

Canadian Securities Administrators' Staff Notice 45-302

Frequently Asked Questions regarding the New Resale Rules

Background

On November 30, 2001, Multilateral Instrument 45-102 *Resale of Securities* came into force. MI 45-102 replaced the resale provisions of the legislation in each jurisdiction, except for Québec, which did not adopt MI 45-102.

Frequently asked questions on MI 45-102

As is often the case with the introduction of a new rule, users of MI 45-102 find they have questions regarding its application and interpretation. To assist those persons and companies using MI 45-102, we have compiled a list of frequently asked questions (FAQs) that, while not exhaustive, represent the types of inquiries we have received to date. We plan to update this Notice periodically. During our one-year review of MI 45-102, we will also consider whether amendments to MI 45-102 are required to address any of these questions.

We have divided the FAQs into the following categories:

- A. Definitions
- B. Private issuers and non-reporting issuers
- C. Resale restrictions and legending of securities
- D. Forms and Notice Requirement
- E. General

A. Definitions

Current AIFs

1. **Q:** In what jurisdiction(s) should an issuer file its current AIF?

A: For the purposes of MI 45-102, an issuer's current AIF must be filed in the jurisdiction where its head office is located, provided the issuer is reporting in that jurisdiction. If the issuer is not reporting in the jurisdiction where its head office is, the current AIF must be filed in the jurisdiction that the issuer has the most significant connection to where it is reporting. Issuers are reminded that they may also have to file their current AIF in other jurisdictions to satisfy AIF filing requirements that are separate from MI 45-102, or concurrent filing requirements under the securities legislation.

2. **Q:** Can a reporting issuer that does not have any active business operations, other than a CPC, (a shell issuer) file a current AIF for the purpose of satisfying the qualifying issuer criteria?

A: Yes, a shell issuer can file a current AIF for the purpose of satisfying the qualifying issuer criteria. Also, shell issuers are not required to file a new AIF following a material change in their affairs, such as a reverse take-over (RTO) or other significant transaction, in order to satisfy the qualifying issuer criteria. However, shell issuers are reminded of their obligations under securities legislation to issue press releases and file material change reports on the occurrence of a material change.

3. **Q:** Do the audited financial statements for an issuer's most recent year end have to be attached to an issuer's Form 44-101F1 AIF to be "contained" in the AIF as required under subsection (c) of the definition of current AIF?

A: No, the financial statements do not need to be attached to the AIF but can be incorporated by reference in a 44-101F1 AIF provided that there is a reference to where the financial statements can be found on SEDAR.

4. **Q:** If an issuer has completed a financial year, how long is its current AIF valid?

A: As outlined in paragraph 2.2 of the Companion Policy, an issuer's current AIF is valid until the filing of its financial statements for the most recent year end or until the expiry of 139 days after its most recently completed financial year.

5. **Q:** If an issuer has not yet completed its first financial year, can it file a form of current AIF under MI 45-102?

A: No, the issuer cannot file a current AIF as it will not have the financial statements required under MI 45-102.

6. **Q:** If an issuer has recently merged, amalgamated or reorganized to form a new issuer, can it rely on one of its predecessor's current AIFs as its own?

A: If the issuer is qualified to use the short form prospectus system in National Instrument 44-101 *Short Form Prospectus Distributions*, as a "successor issuer", as defined in NI 44-101, it may use section 2.10 of NI 44-101 to rely on one of its predecessor's AIFs. If the issuer is not qualified to use the short form prospectus system, the issuer may not rely on its predecessors' current AIFs.

7. **Q:** Can an RTO circular be used as a form of current AIF under MI 45-102?

A: No, an RTO circular is not a permitted form of current AIF under MI 45-102. Discretionary relief would have to be sought to use an RTO circular as a current AIF. Where the jurisdictions are comfortable with the level of review of the circular by the relevant exchange, applications for discretionary relief may be considered.

8. **Q:** Can a take-over bid circular be used as a form of current AIF?
- A:** No, a take-over bid circular is not a permitted form of current AIF under MI 45-102.
9. **Q:** Can a US Form 10K SB be used as a form of current AIF?
- A:** No, a US Form 10K SB is distinct from a Form 10K and is not a permitted form of current AIF under MI 45-102.
10. **Q:** Where do I file my current AIF on SEDAR if I am not a POP issuer and not filing the current AIF under Ontario Securities Commission Rule 51-501 *AIF and MD&A*, or Saskatchewan Local Instrument 51-501 *Annual Information Form and Management's Discussion & Analysis*?
- A:** The current AIF should be filed, together with the appropriate notice, under "MI 45-102", not "SHAIF" or "non-POP AIF". CDS will be issuing a news release that provides guidance on the filing of current AIFs under MI 45-102.
11. **Q:** I previously filed my AIF on SEDAR under non-POP AIF for the purposes of OSC Rule 51-501, or SSC Instrument 51-501. Do I have to re-file the AIF on SEDAR under MI 45-102?
- A:** Provided that the AIF filed for the purposes of OSC Rule 51-501 or SSC Instrument 51-501 is in the form required by Form 44-101F1, then the AIF does not have to be re-filed. However, the notice contemplated in section 3.1(2) of MI 45-102 must be filed.

Qualifying issuer

12. **Q:** If I previously filed my current AIF but not my National Instrument 43-101 *Standards of Disclosure for Mineral Projects* or National Policy 2-B technical report, do I have to re-file the current AIF with the report attached?
- A:** Under NI 43-101, you are required to file the technical report no later than the time the AIF is filed. Under NP 2-B, you must have filed the technical report before the distribution is completed. Therefore, an issuer that has not filed its technical reports with its AIF as required by NI 43-101 does not have a current AIF and should re-file its AIF in compliance with the requirements of NI 43-101.
13. **Q:** A mining issuer filed its current AIF and NI 43-101 technical report so that it is a qualifying issuer on the distribution date for certain securities. Subsequently, the issuer acquires a major property and is required under NI 43-101 to file a technical report with respect to the acquisition within 30 days. Prior to the filing of the additional technical report, is the issuer still a qualifying issuer?

A: Yes, the issuer is still a qualifying issuer, as the only requirement in MI 45-102 relating to technical reports is for the issuer to file any technical reports required under NI 43-101 with its AIF.

B. Private issuers and non-reporting issuers

14. **Q:** What legend is required on securities of a non-reporting issuer acquired under an exemption listed in Appendix D or another exemption where section 2.5 of MI 45-102 is specified to apply?

A: The legend set out in section 2.5(3)3.b is the correct legend.

15. **Q:** Are securities received under the private issuer exemption by employees, executives, consultants or administrators subject to the resale provisions in subsection 2.6(5)?

A: No, they are not. They are subject to the resale provisions in subsection 2.6(4).

C. Resale restrictions and legending of securities

16. **Q:** What does the reference to “local jurisdiction” in section 2.5 and 2.6 mean?

A: The phrase “local jurisdiction” is defined in National Instrument 14-101 *Definitions* and includes a province or territory of Canada. It does not include a foreign jurisdiction, such as the US.

17. **Q:** Does the reference to purchaser in section 2.5(3)1.b refer to the purchaser under the initial distribution who is making the resale, or the purchaser under the resale?

A: It refers to the purchaser under the resale.

18. **Q:** Is it possible for the same distribution to have different resale restrictions in the different jurisdictions?

A: Yes, it is possible. Although the resale rules are harmonized under MI 45-102, the exemptions are not, so that the same distribution may have different resale restrictions applicable in different jurisdictions. One example is an exempt take-over bid where securities distributed to purchasers in BC will be subject to a restricted period and securities distributed to purchasers in Alberta and Ontario will only be subject to a seasoning period.

19. **Q:** Do securities have to be legended for the exemption in section 2.14 to be available?

A: There is no requirement to legend securities to rely on this exemption.

D. Forms

20. **Q:** When and where does the Form 45-102F1 have to be filed?

A: The F1 should be filed as soon as practicable after the issuer ceases to be a private issuer. As noted in the instructions to the F1, the F1 should be filed with the securities regulatory authority in each jurisdiction in which the issuer has shareholders and has ceased to be a private company or private issuer and where section 2.7 of MI 45-102 has been implemented.

21. **Q:** Is the information required to answer questions 5 and 6 on the F1 the same?

A: No, it is not the same information. Question 5 requires a list containing the name and *address* of security holders. This list is not made public. Question 6 requires certain information be completed on the form, which includes the name of security holders and the *municipality of residence*. Freedom of information legislation prohibits the disclosure of an individual's address.

22. **Q:** When an issuer is issuing underlying securities that are subject to either section 2.5 or 2.6, does another Form 45-102F2 have to be filed under section 2.7?

A: No, another F2 does not have to be filed. An F2 must be filed on or before the tenth day after the distribution date. Subparagraph (c) of the definition of distribution date provides that the distribution date of an underlying security is the date that the convertible security, exchangeable security or multiple convertible security was issued. Therefore, the F2 that was originally filed by the issuer in respect of the convertible security, exchangeable security or multiple convertible security is sufficient.

23. **Q:** If a qualifying issuer is not relying on its qualifying issuer status, for example, it is relying on one of the resale exemptions in section 2.10, 2.11, 2.12 or 2.14 of MI 45-102 or the distribution is subject to section 2.6 but the issuer has been reporting for more than 12 months, does the issuer have to file an F2 when it does a distribution?

A: Technically, under subsection 2.7(2) of MI 45-102, the issuer must file the F2 when it does a distribution. However, staff of the jurisdictions will not object if the F2 is not filed if the issuer is not relying on its qualifying issuer status in respect of the distribution. The issuer cannot later attempt to rely on its qualifying issuer status in respect of that distribution.

24. **Q:** Should the F2 be filed in paper format or on SEDAR?

A: The F2 should be filed on SEDAR.

25. **Q:** Does an F2 have to be filed within 10 days of every distribution date under a dividend reinvestment plan (DRIP) or employee stock purchase plan (plan)?

A: Technically, under subsection 2.7(2) of MI 45-102, the issuer must file the F2 after every distribution under the DRIP or plan. However, staff of the jurisdictions will not object if the F2 is filed on an annual basis, as long as the F2 includes the date and a description of each distribution under the DRIP or plan, and the certificate was true as of each distribution date.

26. **Q:** Where does the Form 45-102F3 have to be filed?

A: The F3 must be filed in each jurisdiction where the securities are being distributed. Where the securities are being sold on an exchange, the F3 should be filed in every jurisdiction across Canada.

27. **Q:** What securities must be included in the answer to question 11 on the F3 relating to the dates the selling security holder acquired the securities?

A: The selling security holder must indicate the dates it acquired only the securities on the F3 that it intends to sell. These are the securities listed in response to question 6 on the F3.

D. Notice requirement

28. **Q:** When do I have to file a notice on SEDAR under section 3.1?

A: The notice must be filed when any AIF that is not a current AIF under NI 44-101 or a “Current AIF” as defined in NP 47 is filed as an issuer’s current AIF. This means that a notice must be filed when an AIF “in the form required by 44-101F1” is filed.

E. General

29. **Q:** In what jurisdiction(s) must an application for discretionary relief under Part 4 of MI 45-102 be filed?

A: An issuer must file an application for discretionary relief under MI 45-102 in at least each jurisdiction where the issuer is reporting. The application must also be filed in every other jurisdiction where the relief is required.