



BC Notice 2020/03

Notice of Amendments to the Securities Act

On November 28, 2019 Bill 33, the *Securities Amendment Act, 2019* (the Act amendments) received Royal Assent. The Act amendments are significant and extensive and will provide the commission with significant new enforcement, compliance, investor protection and sanction collection tools. Many of these Act amendments provide the commission with the strongest powers among securities regulators in Canada to address misconduct in the financial markets.

The Act amendments are targeted at:

- strengthening compliance and enforcement powers
- improving investor protection
- providing additional collections-related tools
- implementing a regime for regulating derivatives and benchmarks
- harmonizing with other provinces
- modernizing the *Securities Act*

The Act amendments only come into force once a regulation is passed by the British Columbia government. Once that regulation is passed, further notice will be published at that time.

Consequential amendments and orders necessary to implement the Act amendments

To fully implement the Act amendments, some amendments to the Securities Rules, Securities Regulation and National or Multilateral Instruments are anticipated. We will publish the text of any consequential amendments in a notice once the Act amendments are brought into force.

Once the Act amendments are brought into force, we also expect to issue a designation order under section 3.2 designating over-the-counter derivatives to be securities for the purposes of Part 5 (Registration) and Part 9 (Prospectus) of the Act. This will maintain the status quo for these derivative instruments until the derivatives registration and disclosure regime being developed by the commission and other Canadian securities regulators is complete. Further amendments to other National and Multilateral Instruments, local BC Instruments and policies will be required as we fully implement the derivatives and benchmark regime.

There are also significant related amendments to the *Court Order Enforcement Act* and the *Limitation Act*. A summary of those amendments follows the summary of changes to the *Securities Act*.

Where to find the amendments

The *Securities Amendment Act, 2019* is located on the commission's website under "Securities Laws" and on the BC Legislative Assembly's website at leg.bc.ca under "Parliamentary Business – Progress of Bills". When it is available through BC Laws, a link to the

consolidation of the updated *Securities Act* will be posted on the commission's website under Securities Law – Act, Regulations and Rules.

Summary of the key Act amendments

Below we summarize the key Act amendments. Given the extent of the Act amendments, not all are summarized below. The summary also identifies some of the Act amendments that are unique to BC.

Strengthening compliance and enforcement powers

- expand and align certain powers a reviewer or investigator can use when conducting a compliance review or investigation (s.141.1, 141.2, 141.3, 141.5, 143 and 143.1).
Examples of some of the expanded and aligned powers are:
 - the ability to enter into the business premises during business hours of the person under review or investigation
 - using any means of communication, electronic device or system in the business premise to examine information
 - requiring a person under review to provide the reviewer or investigator with any information, records or things in the person's possession or control
- expand the executive director's power to order production of records or information to include additional market participants such as information processors, benchmark administrators or contributors, directors and officers of a person distributing securities using a prospectus exemption and former market participants (s.141)
- make necessary changes so the compliance and investigation powers are also appropriate for the review of parties involved with a derivative or a benchmark (e.g. s.141.1(1), s.141.2(1)(c) and (d), and s.143(1)(e)(v))
- add additional investigation powers for use when the commission is investigating an offence under the *Securities Act*; these powers are similar to some of the powers in Part XV of the *Criminal Code* and include powers to seek judicial orders requiring the production or preservation of information that might be relevant to an offence, to obtain certain telecommunications data or to obtain gambling records from casinos (s. 140.95, s.146.01 – 146.17) (unique to British Columbia)
- provide for a more flexible process for investors to claim disgorged proceeds (s.15.1)

Investor protection

- introduce a new definition of “promotional activity” together with significant new prohibitions about making representations involving securities or derivatives, and in particular against making false or misleading statements or information when engaging in promotional activity and the statement or information is something a reasonable investor would consider important when deciding whether to purchase, trade or not trade a security or a derivative (s.1(1) definition of “promotional activity” and s.50, in particular s.50 (4)) (unique to BC)

- remove existing restrictions that limit the application of the prohibition on misrepresentations to a person engaging in investor relations activities or with the intention of effecting a trade in a security so the prohibition applies more generally (s.50(2))
- repeal the current disclosure requirements for investor relations activities and replace them with a more robust disclosure regime in a BC rule (s.52 to be repealed)
- introduce new prohibitions against attempting to commit a fraud (s.57(2)), or contributing to another person's fraud (s.57(1)(b) and (c))
- provide for mandatory minimum sentencing for fraud offences under the *Securities Act* (s.155(5.2)) (unique to BC)
- increase maximum fines to \$5 million and 5 years imprisonment for committing an offence under the *Securities Act* (s.155(2))
- expand the enforcement orders the commission can issue to reflect other amendments to the *Securities Act* (s.161 (1)(a)(iii) and (iv), (b) and (d), (6) and (7))
- clarify that a disgorgement order issued in relation to fraud or market manipulation can be based on amounts payable or payments or losses avoided by all persons as a result of the contravention(s) and that each person participating in the contravention(s) is jointly and severally liable for the payment (s.161)(1.1)
- introduce an administrative monetary penalty regime so the executive director can impose penalties by issuing a notice (without holding a hearing) for contraventions of the regulations, decisions and prescribed provisions of the Act together with a process for disputing this notice (s. 162.01 – 162.06) (unique to BC)
- updating the record-keeping requirement in s.57.7 and increasing the maximum administrative penalty that can be ordered for failing to keep records to \$5 million (s.57.7 and 162(2)) (administrative penalty amount unique to BC)
- introduce new prohibitions against aiding, abetting, counselling, conspiracy, and for conversion of property (s. 168.01 – s.168.03) (unique to BC)
- introduce protection for whistleblowers (s.168.04 and s.168.05)

Collections-related tools

- provide for expanded preservation order powers (formerly freeze order powers in s.151 – now located in s.164.04) allowing the commission to make orders:
 - restraining the disposition or transmission of any property
 - for the possession, delivery to the commission or safekeeping of property
 - for the disposition of property to better preserve its value and directing the proceeds be paid to the commission until the conclusion of a proceeding

- to prevent property from being removed from the province and for its preservation
- that extend to property third parties have received from a person under investigation or from a person who has been sanctioned
 - for family members, the orders can apply to property a family member received under value at any time
 - for non-family members, the orders can apply to property transferred from a sanctioned person or person under investigation if the property was transferred under value after the alleged misconduct began (unique to BC)
- amend the investigation powers to expressly permit an investigator to question a person under investigation about property for the purposes of collections and to add new powers for investigators to ask third parties (family members and non-family members who may have received property from a person under investigation) questions about their property and the property of the person under investigation (s.143 and s.143.1) (unique in British Columbia for third parties and family members)
- provide for the commission to obtain orders from the court that a third party who received property under value from a person subject to a disgorgement order and the person subject to the order are jointly and severally liable for the benefit the third party received unless the third party proves they were dealing at arms-length (s.164.09) (unique to BC)
- provide for the commission to obtain these joint and several orders for a family member of a person subject to a disgorgement order for a benefit the family member received (s.164.09) (unique to BC)
- permit the commission to apply to court for an order forfeiting property of a person subject to a disgorgement order or an administrative penalty order or of a third party (including a family member) who received property from a person subject to a disgorgement order and providing the commission with priority over that property as follows (s.164.10 – s.164.14) (unique to BC):
 - for real property, as early as when a preservation order is filed in the land title office
 - for most personal property, as early as when a preservation order is registered in the personal property registry
- provide the commission with a lien against the property of a person subject to a disgorgement order that will have priority over claims of any other person except claims secured before the date of the commission's notice of hearing or claims arising under the Employment Standards Act or the Family Maintenance Enforcement Act (s.163.1) (unique to BC)
- extend the commission's powers to garnish a person who is likely to become indebted to a person who owes money to the commission with the result that this garnishing order can remain effective indefinitely (s.162.1)

- enable the commission or the executive director to provide notice to ICBC requiring ICBC to not issue or renew a driver's licence or a numbered plate for a motor vehicle owned by the person if the person is in default of any financial sanction ordered by the commission or the court (s.163.2) (unique to BC)
- expand the commission's powers to spend money obtained from collecting financial sanctions or from a disgorgement order (after investor claims to disgorged proceeds have been paid) to include enforcement purposes, administering a disgorgement order claims process, or to benefit a third party the commission considers appropriate in addition to the commission's current requirement to spend this money on investor or market participant education (s.15)

Regime for regulating derivatives and financial benchmarks

- introduce new definitions of "benchmark", "benchmark contributor", "derivative", and "underlying interest" and amend the definition of "security", (s.1(1))
- introduce new powers for the commission to designate by order derivatives that should be regulated as securities and securities that should be regulated as derivatives (s.3.1 and 3.2)
- replace references to exchange contracts and futures contracts with references to derivatives where appropriate (numerous sections)
- make updates throughout the Securities Act to reflect the regulation of derivatives (numerous sections)
- expand the fraud prohibition to include perpetrating a fraud in relation to a benchmark (s.57)
- expand the market manipulation prohibition to include conduct relating to an underlying interest of a derivative (s.57)
- introduce a new market manipulation prohibition to address conduct that results in or contributes to a false benchmark or that is intended to mislead a benchmark administrator (s.57(3))
- introduce civil liability for a misrepresentation in a prescribed disclosure document for derivatives together with appropriate defences (s.132.2)
- provide additional regulation and rule making powers for benchmarks and derivatives (s.183 and s.184)

Harmonization amendments

- introduce a provision suspending the limitation period for secondary market civil liability actions in the Securities Act for the time period when a court is considering whether to grant leave to commence a secondary market civil liability proceeding (s.140.94)

- introduce new automatic reciprocal order powers so that where a contravention of securities legislation has been found or admitted by or to another Canadian securities regulator and the other regulator has made a market conduct order, those orders automatically apply in British Columbia without further notice (s.162.07)

Modernization amendments

- update Part 4 of the Securities Act to include benchmark administrators, information processors and trade repositories
- update Part 13 of the Securities Act to expand who can apply, the circumstances and the orders the commission or a court can make under this Part. It will include an issuer whose securities are the subject of a business combination or related party transaction or whose securities are the subject of a proxy solicitation (s.92, s.114 and s.115)
- impose liability for misrepresentations in prescribed disclosure documents on persons whose consent to information in the disclosure document was filed and provide defences aligned with defences in other civil liability provisions (s.132.1)
- update the limitation period for proceedings under the Securities Act so that the time will stop running for the period in which an application, motion or notice relating to an investigation or similar matter is before the courts (s.159)

Consequential amendments to other legislation in BC

To support the amendments to the *Securities Act* relating to collecting financial sanctions, the *Court Order Enforcement Act* has been amended so that orders under the *Securities Act* can be enforced against registered plans. The *Limitation Act* has also been consequentially amended so that it does not apply to fines, penalties, disgorgement orders, joint and several liability orders and administrative monetary penalties issued by notice under the *Securities Act* and they no longer expire.

When are the amendments in force

We will publish further notices as and when provisions of the *Securities Amendment Act, 2019* come into force.

We will seek public comment on any new rules or amendments to existing rules that are brought forward for ministerial approval through the regular rule-making process in British Columbia.

Please refer any questions to:

Noreen Bent
 Manager and Senior Legal Counsel
 604-899-6741
 nbent@bcsc.bc.ca

Michael Brady
Manager, Derivatives
604-899-6561
mbrady@bcsc.bc.ca

Sarah Corrigall-Brown
General Counsel
604-899-6738
scorrigall-brown@bcsc.bc.ca

Rina Jaswal
Senior Legal Counsel
604-899-6683
rjaswal@bcsc.bc.ca

February 6, 2020

Brenda M. Leong
Chair