

CSA Staff Notice**Amendments to
Multilateral Instrument 45-103 *Capital Raising Exemptions***

January 16, 2004

Adoption and Effective Date

On March 30, 2004 the securities regulatory authorities in each of Alberta, British Columbia, Manitoba, Newfoundland and Labrador, Northwest Territories, New Brunswick, Nova Scotia, Nunavut, Prince Edward Island, Saskatchewan and Yukon Territory (the "Jurisdictions") approved amendments (collectively, the "Amendments") to:

- Multilateral Instrument 45-103 *Capital Raising Exemptions* ("MI 45-103"),
- Form 45-103F1 *Offering Memorandum for Non-Qualifying Issuers*,
- Form 45-103F2 *Offering Memorandum for Qualifying Issuers*,
- Form 45-103F4 *Report of Exempt Distribution*, and
- 45-103 CP *Companion Policy*.

Background

The Amendments were required as a result of the concurrent adoption of the following Instruments in each of the Jurisdictions:

- National Instrument 51-102 *Continuous Disclosure Obligations* ("NI 51-102").
- National Instrument 52-107 *Acceptable Accounting Principles, Auditing Standards and Reporting Currency* ("NI 52-107").
- Repeal and replacement of Multilateral Instrument 45-102 *Resale of Securities* ("MI 45-102"). .

Summary of Amendments***Definition of "Qualifying Issuer"***

MI 45-103 permits "qualifying issuers", previously defined in MI 45-102, to use a shorter form of offering memorandum and incorporate by reference an annual information form (an "AIF"). One of the consequences of the implementation of NI 51-102 and the amendments to MI 45-102, was that the concept of "qualifying issuer" was removed from MI 45-102.

As a result, MI 45-103 was amended to define "qualifying issuer" with reference to continuous disclosure filed under NI 51-102. The amended definition of "qualifying issuer" requires an issuer to be a reporting issuer and SEDAR filer, to have filed an AIF, management's discussion and analysis ("MD&A") and annual financial statements under NI 51-102, and to have complied with any applicable continuous disclosure obligations under National Instrument 43-101 *Standards of Disclosure for Mineral Projects* and National Instrument 51-101 *Standards of Disclosure for Oil and Gas Activities*.

If a reporting issuer has filed a prospectus but has not yet filed, or been required to file, its AIF, MD&A and annual financial statements under NI 51-102, the issuer can use its prospectus as the base disclosure document for the shorter form of offering memorandum until it files its AIF, MD&A and annual financial statements under NI 51-102.

Venture Issuers

Under NI 51-102, venture issuers are not required to file AIFs. However to become a “qualifying issuer” under MI 45-103 a venture issuer must voluntarily file an AIF under NI 51-102. The shorter form of offering memorandum, Form 45-103F2, is only available to qualifying issuers because one of the requirements under this form is to incorporate its AIF into its offering memorandum. Therefore, venture issuers that have historically filed AIFs and believe that there is benefit in continuing to do so, and venture issuers that want to voluntarily begin filing AIFs, are thereby complying with the public disclosure requirements applicable to all other reporting issuers and consequently should not be excluded from the ability to use the shorter form of offering document.

The venture issuer’s prospectus (for a venture issuer that is a capital pool company, the information circular, or filing statement, that it has filed for its qualifying transaction) can serve as a base disclosure document for the shorter form of offering memorandum until the venture issuer has filed, or has been required to file, its annual financial statements under NI 51-102. After that time, the venture issuer must file an AIF to continue to be able to use the shorter form of offering memorandum.

Offering Memorandum Exemption in Newfoundland and Labrador

The amendment to section 4.1 of MI 45-103 moves “Newfoundland and Labrador” to subsections (1) and (2) from subsections (3) and (4). The jurisdictions of Alberta, Manitoba, Northwest Territories, Nunavut, Prince Edward Island and Saskatchewan require, among other conditions, that either a purchaser is an eligible investor as defined in the Instrument, or the aggregate acquisition cost to the purchaser not exceed \$10,000. As a consequence of the amendment, purchasers in Newfoundland and Labrador (like purchasers in British Columbia and Nova Scotia) will not be subject to those conditions.

Manitoba Resale Restrictions

The amendment to section 6.4 of MI 45-103 will mirror similar changes to the resale restrictions made in MI 45-102, namely that an issuer must be a reporting issuer in a jurisdiction of Canada, not just those jurisdictions previously listed in Appendix B of MI 45-102. Also some language has been added to the end of paragraph (d) to clarify that an exemption from the prospectus requirement is only necessary if a trade would be subject to a prospectus requirement.

Amendments to Offering Memorandum Forms

Significance Tests

Section C.2 of Form 45-103F1 sets out two tests that issuers must use to determine if they have to include in an offering memorandum the financial statements of a business that the issuer has acquired during the past two years, or that the issuer proposes to acquire (the “Significance Tests”). The Amendments will decrease the level of the Significance Tests from 50% to 40% to reflect the requirements in NI 51-102 for venture issuers that have acquired a business. This would result in a lower threshold for all issuers who want to use a non-qualifying issuer offering memorandum, whether or not an issuer is a reporting issuer, and whether or not the issuer has acquired the business or is proposing to acquire a business.

We have made other Amendments to Form 45-103F1 and Form 45-103F2 as follows:

- revised the summary of the resale restrictions that issuers must state in their offering memorandum to reflect the resale restrictions in MI 45-102,
- required that financial statements included in the offering memorandum comply with NI 52-107, whether or not an issuer is a reporting issuer,
- required incorporation by reference of business acquisition reports filed under NI 51-102 into the shorter form of offering memorandum, and
- amended the provision concerning acceptable alternative disclosure for an acquisition of a business that is an interest in an oil and gas property to mirror the similar provision in NI 51-102.

We have also made Amendments to Form 45-103F4 as follows:

- amended the wording in Item 1 *Issuer Information* to clarify when vendors, other than the issuer, are required to file a report.

Comments

The Amendments were published for a 60 day comment period on July 25, 2003. We received submissions from one commenter, Bruce S. Thompson, Thompson Dorfman Sweatman, Barristers & Solicitors, Winnipeg Manitoba. After considering the comments we have made a few non-material amendments to MI 45-103. The following provides a summary of the comments and our response:

1. With respect to subsection 5.1(1) a concern was raised over the issue of activities in furtherance of a trade only being exempted if a prospective purchaser actually purchases the security.

Response

We acknowledge the commentator's concern but note that this issue is neither new nor unique to MI 45-103. The condition that the purchaser purchase as principal under the accredited investor exemption in MI 45-103 is virtually the same as the condition under the \$97,000/\$150,000 exemption, which has existed in securities legislation for many years. Furthermore, we note that essentially all of the exemptions are similarly subject to other conditions (e.g., delivery of offering memorandum and signing of risk acknowledgement) that must be met in order to validly rely upon an exemption.

We recognize that the definition of trade in some jurisdictions includes conduct, negotiation, solicitation, advertisements and other activity ("Solicitations") in furtherance of a trade and that these Solicitations typically occur before the issuer can possibly comply with all of the conditions to use an exemption. Further, we recognize that there is always the possibility that Solicitations that do not result in a sale or disposition will occur. In that regard, we note that the securities regulatory authorities have not generally taken enforcement action in respect of Solicitations only because a sale or disposition did not ultimately occur.

It is our view that if an issuer takes reasonable steps to limit Solicitations to persons or companies to whom the issuer could reasonably expect to validly sell or dispose of the securities under an exemption, the securities regulatory authorities would generally not

consider those Solicitations to be a breach of the registration requirements requiring enforcement action only because a sale or disposition did not ultimately occur.

2. The commenter suggested that the words “in Manitoba” in subsection 6.4(1) should be deleted and substituted with “in any jurisdiction in Canada”. In addition the commenter suggested reversing the order of clauses 6.4(1)(b) and (c).

Response

We agree with the commenter and have made the suggested changes.

3. The commenter noted that Form 45-103F4 referred to the filing of a report by a “vendor other than the issuer” and suggested that subsection 7.1(1) of MI 45-103 add “vendor.

Response

MI 45-103 does not require vendors other than issuers to file a Form 45-103F4. However, the securities legislation of some jurisdictions may require a vendor that relies on an exemption other than an exemption in MI45-103, file a Form 45-103F4. For that reason Form 45-103F4 refers to “vendors”, in addition to “issuers”. We have added clarifying language to Form 45-103F4.

Attachments

The Amendments are attached to this Notice as follows:

Appendix A: Amendments to MI 45-103

Appendix B: Amendments to Forms 45-103F1, 45-103F2 and 45-103F4

Appendix C: Amendments to the Companion Policy.

Also attached are consolidated versions of MI 45-103, 45-103F1, 45-103F2 and 45-103F4 and Companion Policy which incorporated the amendments.

Questions

Please refer your questions to any of:

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