

# **2002 BCSECCOM 955**

## **Headnote**

Mutual Reliance Review System for Exemptive Relief Applications – relief from the registration and prospectus requirements in connection with first trades of shares under employee stock option and stock purchase plans, subject to conditions

## **Applicable British Columbia Provisions**

*Securities Act*, R.S.B.C. 1996, c. 418, ss. 48 and 76

Multilateral Instrument 45-102 - *Resale of Securities*

## **IN THE MATTER OF THE SECURITIES LEGISLATION OF BRITISH COLUMBIA AND ONTARIO**

**AND**

## **IN THE MATTER OF THE MUTUAL RELIANCE REVIEW SYSTEM FOR EXEMPTIVE RELIEF APPLICATIONS**

**AND**

## **IN THE MATTER OF ADOBE SYSTEMS INCORPORATED**

## **MRRS DECISION DOCUMENT**

WHEREAS the local securities regulatory authority or regulator (the “Decision Maker”) in Ontario and British Columbia (the “Jurisdictions”) has received an application from Adobe Systems Incorporated (“Adobe” or the “Company”) for a decision pursuant to the securities legislation of the Jurisdictions (the “Legislation”) that the requirements contained in the Legislation to be registered to trade in a security (the “Registration Requirements”) and to file and obtain a receipt for a preliminary prospectus and a prospectus (the “Prospectus Requirements”) will not apply to first trades of shares of Adobe common stock (the “Shares”) acquired under the Adobe 1999 Non-Statutory Stock Option Plan (the “1999 Plan”), the Adobe 1997 Employee Stock Purchase Plan (the “ESPP”), and the Adobe 1994 Stock Option Plan (the “1994 Plan”) (the 1999 Plan, the ESPP and the 1994 Plan are collectively, the “Plans”) in each of the Jurisdictions;

AND WHEREAS pursuant to the Mutual Reliance Review System for Exemptive Relief Applications (the “System”), the Ontario Securities Commission is the principal regulator for this application;

AND WHEREAS Adobe has represented to the Decision Makers as follows:

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1. Adobe is presently a corporation in good standing incorporated under the laws of the State of Delaware.
2. The Company is registered with the Securities Exchange Commission (the “SEC”) in the U.S. under the U.S. Securities Exchange Act of 1934 and is not exempt from the reporting requirements of the Exchange Act pursuant to Rule 12g3-2.
3. On or about February 1, 2002, Adobe and Accelio Corporation (“Accelio”) entered into an agreement under the terms of which approximately 1.81 million Shares of Adobe were exchanged for Accelio securities on April 12, 2002. The acquisition of Accelio by Adobe (the “Accelio Transaction”) was structured as a plan of arrangement involving Adobe, Accelio and an affiliate of Adobe that is a Cayman Islands limited partnership. An application for discretionary relief was submitted by Adobe to certain regulatory authorities in Canada in connection with the Accelio Transaction and an MRRS Decision document dated April 7, 2002 was rendered by such regulators.
4. Adobe was not a reporting issuer in either of the Jurisdictions but, as a result of the Accelio Transaction, Adobe became a reporting issuer in Alberta, Quebec and Saskatchewan. Adobe is not a reporting issuer in Ontario and has no present intention of becoming a reporting issuer in Ontario. The majority of directors and the majority of senior officers of Adobe reside outside of Canada.
5. The authorized share capital of Adobe consists of: 900,000,000 Shares with a par value of U.S.\$ .0001; and 2,000,000 shares of preferred stock (“Preferred Shares”) with a par value of U.S.\$ .0001. As of October 7, 2002 there were 240,019,082 Shares, and no Preferred Shares issued and outstanding.
6. The Shares are quoted on Nasdaq under the ticker symbol “ADBE” but are not listed or quoted on any Canadian stock exchange or market.
7. Adobe uses the services of agents/brokers in connection with the operation of the Plans (each an “Agent”). E\*Trade Canada Securities Corporation (“E\*Trade Canada”) and E\*Trade Securities, Inc. (“E\*Trade U.S.”) has each been appointed as an Agent under the Plans. E\*Trade Canada is registered to conduct retail trades in securities in both of the Jurisdictions; however, E\*Trade U.S. is not so registered. E\*Trade U.S. is registered to conduct retail trades under applicable U.S. securities or banking legislation and any other Agent appointed in addition to, or in replacement of, E\*Trade Canada or E\*Trade U.S. will be a registrant to conduct retail trades in the Jurisdictions or

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a corporation registered to conduct retail trades under applicable U.S. securities or banking legislation and will be authorized by Adobe to provide services as an Agent under the Plans.

8. The role of the Agent may include: (a) disseminating information and materials to Participants (as defined below) in connection with the Plans; (b) assisting with the administration of and general record keeping for the Plans; (c) holding Shares on behalf of Participants, Former Participants (as defined below) and Permitted Transferees (as defined below) in limited purpose brokerage accounts; (d) facilitating Option (as defined below) exercises (including cashless exercises) under the Plans; (e) facilitating the payment of withholding taxes, if any, by cash or withholding of Shares; (f) facilitating the reacquisition of Shares and options for Shares ("Options") (Options and Shares are together "Awards") under the terms of the Plans; and (g) facilitating the resale of Shares issued in connection with the Plans.
9. The purpose of the 1994 Plan and the 1999 Plan (collectively, the "SOPs") is to advance the interests of Adobe and its affiliates (the "Adobe Affiliates") (Adobe and the Adobe Affiliates are, collectively, the "Adobe Companies") and its stockholders by providing an incentive to attract, retain and reward employees ("Employees") and consultants ("Consultants") (Employees and Consultants are, collectively, "Participants") of the Adobe Companies and by motivating the Participants to contribute to the growth and profitability of the Adobe Companies. The purpose of the ESPP is to provide Employees with an opportunity to acquire a proprietary interest in the Company through the purchase of Shares.
10. Subject to adjustment from time to time, the maximum number of Shares that may currently be issued pursuant to the Plans are: 29,200,000 Shares under the 1994 Plan; 40,700,000 Shares under the 1999 Plan and 38,000,000 Shares under the ESPP. From time to time Adobe may increase the maximum number of Shares issuable under the Plans.
11. The SOPs permit grants of Options to Participants including prospective Employees and prospective Consultants resident in the Jurisdictions. Unless a Participant is promoted to a position that makes such Participant eligible to receive an Option grant under the 1994 Plan, no new grants will be made to Participants under the 1994 Plan.
12. Under the ESPP, Employees are offered an opportunity to purchase Shares by means of applying accumulated payroll deductions to the purchase of Shares at a discounted price determined in accordance with the terms of the ESPP.

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13. Employees of the Adobe Companies eligible to participate in the Plans will not be induced to purchase Shares or exercise Options by expectation of employment or continued employment.
14. Consultants of the Adobe Companies eligible to participate in the Plans who participate in the Plans will not be induced to purchase Shares or exercise Options by expectation of the individual Consultant, the Consultant's company or the Consultant's partnership being engaged or continuing to be engaged as a Consultant.
15. Officers of the Adobe Companies who participate in the Plans will not be induced to purchase Shares or exercise Options by expectation of appointment or employment or continued appointment or employment as an officer.
16. It is anticipated that Consultants who have been or will be granted Options under the 1999 Plan, to the extent permitted, will: (a) provide technical, business, management or other services to the Adobe Companies (other than services relating to the sale of securities or promotional/investor relations services); (b) provide consulting services to the Adobe Companies under a written contract; (c) have a relationship with the Adobe Companies that will permit them to be knowledgeable about the business and affairs of the Adobe Companies; and (d) will spend a significant amount of time and attention on the affairs and business of the Adobe Companies.
17. As of October 7, 2002, there were 299 Participants in Canada eligible to receive Awards under the Plans: 273 Participants resident in Ontario; 2 Participants resident in British Columbia and 24 Participants resident in Quebec.
18. The SOPs are administered by a committee appointed by the board of directors of Adobe (the "Committee").
19. Generally, in order to exercise an Option granted under the SOPs, an optionee must submit a written notice of exercise to Adobe or to the Agent identifying the Option, the number of Shares being purchased, and the method of payment.
20. The SOPs provide that on exercise of Options, the payment of the exercise price in order to acquire the Shares of the Company may be made (a) in cash, (b) a cashless exercise, (c) by a combination of the foregoing, or (d) such other consideration and method of payment permitted by the Committee at an exercise price determined in accordance with the terms of the SOPs.

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21. Adobe shall have the right to deduct applicable taxes from any Award payment and withholding, at the time of delivery of cash or Shares under the Plans, an appropriate amount of cash or Shares or a combination thereof for a payment of taxes required by law or to take such other action as may be necessary in the opinion of Adobe or the Committee to satisfy all obligations for the withholding of such taxes.
22. During the lifetime of a Participant, Awards shall be exercisable only by the Participant or the Participant's guardians or legal representatives. Generally, no Award shall be assignable or transferable by the Participant, except by will or by the laws of intestacy (the recipient of an Award under a will or the laws of intestacy is a "Beneficiary") (Beneficiaries, guardians and legal representatives are, collectively, "Permitted Transferees").
23. Generally, following the termination of a Participant's relationship with the Adobe Companies for reasons of death, disability, retirement or any other reason, a former Participant ("Former Participant") and, on the death of a Participant, a Permitted Transferee, may continue to have rights in respect of the SOPs ("Post-Termination Rights").
24. Post-Termination Rights are only available if the Awards to which they relate were granted to the Participant while the Participant was an Employee or Consultant and no new Awards will be granted to Former Participants.
25. As there is no market for the Shares in Canada and none is expected to develop, it is expected that the resale by Participants, Former Participants and Permitted Transferees of the Shares acquired under the Plans will be effected through Nasdaq.
26. The sale ("First Trade") of Shares acquired under the Plan may be made by Participants, Former Participants or Permitted Transferees through the Agent.
27. As of October 1, 2002, residents of Canada did not own, directly or indirectly, more than 10% of the outstanding Shares and did not represent in number more than 10% of the total number of owners, directly or indirectly, of the Shares.
28. All necessary securities filings have been made in the U.S. in order to offer the Plans to Participants resident in the U.S.
29. A prospectus prepared according to U.S. securities laws describing the terms and conditions of each of the Plans will be electronically available (or available in hard copy upon request) to each Participant in the SOPs who is

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granted an Award and to each Participant who is eligible to participate in the ESPP. The annual reports, proxy materials and other materials that Adobe provides to its U.S. stockholders will be provided or made available upon request to Participants resident in the Jurisdictions who acquire and retain Shares under the Plans at substantially the same time and in substantially the same manner as such documents would be provided to U.S. stockholders.

30. An order of the British Columbia Securities Commission dated December 18, 1998 (the "Prior B.C. Order") provided exemptive relief from the Prospectus Requirement and the Registration Requirement required in connection with First Trades in Shares acquired under the 1994 Plan and the ESPP. The Prior B.C. Order did not provide the relief requested in this Application with respect to trades involving beneficiaries or First Trades.
31. When the Agents sell Shares on behalf of Participants, Former Participants and Permitted Transferees, the Agents, Participants, Former Participants and Permitted Transferees may not be able to rely upon the exemptions from the Registration Requirements and Prospectus Requirements contained in the Legislation of the Jurisdictions.
32. The exemption contained in section 2.14 of Multilateral Instrument 45-102 ("MI 45-102") is not available in connection with First Trades because Adobe is a reporting issuer in certain Canadian jurisdictions.

AND WHEREAS pursuant to the System, this Decision Document evidences the decision of each Decision Maker (collectively, the "Decision");

AND WHEREAS each of the Decision Makers is satisfied that the test contained in the Legislation that provides the Decision Maker with the jurisdiction to make the Decision has been met;

THE DECISION of the Decision Makers pursuant to the Legislation is that the Prospectus Requirement and the Registration Requirement will not apply to first trades by Participants, Former Participants or Permitted Transferees in Shares acquired pursuant to the Plans, including first trades effected through the Agents, provided that the conditions in subsection 2.14(1) of Multilateral Instrument 45-102 – *Resale of Securities*, other than the requirements of paragraph 2.14(1)(a), are satisfied.

DATED November 15th, 2002.

Paul M. Moore

Harold P. Hands