issuers, except venture issuers, to file an AIF. The term "venture issuer" is defined in National Instrument 51-102 (see below).

Continued...

Other Changes

The New MI 45-102 further harmonizes and simplifies certain provincial and territorial resale restrictions imposed on first trades of securities initially distributed under an exemption from the prospectus requirement, as well as the approach to distributions by control persons. New MI 45-102 also provides a prospectus exemption to permit the resale of securities of a non-reporting issuer with a minimal connection to Canada over a foreign exchange or market. Lastly, it provides an exemption from the seasoning requirements in section 2.5, 2.6 and 2.8 if the issuer of the securities becomes a reporting issuer after the distribution date by filing and obtaining a receipt for a prospectus in a jurisdiction listed in British Columbia, Alberta, Manitoba, Saskatchewan, Ontario, Québec or Nova Scotia.

New Continuous Disclosure Requirements

The Canadian Securities Administrators (“CSA”), have developed a nationally harmonized set of continuous disclosure (“CD”) requirements for reporting issuers, other than investment funds. The new CD requirements are set out in National Instrument 51-102 Continuous Disclosure Obligations (the “Rule”), Form 51-102F1 Management’s Discussion & Analysis, Form 51-102F2 Annual Information Form, Form 51-102F3 Material Change Report, Form 51-102F4 Business Acquisition Report, Form 51-102F5 Information Circular, Form 51-102F6 Statement of Executive Compensation (collectively, the “Forms”), and Companion Policy 51-102CP Continuous Disclosure Obligations (the “Policy”). The Rule and the Forms are together herein referred to as the “Instrument”.

The Policy is expected to be adopted in all jurisdictions, including Québec.

CSA has also published a nationally harmonized set of exemptions from certain CD and other requirements for foreign reporting issuers. See OSC Notice of Rule - National Instrument 71-102 Continuous Disclosure and Other Exemptions Relating to Foreign Issuers, which provides information about the new rule applicable to foreign issuers.

The requirements in the Instrument concerning

- annual and interim financial statements, except change in year-end, change in corporate structure and change of auditor requirements,
- MD&A,
- AIFs, and
- filing of documents under Part 12 of the Instrument,

will apply for financial years beginning on or after *January 1, 2004*. The requirements relating to business acquisition reports (“BARs”) apply to significant acquisitions if the agreement was entered into after *March 30, 2004*. The requirements relating to proxy solicitation and information circulars, will apply from and after *June 1, 2004*. All other CD requirements set out in the Instrument will apply as of *March 30, 2004*.

Summary of Significant Changes to Existing CD Requirements

- **Filing Deadlines** - Filing deadlines for annual and interim financial statements will be shortened. The deadline for filing annual financial statements will be reduced to 90 days after year-end for issuers other than venture issuers, and 120 days for venture issuers. The term “venture issuer” is defined in the Instrument as a reporting issuer that, at the applicable time, did not have any of its securities listed or quoted on any of the Toronto Stock Exchange, a U.S. marketplace or a marketplace outside of Canada and the U.S. The deadline for filing interim financial statements will be reduced to 45 days after period end for issuers other than venture issuers, and remains at 60 days for venture issuers. If the issuer is required to comply with an earlier filing deadline under the laws of a foreign jurisdiction, the issuer will be required to comply with that deadline in Canada. According to the OSC, the shorter deadlines better align our requirements with investor demands, common issuer practice, and current requirements in other jurisdictions such as the United States, the United Kingdom and Australia. (The SEC is now proposing to shorten these deadlines even further).
- **Delivery** - Mandatory delivery of annual and interim financial statements and annual and interim MD&A to all securityholders will be eliminated. Issuers will only be obligated to

deliver copies of these documents to securityholders that request them. Issuers will have to disclose annually in their information circulars that the financial statements and MD&A are available from the issuer and how to obtain them. Issuers must send annually a request form to their registered and beneficial securityholders that such securityholders may use to request a copy of the issuer's annual and/or interim financial statements and annual and/or interim MD&A. The requested financial statements and/or MD&A must be provided, without charge, by the later of (a) the filing deadline for the relevant statements and (b) 10 calendar days following the issuer's receipt of the request.

- **Auditor's Report** - The Instrument does not mandate auditor review of interim financial statements; however, the instrument requires issuers to disclose by way of a notice in their financial statement if their auditors have not reviewed such statements. In addition, if a review was initiated but the auditor was unable to complete the review, the interim financial statements must be accompanied by a notice indicating that the auditor was unable to complete such review and the reasons. Similarly, if the auditor expressed a reservation in the auditor's interim review report, the interim financial statements must be accompanied by a written review report from the auditor.
- **AIFs** - All issuers except venture issuers will be required to file an AIF. As noted above, the term "venture issuer" is defined in the Instrument as a reporting issuer that, at the applicable time, did not have any of its securities listed or quoted on any of the Toronto Stock Exchange, a U.S. marketplace or a marketplace outside of Canada and the U.S. This is different from the current requirement in Ontario, Québec and Saskatchewan, which exempts issuers that have shareholders' equity and revenues of less than \$10 million. Issuers required to file the AIF must do so within 90 days of the issuer's year-end. Under the current rule issuers that are not exempt from the requirement must file the AIF within 140 days of the issuer's year-end. The AIF must be prepared in accordance with Form 51-102F1, which is different than the previously prescribed AIF form.
- **MD&A** - All issuers will be required to file annual and interim MD&A, including issuers that

currently have exemptions based on size in some jurisdictions. The MD&A must be filed by the earlier of (a) the filing deadlines for the annual and interim financial statements, as applicable, and (b) the date the issuer actually files the financial statements. The MD&A must be prepared in accordance with Form 51-102F1. Disclosure of certain financial information designed to show investors trends in the issuer's operations, previously included in the AIF, has been moved to the MD&A. Additional MD&A disclosure obligations relating to costs and expenses are imposed on venture issuers that have not had significant revenue from operations in either of their last two financial years, and if the venture issuer's business primarily involves mining exploration and development certain of the costs and expenses must be presented on a property-by-property basis.

- **Disclosure Relating to Liquidity and Capital Resources, and Non-Independent Relationships in MD&A** - MD&A will have to contain disclosure relating to liquidity and capital resources, including off-balance sheet arrangements, and relationships and transactions with person or entities that derive benefits from their non-independent relationship with the issuer or its related parties. These enhancements are based on recent SEC proposals (see SEC Release Nos. 33-8056 and 34-45321 dated January 22, 2002).
- **Board Approval of MD&A and Financial Statements** - An issuer's board of directors will be required to approve its annual and interim MD&A and financial statements. The board of directors may delegate the approval to the audit committee of the board of directors.
- **Critical Accounting Policies Disclosure in MD&A** - MD&A will have to disclose critical accounting policies that impact on the financial condition, results of operations and cash flows.
- **Equity Compensation Disclosure** - Information circulars will have to include new equity compensation plan disclosure similar to disclosure required under recent SEC amendments (see SEC Release Nos. 33-8048 and 34-45189 dated December 21, 2001).
- **Annual Filings** - The requirement to make an annual filing in lieu of an information circular (Form 28 in most jurisdictions) will be eliminated. The AIF will include

Continued...

supplementary disclosure items for issuers that do not distribute information circulars. Issuers that are not required to distribute information circulars and are exempt from filing an AIF will not have to provide the disclosure that is currently required in Form 28 or its equivalent.

- **Significant Acquisitions** - The Rule will include new requirements for disclosure concerning completed significant business acquisitions. Reporting issuers will be required to file a BAR within 75 days after completion of a business acquisition. The BAR will include financial statements of the acquired business and pro forma financial information. Certain issuers will be exempt from the requirement to file a BAR.
- **Filing of Documents Sent to Securityholders or Filed with the SEC** - The Rule will require issuers to file documents sent to their securityholders or filed with the SEC.
- **Material Document** - The Rule will require issuers to file certain constating documents and other instruments that define or materially affect the rights of securityholders.
- **Filing of Material Contracts** - unless previously filed, an issuer must file a copy of any contract that it or any of its subsidiaries is a party to, other than contracts entered in to in the ordinary course of business, that is material to the issuer. In the event that the issuer has reasonable grounds for believing that such filing would be seriously prejudicial to its interests or would violate confidentiality provisions, the issuer may file the contract with those certain provisions omitted or marked so as to be unreadable.

How McLean & Kerr LLP Can Add Value

We are available to answer any questions you may have regarding the New 45-102 and the new CD requirements.

For more information:

Koby Smutylo
Direct Dial: 416 369 6610
Email: ksmutylo@mcleankerr.com

James Blake
Direct Dial: 416 369 6629
Email: jblake@mcleankerr.com

Nadim Wakeam
Direct Dial: 416 369 6612
Email: nwakeam@mcleankerr.com

Website: www.mcleankerr.com

Prepared by:
Koby Smutylo
Direct Dial: 416 369 6610
Email: ksmutylo@mcleankerr.com

The Securities Law Update is a periodic publication of the Securities and Corporate Law Practice Group of McLean & Kerr LLP.

MCLEAN & KERR LLP

BARRISTERS & SOLICITORS

Founded over 75 years ago, McLean & Kerr is a multi-disciplined law firm located in the heart of Toronto. Its clients include individuals as well as local, national and international enterprises and groups requiring a wide range of personal and business assistance.

McLean & Kerr's areas of practice include corporate, commercial, secured lending, commercial real estate, commercial leasing (landlord and tenant), insurance, employment, family, international, securities, mining,

labour, probate and estate administration and litigation in all courts.

In addition, the firm has access, through established relationships, to professional tax advice and counsel in other jurisdictions.

The *Bulletin* is produced by McLean & Kerr for its clients and other interested parties. The contents of the *Bulletin* are necessarily of a general nature and are not intended to be relied upon as legal advice.