



PASSPORT SYSTEM AND HARMONIZED PROSPECTUS REGIME TO TAKE EFFECT MARCH 17, 2008

Effective March 17, 2008, Multilateral Instrument 11-102 - *Passport System* ("MI 11-102") is scheduled to take effect in every province and territory in Canada, except Ontario (the "Passport Jurisdictions"). MI 11-102 will permit capital market participants to clear a prospectus or obtain a discretionary exemption from a principle regulator, with such clearance or exemption automatically applied in all other Passport Jurisdictions (the "Passport System"). Although the Ontario Securities Commission ("OSC") is not adopting MI 11-102, it can be a principal regulator under the instrument, thereby giving market participants in Ontario access to the capital markets in Passport Jurisdictions by dealing only with the OSC.

The new regulatory framework also includes a proposed "passport" for the registration of market participants engaged in business in the securities industry through National Instrument 31-103 - *Registration Requirements* and related documents which is scheduled to take effect later this year once it has been finalized. The comment period is open until May 29, 2008.

Accompanying the Passport System is the introduction of National Instrument 41-101 - *General Prospectus Requirements* ("NI 41-101"), which was first published for comment December 21, 2006, as well as various related amendments to other rules, policies and instruments (the "Related Amendments") which assume the coming into force of certain securities act amendments (the "Act Amendments") that have been proposed or adopted in all the jurisdictions as part of the Canadian Securities Administrators' ("CSA") initiative to harmonize and streamline securities laws in Canada.

The Passport System

National Policy 11-202 - *Process for Prospectus Review in Multiple Jurisdictions* ("MI 11-202") and National Policy 11-203 - *Process for Exemptive Relief Application Reviews in Multiple Jurisdictions* ("NP 11-203") will replace the current mutual reliance review systems for the filing and review of prospectuses and exemptive relief applications. The policies also outline how market participants in Passport Jurisdictions will gain access to Ontario's capital markets.

Background and Purpose

The CSA's stated objective with the introduction of the Passport System is to simplify the application of securities laws across the Passport Jurisdictions through the harmonization of rules and practices. The key advantages are expected to include increased timeliness in which an issuer's principal regulator can respond to a new prospectus filing or application for exemptive relief and reduced professional costs to capital market participants for dealing with multiple regulators and different laws.

Prospectus Review under the Passport System

Effective March 17, 2008, a market participant filing a preliminary, pro forma or final prospectus in any jurisdiction in Canada will be subject to the new harmonized prospectus requirements set forth in NP 11-202.

Under MI 11-102, each market participant will be required to file all required documents and fees with its "principal regulator" and with each "non-principal regulator" in the other Passport Jurisdictions in which it wishes to offer the securities. The issuer will generally need to have its prospectus reviewed by only its principal regulator and will need a receipt for the prospectus from only its principal regulator with a deemed receipt being obtained from the other Passport Jurisdictions. For the purposes of a prospectus filing, the "principal regulator" is the securities regulatory authority or regulator of the jurisdiction in which the issuer's head office is located, (or an investment fund manager's head office is located) or the securities regulatory authority or regulator of the specified jurisdiction with which the issuer (or investment fund manager) has the most significant connection.

For the purposes of coordinating the review of any preliminary, pro forma or final prospectus filed in any jurisdiction in Canada, the new rules distinguish between a "Passport Prospectus" and a "Dual Prospectus".

(i) Passport Prospectus

A prospectus filed in: (i) any Passport Jurisdiction exclusive of Ontario, or (ii) a prospectus filed in Ontario

as the principal jurisdiction and also filed in a Passport Jurisdiction, is termed a “Passport Prospectus”.

In the first instance, if the principal regulator is in a Passport Jurisdiction and the prospectus is not filed in Ontario, only the principal regulator will review the prospectus, communicate with the filer and issue a preliminary or final receipt which will trigger a deemed receipt in all other Passport Jurisdictions where the prospectus is filed. However, if the OSC is the principal regulator and the prospectus is also filed in a Passport Jurisdiction, only the OSC will review the prospectus and the issuance of the OSC receipt will trigger a deemed receipt in each Passport Jurisdiction where the prospectus is filed.

(ii) *Dual Prospectus*

In those circumstances where the principal regulator is a Passport Jurisdiction and the prospectus is also filed in Ontario, the prospectus is a “Dual Prospectus”. In these circumstances, the principal regulator will review the prospectus and the OSC, as a non-principal regulator, will coordinate its review with the principal regulator. The receipt of the principal regulator will trigger a deemed receipt in each other passport jurisdiction where the prospectus is filed and will evidence the receipt of the OSC, *if the OSC has made the same decision as the principal regulator*.

Under MI 11-102, the OSC retains the ability to “opt-out” of this dual review process at any time before the principal regulator issues a final receipt for the prospectus. In such instances, the OSC is required to provide written reasons for its decision to opt-out of the dual review process to the principal regulator who will then use its best efforts to resolve any opt-out issues with the filer and the OSC.

If the principal regulator is able to resolve the OSC’s opt-out issues with the filer and the OSC, the OSC may opt back in. However, if the principal regulator is unable to resolve the OSC’s opt-out issues, the principal regulator’s final receipt will not evidence that the OSC has issued a receipt and the filer will be required to deal with the OSC directly (and outside the ambit of the dual review process) in order to resolve any outstanding issues. In circumstances where the OSC has not otherwise made a decision to opt-out of the dual review process, the principal regulator retains the ability to refer the filer to the OSC in “exceptional circumstances”.

Timing of Review

(i) *Review of Long Form Prospectus*

Pursuant to NP 11-202, the principal regulator will use its best efforts to review the materials relating to a preliminary long form prospectus or pro forma prospectus and provide a first comment letter within 10 working days of the date of the preliminary receipt or of receiving the pro forma prospectus and related materials.

In the case of a dual prospectus, the OSC will, within five working days of the date of the preliminary receipt or of receiving the pro forma prospectus and related materials in acceptable form, use its best efforts to: (a) advise the principal regulator of any concerns with the materials that, if left unresolved, would cause the OSC to opt out of the dual review; or (b) indicate on SEDAR that it is clear to receive final materials.

(ii) *Review of preliminary short form prospectuses and preliminary shelf prospectuses*

The principal regulator will use its best efforts to review the materials relating to a preliminary short form prospectus or preliminary shelf prospectus and provide a first comment letter within three working days of the date of the preliminary receipt.

In the case of a dual prospectus, the OSC will, within two working days of the date of the preliminary receipt, use its best efforts to: (a) advise the principal regulator of any concerns with the materials that, if left unresolved, would cause the OSC to opt out of the dual review; or (b) indicate on SEDAR that it is clear to receive final materials. If the principal regulator does not think it can review a preliminary short form prospectus or preliminary shelf prospectus adequately within this time-period because it is too complex, the principal regulator may decide to apply the time-period for long form prospectuses.

Discretionary Applications under the Passport System

NP 11-203 sets forth the requirements for the review of applications for discretionary exemptions or other relief sought under, or from, securities legislation or securities directions in multiple Passport Jurisdictions. As with NP 11-202, the applicant is to file the application with its principal regulator who will review and provide its decision with an automatic exemption in the other Passport Jurisdictions whereas market participants outside Ontario will be required to file an application with, and have it reviewed and approved by, the OSC.

For the purposes of coordinating the review of any application for exemptive relief, the new rules distinguish between a “Passport Application”, “Dual Application”, “Coordinated Review Application” and “Hybrid Application”.

(i) *Passport Application*

Similar to the “passport prospectus” review system a “passport application” is an application for exemption relief filed in: (i) any Passport Jurisdiction exclusive of Ontario, or (ii) in Ontario as principal jurisdiction and also another Passport Jurisdiction with the issuance of the principal regulator’s exemptive relief decision resulting in an automatic exemption in each Passport Jurisdiction.

(ii) *Dual Application*

Again, where the principal regulator is in a Passport Jurisdiction and the application is also filed in Ontario, this results in a “Dual Application” requiring review by both the principal regulator and the OSC who, as a non-principal regulator, will coordinate its review with the principal regulator and retains “opt-out” rights from the dual review process.

(iii) *Coordinated Review Application*

If the application is seeking a type of relief that is not addressed by the Passport System, the application is known as a “Coordinated Review Application” requiring the applicant to file materials in each jurisdiction where it is seeking relief and requiring the principal regulator to coordinate its review with, and receive comments from, all non-principal regulators. As a result, the granting of exemptive relief by the principal regulator will evidence the decision of each non-principal regulator that has made the same decision as the principal regulator.

(iv) *Hybrid Application*

Finally, NP 11-203 contemplates a “Hybrid Application” in circumstances where an application is comprised of both a passport application or dual application, and a coordinated review application. In such circumstances, NP 11-203 provides that the filer should follow the processes for both a coordinated review application and either a passport application or dual application, as appropriate.

National Instrument 41-101 – General Prospectus Requirements and Related Amendments

Concurrent with the introduction of the Passport System, NI 41-101 has been introduced in an effort to provide capital market participants with a comprehensive and harmonized prospectus regime among Canadian jurisdictions that would: (i) harmonize general prospectus requirements, continuous disclosure and long form and short form prospectus regimes as between jurisdictions; and (ii) take into account various changes in the principles underlying the existing general prospectus requirements including the codification of certain matters which the CSA has consistently

identified in its review of applications for exemptive relief.

Background

The changes proposed by NI 41-101 are based primarily on the existing requirements found in OSC Rule 41-501 – *General Prospectus Requirements* (“Rule 45-101”) which was adopted in December 2000 as the long form prospectus rule by all other jurisdictions in Canada (and in Québec under Regulation Q-28 *Respecting General Prospectus Requirements*). Since then, a number of national instruments prescribing continuous disclosure requirements for all issuers have been adopted, including NI 51-102 - *Continuous Disclosure Obligations* and National Instrument 81-106 - *Investment Fund Continuous Disclosure*. A national short form prospectus regime was adopted concurrently with Rule 41-501 and has been subsequently streamlined and harmonized with the continuous disclosure regime when amended and restated NI 44-101 - *Short Form Prospectus Distributions* came into force in December 2005.

Impact of Changes

Other than in Ontario, certain concurrent securities act amendments will result in certain of the prospectus-related provisions currently in the securities acts of each applicable jurisdiction being moved to NI 41-101. In Ontario, these prospectus-related provisions will remain in the *Securities Act* (Ontario) with a number of Ontario carve outs in NI 41-101 that reflect this difference. As a result, a number of provisions of NI 41-101 will not apply in Ontario and the similar requirements of the *Securities Act* (Ontario) will continue to apply. Finally, there are certain new requirements set forth in 41-101 that will not apply in Ontario.

Summary of Substantive Changes

Although many of the proposed changes are intended to streamline the various definitions and underlying policy concerns of the respective instruments or policies, NI 41-101 contains certain substantive changes which are highlighted below. These include: (i) the restriction of categories of material contracts which are currently exempt from filing as well as the redaction of certain provision therein; (ii) the codification and amendment to certain underwriting practices; and (iii) the inclusion of certain provisions as well as guidance relating to advertising and marketing in connection with prospectus offerings during the waiting period.

1. Material contracts

Background

Effective March 17, 2008, amendments to National

Instrument 51-102 – *Continuous Disclosure Obligation* (“51-102”) and to Form 51-102 – *Annual Information Form* are to take effect and which are also reflected in NI 41-101.

Currently, issuers conducting a prospectus offering are obliged to file on SEDAR a copy of any contract that it, or any of its subsidiaries, is a party to, other than a contract entered into in the ordinary course of business, that is material to the issuer and: (i) that was entered into within the last financial year; or (ii) at anytime prior to the last financial year, but after January 1, 2002 and which remains in effect. The issuer is also required to list and provide particulars for such material contracts in preparing its Annual Information Form (“AIF”). In both instances, the issuer is permitted to redact or omit certain provisions from the filed copy of a material contract if it has reasonable grounds to believe that disclosure of such provisions would be seriously prejudicial to the interests of the issuer or would violate contractual confidentiality provisions.

Amendments

Effective March 17, 2008, there will be two key changes to an issuer’s disclosure obligations with respect to current practices which restrict: (A) the categories of material contracts that are considered to be “in the ordinary course of business” of the issuer and are thus exempt from filing obligations; as well as (B) the ability of issuers to redact certain provisions in those materials contracts which are required to be filed.

The companion policy to MI 41-101 (the “Companion policy”) reminds issuers that a material contract generally includes a schedule, side letter or exhibit referred to in the material contract and any amendment to a material contract and that amendments to the redaction and omission provisions of NI 41-101 apply to such schedules, side letters, exhibits or amendments.

A. Restrictions to Filing Exemptions

The amendments restrict certain categories of material contracts that might otherwise be considered to be in the “ordinary course” and are therefore no longer exempt from the disclosure and filing requirements. These categories include:

- a) contracts to which directors, officers, or promoters are parties other than a contract of employment;
 - The Companion Policy notes that the one way for issuers to determine whether a contract is a contract of employment is to consider whether the contract contains payment or other provisions that would otherwise require disclosure under the issuer’s statement of executive

compensation included in its management information circular as if the individual were a named executive officer or director of the issuer.

- b) a continuing contract to sell the majority of the reporting issuer’s products or services or to purchase the majority of the reporting issuer’s requirements of goods, services, or raw materials;
- c) a franchise or licence or other agreement to use a patent, formula, trade secret, process or trade name;
- d) a financing or credit agreement with terms that have a direct correlation with anticipated cash distributions;
- e) an external management or external administration agreement; or
 - The Companion Policy notes that the issuers should include agreements between the issuer and a third party, the issuer’s parent entity, or an affiliate of the issuer, under which the latter provides management or other administrative services to the issuer.
- f) a contract on which the reporting issuer’s business is substantially dependent.
 - Generally, a contract on which the issuer’s business is substantially dependent is a contract so significant that the issuer’s business depends on the continuance of the contract. Some examples of this type of contract include (a) a financing or credit agreement providing a majority of the issuer’s capital requirements for which alternative financing is not readily available at comparable terms, (b) a contract calling for the acquisition or sale of substantially all of the issuer’s property, plant and equipment, long-lived assets, or total assets, and (c) an option, joint venture, purchase or other agreement relating to a mining or oil and gas property that represents a majority of the issuer’s business.

B. Restriction on Redaction or Omission

The amendments also restrict the extent to which an issuer may redact or omit provisions from the filed copy of a material contract. Under NI 41-101, an issuer may omit or redact a provision of a material contract that is required to be filed if an executive officer of the issuer reasonably believes that: (A) disclosure of the omitted or redacted provision would be seriously prejudicial to the interests of the issuer; or (B) would violate confidentiality

provisions.

(a) *Disclosure seriously prejudicial to interests of issuer*

One example of disclosure that may be seriously prejudicial to the interests of the issuer is disclosure of information in violation of applicable Canadian privacy legislation. However, in situations where securities legislation requires disclosure of the particular type of information, applicable privacy legislation generally provides an exemption for the disclosure. Generally, disclosure of information that an issuer or other party has already publicly disclosed is not considered by the CSA to be seriously prejudicial to the interests of the issuer.

(b) *Confidentiality provisions*

An issuer may not redact or omit any provisions of a material contract relating to the following matters even if disclosure would violate a confidentiality provision, including a blanket confidentiality provision covering the entire material contract:

- (i) debt covenants and ratios in financing or credit agreements;
- (ii) events of default or other terms relating to the termination of the material contract; or
- (iii) other terms necessary for understanding the impact of the material contract on the business of the issuer and which include the following: (a) the duration and nature of a patent, trademark, license, franchise, concession, or similar agreement; (b) disclosure about related party transactions; (c) contingency, indemnification, anti-assignability, take-or-pay clauses, or change-of-control clauses.

Exemption

Regulators may consider granting an exemption to permit a provision of a material contract of the type listed in the Instrument to be redacted if: (a) the disclosure of that provision would violate a confidentiality provision, and (b) the material contract was negotiated before March 17, 2008 (the effective date of the Instrument). Factors to be considered as granting an exemption to these requirements include, among others: (a) whether an executive officer of the issuer reasonably believes that the disclosure of the provision would be prejudicial to the interests of the issuer; or (b) whether the issuer is unable to obtain a waiver of the confidentiality provision from the other

party.

Issuer to include summary of redacted or omitted information

If a provision is omitted or marked to be unreadable, the issuer must include a description of the type of information that has been omitted or marked to be unreadable immediately after the provision in the copy of the material contract filed by the issuer. A brief one-sentence description immediately following the omitted or redacted information is generally sufficient.

Impact of Amendments

Any issuer that files an AIF or conducts a prospectus offering after March 17, 2008 will be required to identify any material contracts entered into prior to the beginning of its last financial year, but after January 1, 2002 and is still in effect, or within the last financial year to confirm whether any material contract which has not previously been filed by the issuer will be required to be filed under the expanded scope of the definition as contemplated by the amendments.

2. *Distribution of Securities Under a Prospectus to an Underwriter*

NI 41-101 prohibits the distribution of securities under a prospectus to a person acting as an underwriter for a distribution of securities under the prospectus, other than:

- (a) an over-allotment option granted to one or more persons or companies for acting as an underwriter in connection with the distribution of any security issuable or transferable on the exercise of such an over-allotment option; or
- (b) securities issued or paid as compensation to one or more persons or companies for acting as an underwriter in respect of other securities that are distributed under the prospectus, where the number or principal amount of the securities issued as compensation, on an as-if-converted basis, does not in the aggregate exceed 10% of the total of the base offering plus any securities that would be acquired upon the exercise of an over-allotment option.

3. *Bona Fide Estimate of Range of Offering Price or Number of Securities Being Distributed*

The draft version of NI 41-101 contemplated requiring issuers filing a preliminary prospectus to disclose a *bona fide* estimate of the range in which the offering price or the number of securities being distributed was expected to be set. The rationale was that information regarding the pricing range is generally disclosed in green sheets and is otherwise required to be disclosed under U.S. securities law.

The final version of NI 41-101 did not include this proposal and the CSA chose to limit the requirement to disclose, in a preliminary prospectus, the offering price or the number of securities being distributed (or estimates of same), to those instances where the issuer has already publicly disclosed this information in a jurisdiction or a foreign jurisdiction. Moreover, should an issuer choose to disclose such information in the preliminary prospectus, the CSA has advised that a difference between this *bona fide* estimate and the actual offering price or number of securities being distributed is not generally, in itself, a material adverse change for which the issuer must file an amended preliminary long form prospectus.

However, the CSA cautions issuers that given the materiality of pricing or offering size information, the *selective disclosure* of this information during the waiting period between the time subsequent to the filing of a preliminary prospectus and prior to which the receipt for the final prospectus is acquired could constitute conduct that is prejudicial to the public interest.

4. *Advertising and Marketing in Connection with Prospectus Offerings Legend for Communications During the Waiting Period*

NI 41-101 sets forth certain requirements and provides guidance in connection with the advertising or marketing activities of issues during the waiting period. NI 41-101 provides the form of legend to be included in any notice, circular, advertisement, letter or other communication used in connection with a prospectus offering during the waiting period, as well as guidance as to certain practices which, at a minimum, participants in all prospectus distributions should consider in seeking to avoid contravening securities legislation:

- Directors or officers of an issuer should not give interviews to the media immediately prior to or during the waiting period. Directors and officers should normally limit themselves to responding to unsolicited inquiries of a factual nature made by shareholders, securities analysts, financial analysts, the media and others who have a legitimate interest in such information.

- No director or officer of an issuer should make any statement during the period of distribution of securities (which includes the period from the commencement of the distribution until the closing of the distribution) which constitutes a forecast, projection or prediction with respect to future financial performance, unless that statement relates to and is consistent with a forecast contained in the prospectus.
- Underwriters and legal counsel have the responsibility of ensuring that the issuer and all directors and officers of the issuer who may come in contact with the media are fully aware of the restrictions applicable during the period of distribution of securities. It is not sufficient to make those restrictions known only to the officers comprising the working group.
- Issuers, dealers and other market participants should develop, implement, maintain and enforce procedures to ensure that advertising or marketing activities that are contrary to securities legislation are not undertaken whether intentionally or through inadvertence.

The Use of Green Sheets

Issuers are also reminded that: (i) material information in a green sheet or other marketing communication that is not contained in the preliminary prospectus could indicate a failure to provide in the preliminary prospectus full, true and plain disclosure of all material facts relating to the securities offered by the prospectus and result in the prospectus certificate constituting a misrepresentation; and (ii) regulators reserve the right to request copies of green sheets and other advertising or marketing materials as part of their prospectus review procedures.

5. *Personal Information Form and Authorization*

NI 41-101 requires issuers to deliver a copy of a completed Personal Information Form which is substantially similar to those currently in use by the Toronto Stock Exchange or the TSX Venture Exchange and which are currently required under British Columbia and Québec securities legislation. This requirement extends to every individual described in this subparagraph with the first preliminary prospectus filed by the issuer (except in Ontario for certain individuals).

This update is intended as a summary only and should not be regarded or relied upon as advice to any specific client or regarding any specific situation. If you would like further information regarding the issues discussed in this update or if you wish to discuss any aspect of this commentary, please feel free to contact any of the following:

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