Appendix A

BC Instrument 51-509

Issuers Quoted in the U.S. Over-the-Counter Markets

Summary of Comments and Commission Responses

List of Commenters

1. Bingo.com
2. Thrust Energy Corp.
3. Bacchus Corporate and Securities Law
4. Clark Wilson
5. Fasken Martineau
6. O'Neill Law Group PLLC
7. Sangra Moller
8. Venture Law Corporation
9. BMO Nesbitt Burns
10. Genuity Capital Markets
11. Jones, Gable & Co.
12. PI Financial Corp.
13. RBC Dominion Securities
14. Research Capital Corporation
15. Canadian Trading and Quotation System Inc.
16. TSX Venture Exchange
17. Association of Professional Engineers and Geoscientists of British Columbia
18. Investment Industry Association of Canada
19. Donald Bernard

Introduction

We appreciate all the comments we received. They greatly assisted us in revising the proposed instrument.

The headings and section numbers refer to the current version of the proposed instrument unless otherwise indicated. Terms used in this Summary that are defined in the proposed instrument have the same meaning.

A. General comments

Commenters were divided between those in support and those opposed.

1. Support

Commenters who supported the proposed instrument generally shared the Commission's concerns about the damaging effect on British Columbia's capital markets of abusive activities that are carried out from British Columbia in the U.S. over-the-counter markets. These commenters commented positively on the increased disclosure requirements, the

leveling of the playing field for publicly traded companies, and the transparency the proposed instrument will bring to this segment of the capital markets.

Response
The Commission acknowledges these expressions of support for this initiative.

2. Opposition
Commenters who opposed the proposed instrument made the following comments:

a. The proposed instrument is unnecessary and won't work
Several commenters said there is no need for the proposed instrument because existing laws are sufficient. Others said that the proposed instrument would not achieve the desired outcomes because fraudsters will find a way around it or move to another jurisdiction. These commenters said the Commission should take other measures, such as more rigorous enforcement of existing laws and improved communication with other regulators. One commenter remarked on the gatekeeping role professional advisers can play.

Response
The Commission believes that the proposed instrument is necessary to ensure that OTC issuers with significant connections to British Columbia make disclosure in British Columbia for which they are accountable, the same as other reporting issuers, and to prevent abusive activities related to these issuers carried out in British Columbia.

While no law can prevent fraud, the proposed instrument will make it more difficult to carry out abusive activities in the U.S. over-the-counter markets from British Columbia and will provide a better basis for compliance and enforcement activity. Other Canadian jurisdictions may follow our example should the persons who carry out abusive activities in the U.S. over-the-counter market migrate there.

The Commission agrees with the importance of rigorous enforcement, good communication among regulators and gatekeeping by professional advisers, and sees them as complimentary to the proposed instrument.

b. Compliance costs detrimental to small business
Several commenters said the proposed instrument would be detrimental to businesses, especially small business, and would discourage business formation and activity in British Columbia.

Response
The cost to OTC reporting issuers quoted on the OTC Bulletin Board will not be substantial because we have revised the proposed instrument so that they may rely on most of the foreign issuer and multijurisdictional disclosure system exemptions. The only exceptions are where U.S. requirements are significantly different, such as timely disclosure reporting and disclosure for mineral projects and oil and gas companies.

These additional obligations put OTC reporting issuers in same position as other reporting issuers in British Columbia.

The proposed instrument will impose new costs on OTC reporting issuers quoted on the Pink Sheets that do not currently provide audited financial statements or other disclosure to their shareholders. However, it is a long-standing principle of securities regulation in Canada that issuers whose shares are publicly traded provide disclosure so that the public can make informed investment decisions and be protected from abusive and manipulative activities. The disclosure requirements in the proposed instrument are consistent with that approach.

c. The proposed instrument will not improve disclosure

Several commenters said the proposed instrument would not improve disclosure by OTC Bulletin Board quoted issuers. They pointed out that disclosure by OTC Bulletin Board issuers is easily accessible by investors on EDGAR. They said the Commission should not require OTC Bulletin Board issuers to file duplicative disclosure.

Response

The proposed instrument will improve disclosure by OTC Bulletin Board issuers in several respects. One is the requirement for OTC reporting issuers to file timely disclosure of material changes. This is an area where U.S. and Canadian securities legislation are significantly different. U.S. legislation does not require an OTC issuer to issue a news release to announce a material change, and may not require the issuer to file a document with the SEC. We have found that false and misleading news release disclosure is a significant problem with OTC issuers associated with abusive market activity.

Another significant problem is false and misleading statements in promotional brochures or "investment newsletters" that some OTC issuers pay to have written and disseminated to U.S. residents. Under the proposed instrument, OTC reporting issuers will file notice of such arrangements, and will be more aware of their liability for false and misleading disclosure.

The proposed instrument will improve disclosure by OTC reporting issuers about mineral and oil and gas projects to the same standards that apply to other reporting issuers in British Columbia.

d. The OTC Bulletin Board and Pink Sheets serve a valid purpose

A few commenters said the OTC Bulletin Board provides a viable alternative for issuers that do not have the resources or contacts to go public on the TSX Venture Exchange, and offers issuers flexibility and access to brokers and investors in the U.S. One commenter said the proposed instrument would eliminate this alternative for issuers that would be OTC reporting issuers under the proposed instrument.

Response
We do not disagree that the U.S. OTC markets offer advantages for some issuers, but we do not agree that the proposed instrument will eliminate that alternative for those that would be OTC reporting issuers under the proposed instrument. The additional cost to an OTC Bulletin Board issuer of complying with the proposed instrument is unlikely to be so high as to offset the advantages of having its shares publicly quoted there.

3. The proposed instrument is not national
Several commenters, including commenters in support of and in opposition to the proposed instrument, were concerned that the proposed instrument would be implemented only in British Columbia, rather than nationally.

Response
It is part of the Commission's mandate to protect the integrity of British Columbia's securities markets. We are faced with abusive activity in the U.S. OTC markets by those with connections to British Columbia that threatens the integrity of our markets. It is a strength of the Canadian system that local problems can be locally addressed. Should other Canadian provinces experience similar problems as British Columbia, it will be open to those provinces to adopt similar initiatives.

B. Specific Comments

Part 1 – Definitions and Reporting Issuer Designation
1. Application too broad
a. Unfair to OTC issuer that is involuntarily quoted
Commenters said that issuers may be quoted on the OTC Bulletin Board or Pink Sheets without their knowledge or consent, and therefore: (i) it is unfair for the proposed instrument to apply to them, and (ii) this could result in an overly broad application of the proposed instrument, and would discourage legitimate international companies from having any connection with British Columbia.

Response
Under British Columbia securities legislation, generally the issuer chooses whether or not to become a reporting issuer. In the United States, securities legislation imposes reporting requirements on an issuer once it reaches a certain size, measured by assets and number of shareholders. In our opinion, we do not see the potential scope of the proposed instrument as unfair, taking into account the public interest. Once the proposed instrument becomes effective, issuers that will be OTC reporting issuers under its terms will be aware of their obligations when they choose to have their securities traded only in the U.S. over-the-counter markets.

One concern was the potential for a substantial international company to be involuntarily quoted on the Pink Sheets, thereby becoming an OTC reporting issuer under the proposed instrument. Neither we, nor the commenters raising this issue, were able to identify an issuer in those circumstances that was not listed on any of the North American exchanges

or quotation systems mentioned in section 1(b) of proposed instrument, and had one of the connecting factors in section 3.

Any issuer that would be an OTC reporting issuer under the proposed instrument, and believes that outcome is inconsistent with the purpose and intent of the proposed instrument, may apply for an exemption.

b. CNQ

One commenter said the Canadian Trading and Quotation System Inc. (CNQ) should be included in the list of exchanges and quotation systems mentioned in section 1(b) of the proposed instrument.

Response

We agree and have revised the proposed instrument accordingly.

c. Exchanges outside North America

Several commenters said stock exchanges outside North America should be included in the list of exchanges and quotation systems mentioned in section 1(b) of the proposed instrument.

Response

We were unable to identify any issuers listed on foreign exchanges, other than those listed in section 1(b) of the proposed instrument, that would be OTC reporting issuers under the proposed instrument. It appears that those that could be OTC reporting issuers are interlisted on one of the listed North American exchanges, or have none of the connecting factors in section 3.

d. American Depositary Receipts (ADRs) and Government Debt

Commenters suggested that the proposed instrument exclude ADRs and government debt securities from the definition of OTC-quoted securities.

Response

We did not exclude ADRs and government debt securities from the definition because we do not expect that issuers of ADRs and government debt securities would be OTC reporting issuers under the proposed instrument. Any issuer of ADRs or government debt securities that would be an OTC reporting issuer under the proposed instrument, and believes that outcome is inconsistent with the purpose and intent of the proposed instrument, may apply for an exemption.

e. Grey market securities

A commenter said the proposed instrument should not apply to issuers whose securities trade in the "grey market".

Response

There are circumstances where it is appropriate for the proposed instrument to apply to an OTC issuer whose securities trade in the grey market. For example, the securities of an

OTC issuer may trade in the grey market if Pink Sheets removes quotes for the issuer's securities from its website because of a questionable promotion, spam, regulatory suspension of trading, or other public interest concern. An issuer whose securities trade in the grey market, that would be an OTC reporting issuer under the instrument, and believes that outcome is inconsistent with the purpose and intent of the instrument, may apply for an exemption.

f. Reporting issuers

A commenter said the proposed instrument should not apply to OTC issuers that are reporting issuers in British Columbia at the time the proposed instrument comes into force.

Response

The reason for treating OTC issuers differently than other reporting issuers is that OTC issuers are not subject to the standards, rules and regulatory oversight that other North American exchanges and quotation systems provide. This distinction applies to all OTC issuers, whether or not they are currently reporting issuers.

2. Confusion over defined terms

Several commenters said it was unclear which terms in the proposed instrument were defined elsewhere and were concerned that readers might not know to refer to another document for their meaning.

Response

The Proposed Policy identifies some key terms used in the proposed instrument that are defined elsewhere and refers the reader to those definitions.

3. Section 3(a) – Reporting issuer designation – directed or administered in or from British Columbia

Many commenters were concerned about how to interpret this condition and requested that the Commission provide guidance. Several commenters were concerned that the presence of a single director or officer in British Columbia would be a sufficient connection for the proposed instrument to apply to an issuer, and some suggested a more prescriptive test, e.g., that a majority of an issuer's directors be resident in British Columbia.

Response

The proposed companion policy offers guidance on this subject. The proposed instrument does not incorporate a bright-line test because any test of that sort is too vulnerable to manipulation and avoidance.

4. Section 3(b) – Reporting issuer designation – investor relations activities

Several commenters said the definition of "investor relations activities" in the Act is too broad to use as a condition for designating an OTC issuer as a reporting issuer. Some said an OTC issuer should not become subject to the proposed instrument because it sends a package to a potential investor at that person's request or in connection with a private

placement. Others said the use of an investor relations firm based in British Columbia should not result in the issuer being designated an OTC reporting issuer.

Response
We disagree with these comments.

Investor relations activities is often a fundamental function for an OTC issuer, whether initiated by the issuer or in response to a request from a potential investor. These activities are often at the heart of the abuses the proposed instrument is intended to deter. An OTC issuer that uses an investor relations person or firm based in British Columbia is conducting its investor relations from British Columbia and its conduct reflects on our capital markets. An issuer that seeks or promotes investment from persons in British Columbia must be willing to accept the obligation to provide the disclosure the proposed instrument requires.

5. Section 1.4 Previous version –control person
One commenter objected to the proposed instrument applying to an OTC issuer that has a control person resident in British Columbia, because the issuer might not be aware of this fact.

Response
We have removed this as a condition for designating an OTC issuer as a reporting issuer. We concluded that the other connection factors in section 3 would apply to almost all OTC issuers that had a control person in British Columbia.

6. Section 1.4 Previous version – promoter and seed stockholders
A few commenters said the definition of "promoter" in the Act is too broad to use as a condition for application of the proposed instrument. A few commenters were concerned about the continued application of the proposed instrument to an issuer that no longer has a significant connection to British Columbia.

Response
We removed these conditions for designating an OTC issuer as a reporting issuer because they may be easily manipulated and discriminated against British Columbia investors if the majority test was not met.

Instead, section 3(c) now adds as a connecting factor the distribution by an OTC issuer of a security in British Columbia before its ticker-symbol date. As a result, any British Columbia investor who acquired securities in those circumstances will benefit from the disclosure and other requirements that will flow from the OTC issuer's being designated a reporting issuer.

7. Section 4 – Ceasing to be a reporting issuer
Under section 4, an OTC reporting issuer may file a notice and no longer be a reporting issuer if

- its business in not directed or administered, and has not been directed or administered for at least one year, in or from British Columbia
- investor relations activities, by or on its behalf, are not carried on, and have not been carried on for at least one year, in or from British Columbia, and
- it has been at least one year since its ticker-symbol date.

Some commenters misunderstood this section to mean that the proposed instrument does not apply to issuers that were public issuers for more than one year.

Response
We have revised the proposed instrument and provided guidance in the proposed companion policy to correct this misconception.

Part 2 – Disclosure
Section 5 – Additional disclosure requirements
8. Application of NI 43-101, NP 51-201 and NP 58-201
One commenter said the proposed instrument or its companion policy should specifically refer to National Instrument 43-101 *Standards of Disclosure for Mineral Projects*. Another commenter wrote that OTC issuers should be subject to National Policy 51-201 *Disclosure Standards* and National Policy 58-201 *Corporate Governance Guidelines,* the same as reporting issuers.

Response
We agree and have written the proposed companion policy accordingly.

9. Conflicting requirements of BCSC and SEC
A few commenters were concerned about differences in accounting standards and financial disclosure requirements of the SEC and the BCSC. A commenter was concerned that an OTC reporting issuer's filings would be subject to simultaneous review by the SEC and BCSC whose comments may conflict.

Response
We have revised the proposed instrument so that OTC reporting issuers may rely on most of the foreign issuer and multijurisdictional disclosure system exemptions. The only exceptions are where U.S. requirements are significantly different, such as timely disclosure reporting and disclosure for mineral projects and oil and gas companies. This reduces substantially the incremental compliance burden on OTC reporting issuers that are SEC filers.

Dual jurisdiction over an issuer's disclosure is not a new phenomenon. Many British Columbia reporting issuers also report to the SEC in the United States. This has not appeared to be a serious problem for those issuers and we do not expect it to be any different for OTC reporting issuers.

10. Section 6 – Timely disclosure obligations

A commenter suggested that we clarify that an OTC issuer must issue a news release through a recognized Canadian news service to announce a material change, and not simply file a reformatted SEC Form 8-K. Another commenter suggested that we permit an issuer to use SEC Form 8-K as a material change report and questioned the need for filing a news release separately.

Response

The proposed companion policy addresses an OTC reporting issuer's timely disclosure requirements. This is an area where British Columbia and U.S. securities legislation significantly differs, and it is important that OTC reporting issuers know that they must issue and file news releases to announce material changes, whether or not they are required to file a Form 8-K with the SEC. The proposed instrument requires an OTC reporting issuer to use the same material change report form as other reporting issuers. Like other reporting issuers, OTC reporting issuers will be required to file news releases in addition to material change reports.

11. Section 2.2 Previous Version – Insider reporting

Several commenters objected to imposing British Columbia insider reporting requirements on insiders of an OTC issuer that is an SEC filer. They said that it would duplicate the work for insiders and the information filed with the SEC, and would provide no additional benefit.

Response

We agree with these comments. Under the proposed instrument as revised, insiders of OTC Bulletin Board issuers, and other OTC issuers that meet the conditions of National Instrument 71-101 *The Multijurisdictional Disclosure System* or National Instrument 71-102 *Continuous Disclosure and Other Exemptions relating to Foreign Issuers*, may rely on the same exemptions from British Columbia insider reporting requirements as insiders of other reporting issuers.

Insiders of Pink Sheet issuers that cannot rely on those exemptions must file insider reports, like insiders of domestic reporting issuers.

12. Section 7 – Registration statement

Several commenters found the requirement to file a registration statement confusing and requested clarification. Another commenter asked if the Commission would review the registration statement. One commenter objected to the requirement to file a document that was already publicly available on EDGAR.

Response

We have revised the proposed instrument to clarify that this requirement applies only to an issuer that is an OTC reporting issuer under the proposed instrument when it obtains its ticker symbol. If it is, then it must file the last registration statement it filed with the SEC – generally speaking, this will be a registration statement to register the sale of previously issued, restricted securities.

Commission staff will not review an OTC issuer's registration statement as a matter of course, but may do so as part of a continuous disclosure review of the OTC issuer.

We are requiring OTC issuers to file these registration statements because it provides base disclosure for which the issuers and their management are responsible.

13. Section 8 – Investor relations activities

One commenter said the notice that an OTC issuer must file if it enters into an agreement for investor relations activities should be readily available to investment dealers and the public.

Response

The proposed instrument clarifies that an OTC issuer must file the notice of investor relations activities on SEDAR, so it will be publicly available. The proposed companion policy reminds readers that if the investor relations activities are a material change, the OTC issuer must issue a news release.

Part 3 – Resale of private placement securities

14. General

A few commenters said shareholders of OTC issuers that comply with their disclosure requirements should not be treated any differently than shareholders of other reporting issuers.

Response

The proposed instrument treats seed stock shareholders of OTC reporting issuers differently from seed stock shareholders of other reporting issuers to prevent the undisclosed purchase and delivery of their shares, which represents the public float, by a shell manufacturer to a shell buyer.

The proposed instrument treats private placees in OTC reporting issuers differently from private placees in other reporting issuers to provide transparency to off-market transactions.

These two aspects of the proposed instrument will be integral to the proposed instrument's success in deterring the abusive activities it is intended to deal with.

The Commission will consider exemptions in appropriate circumstances.

15. Section 10 – Resale of seed stock

There is confusion about when the restriction on resale of securities acquired before the issuer obtains its ticker-symbol applies.

Response

The proposed companion policy clarifies that until the OTC reporting issuer's ticker-symbol date, a person who acquires securities of the issuer may sell his or her securities in a private transaction using any available exemption.

16. Section 11 – Legends on certificates

A number of commenters were concerned about the legending requirement because an issuer may have delivered unlegended share certificates prior to making the decision to go public in the U.S. over-the-counter markets. One commenter said there is no benefit to placing the legend on share certificates issued to shareholders outside British Columbia.

Response

Issuers that have delivered unlegended share certificates can contact their shareholders and ask for their cooperation in submitting their certificates for replacement with legended ones. We expect most shareholders will do so – until they do, they will not be able to trade the securities without breaching the resale restrictions in section 10.

Since investors may trade shares purchased before the issuer's ticker-symbol date under available exemptions before the restriction on resale applies to the issuer's securities, the issuer may wish to legend all share certificates, so that if the shares are traded to an investor in British Columbia, the restriction applies to the shares in the investor's hands. The legend is important because it helps to ensure that the shareholder complies with restrictions on transfer.

17. Section 12 – Resale of private placement securities acquired after ticker-symbol date

A few commenters objected to this provision because it limits the availability of all other resale exemptions and places OTC issuers at a disadvantage to other issuers whose shareholders have other registration and prospectus exemptions available to them for trading shares they acquire by private placement.

Response

It is important for the time being to limit trades of securities acquired in a private placement to open market trades through investment dealers. If a shareholder wishes to sell his or her securities in a private transaction or under different conditions than permitted in the proposed instrument, the shareholder must apply for an exemption, which allows the Commission to review the transaction and provides greater transparency to the proposed trade.

Part 4 – Other exemption restrictions

18. Section 14 – Securities for Debt

One commenter objected to the restriction on use of the exemption in section 2.14 of NI 45-106 *Prospectus and Registration Objections* by OTC reporting issuers for three reasons: (i) it would eliminate the opportunity for OTC reporting issuers to free up cash for purposes other than debt repayment, (ii) the risk for abuse is remote because of the

hold period under U.S. law, and (iii) issuers can structure the transaction to avoid the restriction.

Response
A restriction on issuing shares for debt is important because, without exchange rules or oversight, management of an OTC reporting issuer can use this exemption to issue shares to themselves for debts that are not *bona fide*, and unfairly dilute public shareholders. We will consider exemption orders for the issue by OTC issuers of shares for *bona fide* debt at a fair conversion rate. We do not agree that a hold period is sufficient to prevent abuse. Should an OTC issuer restructure a shares-for-debt transaction, it must comply with prospectus and disclosure requirements that impose appropriate safeguards to the market.

19. Section 4.9 of Previous Version – Trades among employees, officers, etc.
One commenter objected to the restriction on use of the exemption in section 2.26 of NI 45-106 *Prospectus and Registration Exemptions* by OTC reporting issuers because it would limit the use of normal course arrangements, like shot-gun clauses, amongst the shareholders of small, tight-knit issuers.

Response
This exemption is not available to reporting issuers.

20. Section 15 – Take-over bid
A commenter remarked that the proposed instrument's elimination of some take-over bid exemptions would not eliminate pump and dumps or reverse mergers, and would only make it more difficult and expensive for OTC issuers to effect a change of control.

Response
The proposed instrument restricts the use of the private agreement exemption from the take-over bid requirements of the Act that a person could use to facilitate transfer of a shell company or another change of control without the disclosure or shareholder protection a formal take-over bid would provide. A person that wishes to make a take-over bid under similar conditions may apply to the Commission for an order exempting it from the formal take-over bid requirements, which would allow the Commission to review the transaction. The proposed instrument no longer restricts use of the non-reporting issuer exemption, since it imposes requirements by designating OTC issuers as reporting issuers.

21. Part 5 – Effective Date and Transition
A commenter suggested that the effective date for reporting on SEDAR and SEDI should be delayed until January 31, 2009 to recognize the time, cost and data collection burdens the proposed instrument imposes and to allow OTC issuers that do not wish to comply with the increased regulatory burden to move out of British Columbia in an orderly fashion. The commenter also suggested that we consider phasing in reporting requirements alphabetically to avoid a rush on professionals and to allow investors to sell

their shares of OTC issuers that will not become reporting issuers under the proposed instrument.

Response
We have revised the proposed instrument to specify a date certain when the proposed instrument will be effective and to provide a general 15 day transition period for all filings that OTC reporting issuers and their insiders must make, so that OTC reporting issuers and their insiders may prepare to make required filings. It is not in the public interest to provide a more extended period of time to OTC reporting issuers to re-arrange their affairs, including changing control, or appear to do so, to avoid compliance with the proposed instrument.