

Notice and Request for Comment

Draft Regulation 51-105 respecting Issuers Quoted in the U.S. Over-the-Counter Markets and Policy Statement to Regulation 51-105 respecting Issuers Quoted in the U.S. Over-the-Counter Markets

Date: June 10, 2011

Introduction

We, the Canadian Securities Administrators (CSA) except the Ontario Securities Commission, are publishing for a 90-day comment period the following proposed documents:

- *Regulation 51-105 respecting Issuers Quoted in the U.S. Over-the-Counter Markets* (the Regulation), including *Form 51-105F1, Notice – OTC Issuer Ceases to be an OTC Reporting Issuer, Form 51-105F2, Notice of Promotional Activities, Form 51-105F3A, Personal Information Form and Authorization of Indirect Collection, Use and Disclosure of Personal Information, Form 51-105F3B, Personal Information Form and Authorization of Indirect Collection, Use and Disclosure of Personal Information* and *Form 51-105F4, Notice – Issuer Ceases to be an OTC Reporting Issuer* (collectively, the Forms);
- *Policy Statement to Regulation 51-105 respecting Issuers Quoted in the U.S. Over-the-Counter Markets* (the Policy Statement);

(together, the OTC Regulation).

The Notice and OTC Regulation are available on the websites of CSA members, including the following:

www.bcsc.bc.ca
www.albertasecurities.com
www.sfsc.gov.sk.ca
www.lautorite.qc.ca
www.nbsc-cvmnb.ca
www.gov.ns.ca/nssc

We are also proposing consequential changes to:

- National Policy 11-203 *Process for Exemptive Relief Applications in Multiple Jurisdictions*
- CSA Staff Notice 12-307 *Applications for a Decision that an Issuer is not a Reporting Issuer*

Substance and Purpose of the OTC Regulation

The OTC Regulation would give us better legal tools to:

- improve disclosure by issuers with a significant connection to a Canadian jurisdiction whose securities are quoted in the U.S. over-the-counter markets
- discourage the manufacture and sale in a Canadian jurisdiction of U.S. over-the-counter quoted shell companies that can be used for abusive purposes

Background to the OTC Regulation

On September 15, 2008, BC Instrument 51-509 *Issuers Quoted in the U.S. Over-the-Counter Markets* and related amendments (the BC OTC Regulation) came into force as

a local rule in British Columbia. The BC OTC Rule regulates issuers that are quoted in the U.S. over-the-counter markets but not on another North American exchange listed in the rule and that have a significant connection to British Columbia.

The BC OTC Rule was an initiative to address the harm caused to the reputation of British Columbia's capital markets by market participants with a significant connection to British Columbia that engage in abusive activities through the over-the-counter markets in the United States. These markets consist of the OTC Bulletin Board and Pink OTC Markets quotation systems. Damage to British Columbia's market reputation, in turn, was harming legitimate issuers, investment dealers, and other British Columbia market participants.

Since then, some of the OTC reporting issuers migrated to other Canadian jurisdictions. As a result, we are proposing to adopt the OTC Regulation.

Application of the OTC Regulation

The OTC Regulation would apply to any OTC issuer that has a significant connection to a local Canadian jurisdiction.

Under the OTC Regulation, an OTC issuer is an issuer whose securities are quoted on any U.S. over-the-counter markets unless the issuer is also listed or quoted on the TSX Venture Exchange, The Toronto Stock Exchange, the Canadian National Stock Exchange, the New York Stock Exchange, the NYSE Amex Equities, or the NASDAQ Stock Market. Those exchanges impose requirements on issuers that make it unnecessary for them to be subject to the OTC Regulation. An OTC reporting issuer also includes an issuer if trades in its securities are reported in the grey market.

Under the OTC Regulation, an OTC issuer has a significant connection to a Canadian jurisdiction if

1. it is directed or administered or promotional activities are conducted in or from the jurisdiction, in whole or in part, or
2. it distributed securities in a Canadian jurisdiction prior to obtaining a ticker-symbol for the purpose of having its securities quoted on an over-the-counter market in the U.S. and those securities became the issuer's OTC-quoted securities.

The OTC Regulation would apply to an OTC issuer when the U.S. Financial Industry Regulatory Authority (FINRA) assigns a ticker symbol to a class of its securities so that trades in those securities may be reported. Once an OTC issuer becomes an OTC reporting issuer under the OTC Regulation, the OTC Regulation will continue to apply to it for at least one year. After that, the OTC Regulation would apply only if the issuer is directed or administered or carries out promotional activities in or from a jurisdiction of Canada.

The OTC Regulation would apply to an OTC issuer that is a reporting issuer in a Canadian jurisdiction at the time the regulation comes into force. We considered excluding the application of the OTC Regulation to this class of OTC issuers but concluded, given the objectives of the OTC Regulation, that there is no persuasive policy reason to exclude its application to this class of OTC issuers.

Disclosure requirements

Issuers

We intend the OTC Regulation's disclosure requirements to improve continuous disclosure for OTC reporting issuers. We will monitor and enforce compliance with the new requirements through continuous disclosure reviews and the use of compliance and enforcement tools when appropriate.

Under the OTC Regulation, OTC reporting issuers must:

- meet the same periodic disclosure requirements imposed on other domestic reporting issuers under *Regulation 51-102 respecting Continuous Disclosure Obligations*, including an annual information form (AIF), management's discussion and analysis (MD&A), and audited financial statements
- comply with Canadian timely disclosure requirements
- file their public disclosure on SEDAR

Other than the requirement to file an AIF, OTC reporting issuers would be treated as venture issuers, as defined in *Regulation 51-102 respecting Continuous Disclosure Obligations*.

OTC reporting issuers that are SEC filers – issuers that file disclosure with the United States Securities and Exchange Commission – could comply with the draft regulation's requirements to file financial statements, material change reports, MD&A and AIFs using documents they file with the SEC.

The OTC Regulation would also require an OTC reporting issuer to file

- in certain circumstances, the most recent registration statement it filed with the SEC, and
- information about persons it retains for promotional activities, the nature and scope of the engagement, compensation, and other material terms of the agreements entered into with those persons.

The OTC Regulation would also require OTC reporting issuers in the oil and gas business to comply with *Regulation 51-101 respecting Standards of Disclosure for Oil and Gas Activities*. The OTC Regulation does not impose additional requirements with respect to *Regulation 43-101 respecting Standards of Disclosure for Mineral Projects* because that regulation currently applies to OTC issuers.

Insider reports

The OTC Regulation would require an insider of an OTC reporting issuer to file an insider report on SEDI unless the insider is exempted from those requirements because it has filed its insider report in compliance with U.S. federal securities law. If an insider of an OTC reporting issuer is exempted from reporting requirements under U.S. federal securities law, the OTC Regulation will require that it file an insider report under Canadian law.

Personal Information Forms

Under the OTC Regulation, each director, officer, promoter or control person of an OTC reporting issuer would be required to deliver to the securities regulatory authorities a personal information form (PIF). This form would include the person's consent to a criminal record search. Directors and officers of issuers listed on the TSX Venture Exchange and the Toronto Stock Exchange must file a similar form with the Exchange. If a person has submitted a PIF to the TSX Venture Exchange or the Toronto Stock Exchange and the information contained in it has not changed, the person may deliver it to satisfy the requirements of the OTC Regulation.

Foreign Issuer and MJDS Exemptions

Under the OTC Regulation, an OTC reporting issuer may rely on exemptions from continuous disclosure requirements that are available to other reporting issuers that have a class of securities registered under section 12 of the United States *Securities Exchange Act of 1934* or are required to file reports under section 15(d) of that Act, except for the

exemption regarding material change reporting. An OTC reporting issuer must comply with the same timely disclosure requirements for material change reporting as domestic reporting issuers, except that it may use SEC Form 8-K *Current Report* as a material change report. The continuous disclosure and other exemptions for a designated foreign issuer under *Regulation 71-102 respecting Continuous Disclosure and Other Exemptions Relating to Foreign Issuers* are available to an OTC reporting issuer that is a designated foreign issuer.

Restriction of exemptions

We intend the OTC Regulation to deter manufacturers of shell companies from delivering to buyers of shell companies, for abusive purposes, the “public float” that is created from shares sold in private placements to Canadian residents and registered in a US registration statement that an issuer files with the SEC prior to obtaining a ticker-symbol.

To effect this, the OTC Regulation would:

- deny the use of the private agreement take-over bid exemption that could be used for this purpose
- require a Canadian resident who acquired shares from an OTC issuer before it obtained a ticker-symbol to sell the shares only through a registrant, from an account in the person’s own name, into the market or into a formal take-over bid, amalgamation, merger, reorganization or other similar statutory procedure, and
- require a legend on the certificates or a legend restriction notation on the ownership statements representing the seed stock held by Canadian residents to that effect.

We also intend the OTC Regulation to deter insiders and persons who have close ties to issuers from dumping shares into a market that has been prepared with promotional disclosure. Therefore, the OTC Regulation provides security holders of OTC reporting issuers with a transparent, open-market resale regime for securities acquired in a private placement.

All of the usual capital raising exemptions would be available to an OTC issuer during both its private and public stages. However, the OTC Regulation would place restrictions on the use of prospectus exemptions when an OTC reporting issuer is issuing securities for services.

Transition Provisions

When the OTC Regulation comes into force, an OTC reporting issuer will have to begin making disclosure immediately. The first quarterly and annual filings would require reporting on periods prior to the effective date of the OTC Regulation.

Issuers that are not SEC filers may not have an auditor or the resources and experience to meet the OTC Regulation’s new disclosure requirements. To give these issuers more time to prepare for compliance with the new regulation, we are considering providing a transition period following the adoption of the OTC Regulation. This would give OTC reporting issuers more time to comply with their requirements to file annual and interim financial statements, related MD&A and AIFs.

Proposed Fees

The securities regulatory authorities propose to impose the same filing fees that reporting issuers, and insiders of reporting issuers, pay to the applicable securities regulatory authority. These fees are set out in the applicable securities legislation. OTC reporting issuers will also have to pay SEDAR fees as well as late fees for failure to meet filing deadlines.

Consequential changes

We propose amending National Policy 11-203 *Process for Exemptive Relief Applications in Multiple Jurisdictions* to direct filers to the Policy Statement for the factors a filer should consider in identifying the principal regulator for an application for exemptive relief from the requirements of the Regulation or the Forms.

We also propose amending CSA Staff Notice 12-307 *Applications for a Decision that an Issuer is not a Reporting Issuer* to state that the simplified procedure for ceasing to be a reporting issuer detailed in that staff notice is not available for an OTC reporting issuer.

Anticipated costs and benefits of the OTC Regulation

The disclosure requirements should not be onerous for OTC reporting issuers who are SEC filers, because they can use the documents they file with the SEC in lieu of the Canadian forms for material change reports, financial statements, MD&A and AIF.

OTC reporting issuers who are not SEC filers and who do not have audited financial statements may incur significant new costs to comply with the OTC Regulation.

OTC reporting issuers in the resource sector, like other reporting issuers, must comply with *Regulation 51-101 respecting Standards of Disclosure for Oil and Gas Activities* and *Regulation 43-101 respecting Standards of Disclosure for Mineral Projects*. Compliance with these regulations may result in significant new costs to OTC reporting issuers.

Since an OTC reporting issuer has a significant connection with a jurisdiction of Canada, we think it is appropriate that those issuers make disclosure to the same standard as other Canadian reporting issuers.

Request for Comment on the OTC Regulation and consequential changes

We invite comment on the OTC Regulation and the consequential changes generally.

Alternatives Considered

Since a similar regulation has worked effectively in British Columbia, we did not consider other alternatives.

Unpublished Materials

In developing the OTC Regulation, we did not rely upon any significant unpublished study, report, or other written materials.

Local Notices

Certain jurisdictions will publish other information required by local securities legislation in Appendix A to this Notice.

Publishing Jurisdictions

The OTC Regulation and the consequential changes are initiatives of all CSA members except Ontario. Other than Ontario, each CSA member would adopt the Regulation and the Forms as a regulation, commission regulation, or regulation, and the Policy Statement and consequential changes as policies.

How to Provide Your Comments

Please provide your comments by **September 9, 2011**.

Please address your submission to the following CSA member commissions, as follows:

British Columbia Securities Commission
 Alberta Securities Commission
 Saskatchewan Financial Services Commission – Securities Division
 Manitoba Securities Commission
 Autorité des marchés financiers
 New Brunswick Securities Commission
 Registrar of Securities, Prince Edward Island
 Nova Scotia Securities Commission
 Securities Commission of Newfoundland and Labrador
 Superintendent of Securities, Northwest Territories
 Superintendent of Securities, Yukon Territory
 Superintendent of Securities, Nunavut

You do not need to deliver your comments to all CSA members. Please deliver your comments **only** to the following addresses, and CSA members' staff will distribute your comments to all other jurisdictions.

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If you are not sending your comments by e-mail, please send a CD-ROM containing your comments in MS Word format.

We cannot keep submissions confidential because securities legislation in certain provinces requires that we publish a summary of the written comments received during the comment period.

Questions

If you have any questions, please refer them to any of the following:

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