

BC Policy 45-601

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BC Policy 45-601

Statutory and Discretionary Exemptions

Introduction

This Policy sets out guidelines for using certain statutory exemptions from the registration and prospectus requirements of the legislation.

You can find more information about other statutory exemptions in National Instrument 45-106 *Prospectus and Registration Exemptions*.

This Policy is, in substance, former LPS 3-24 corrected for cross-references and updated for major changes in the legislation.

Part 1 Rescinded

Part 2 Application

2.1 Registration and Prospectus Requirements - The *Securities Act* applies to any trade of a security in British Columbia, whether or not the issuer of the security is a reporting issuer under the Act. Section 34 of the Act prohibits a person from, among other things, trading in a security unless that person is registered. Section 61 of the Act requires the use of a prospectus for any distribution of securities in British Columbia.

2.2 Exemptions from Registration and Prospectus Requirements - Parts 6 and 10 of the Act and the *Securities Rules* provide exemptions from the registration and prospectus requirements of the Act.

You can find more exemptions in National Instrument 45-106 *Prospectus and Registration Exemptions*.

Sections 48 and 76 of the Act also give the Commission and the Executive Director the power to issue discretionary orders to exempt trades, intended trades, securities and persons from the registration and prospectus requirements of the Act when it is not prejudicial to the public interest to do so.

In most cases, each prospectus exemption has a corresponding registration exemption and, in using this policy, the principles stated for a particular prospectus exemption should also be applied to its corresponding registration exemption.

2.3 Multi-Jurisdictional Trades and Distributions - A trade or distribution can occur in more than one jurisdiction and, if it does, the issuer must comply with the rules

of each jurisdiction in which the trade or distribution occurs. For example, where an issuer resident in British Columbia distributes securities to a purchaser who resides in California, the issuer must comply with the laws of British Columbia, California and the United States. If neither party to a trade is located in British Columbia and no acts in furtherance of the trade occur in British Columbia, B.C. laws do not apply to the trade. Since “trade” is defined broadly in the Act and includes any act, advertisement, solicitation, conduct or negotiation in furtherance of a trade, an issuer or other person engaged in a trade should consider consulting legal counsel regarding compliance with the laws of all applicable jurisdictions.

2.4 Scope of Policy - This policy sets out guidelines for using certain statutory exemptions from the registration and prospectus requirements of the legislation.

This policy also describes how to apply for discretionary orders from the Commission and the Executive Director and discusses some examples of how the Commission and the Executive Director may exercise their discretion in certain circumstances.

Part 3 Statutory Exemptions - General

3.1 Responsibility for Compliance - It is the responsibility of the person using an exemption to determine that the exemption relied on is available in the circumstances. It is also the responsibility of the person using the exemption to retain the documents necessary to show that the person properly relied on an exemption. Where a person improperly relies on an exemption, the trade or distribution may be illegal and could expose those involved to prosecution, administrative sanctions or civil proceedings for damages or rescission.

3.2 Cease Trade Orders - When an issuer’s securities are subject to a cease trade order issued under the Act, the statutory exemptions cannot be used to trade those securities.

3.3 Rescinded

3.4 Rescinded

3.5 Use of Multiple Exemptions - An issuer may use more than one exemption in connection with the distribution of its securities to purchasers on the same date. For example, an issuer may use the minimum amount investment exemption in section 74(2)(4) of the Act for some purchasers and the accredited investor exemption in section 2.3 of NI 45-106 for others.

3.6 Baskets of Securities - An issuer may wish to distribute to a purchaser more than one security of its own issue, such as shares and debt, under an exemption that requires the securities being distributed to have a prescribed minimum acquisition cost, such as the minimum amount investment exemption in section 74(2)(4) of the Act. So long as the

shares and debt are sold in units that have an aggregate acquisition cost of not less than the required amount, the exemption in section 74(2)(4) can be used, notwithstanding that the shares and debt, taken separately, have an acquisition cost of less than the required amount. On September 14, 2005, the Commission increased the minimum amount required under the minimum amount investment exemption from \$97,000 to \$150,000.

3.7 Portfolio Manager and Others Purchasing as Principal - Under sections 43(1) and 74(1) of the Act, a trust company, an insurer or a portfolio manager is deemed to be acting as principal when purchasing for accounts that are fully managed by it. The Commission has set out its interpretation of “fully managed” in BCIN 45-701. As a consequence, an issuer may distribute securities under sections 45(2)(5) and 74(2)(4) of the Act to a trust company, an insurer or a portfolio manager that purchases securities having a cost of less than \$150,000 for each of several accounts fully managed by it, so long as the aggregate acquisition cost of the securities purchased for all the accounts is not less than \$150,000.

A “portfolio manager” in sections 43(1) and 74(1) of the Act must be a portfolio manager in British Columbia and thus must either be registered or exempted from registration under the Act. Similarly, in accordance with the definitions in the Interpretation Act, a “trust company” or “insurer” (insurance company) in sections 43(1) and 74(1) of the Act must be a trust company or insurer authorized to carry on business in British Columbia.

BC Instrument 45-504 provides a parallel discretionary exemption for a portfolio manager registered or exempted from registration in another Canadian province or territory and a trust company or insurer authorized to carry on business in another Canadian province or territory, where the portfolio manager, trust company or insurer is purchasing securities for accounts that are fully managed by it.

3.8 “Persons” Created Solely to Use Exemptions - Under section 1(1) of the Act, a “person” includes a corporation, partnership, trust, fund, association and any other organized group of persons. The Commission takes the position that it would be abusive for a “person” to be created solely, or used primarily, to permit a group of individuals to purchase securities without a prospectus unless the issuer could use an exemption to distribute its securities to each individual.

For example, if the person was created solely, or used primarily, to purchase securities without a prospectus, then in order for the person to use an exemption each of the individuals who form part of the group must:

- (a) where the issuer is using the \$150,000 exemption in sections 45(2)(5) and 74(2)(4) of the Act, purchase securities having an aggregate acquisition cost of at least \$150,000; and
- (b) where the issuer is using the asset exemption in sections 45(2)(6) and 74(2)(5) of the Act, contribute assets having a fair market value of at least \$150,000; and

Where purchases are being made on behalf of family members, the family can be counted as a single purchaser only where there is a single investment decision being made and the investment is made from a single pool of funds. In that case, the person making the investment decision must meet all the requirements of the exemption. Where each member of a family is making a separate investment decision, each member of the family must meet all the requirements of the exemption.

3.9 Transfer of Securities Into RRSP - A transfer of securities into the transferor's registered retirement savings plan ("RRSP") is not a trade as it involves no change of beneficial ownership. Accordingly, the transfer does not require the use of a statutory exemption or discretionary order. However, a transfer of securities into a spousal RRSP is a trade and therefore a registrant must be used or a registration exemption found.

3.10 Reliance on Registration Exemption - Certain exemptions from the registration requirement in section 34(1)(a) of the Act are available to an issuer making a trade in a security of its own issue. Where an issuer is relying on such a registration exemption, persons acting on behalf of the issuer in connection with that trade (such as directors, officers, employees and agents) may also rely on the issuer's registration exemption, as long as they have not had their ability to rely on that exemption restricted under sections 36(1)(c) or 161 of the Act. However, the issuer and persons acting on its behalf should note that the exemptions are only from the requirement to be registered to trade in securities and not from the requirement to be registered to act as an adviser. Refer to BCN 31-701 "Advising Under the Securities Act" and BCIN 33-701 "Trading by Limited Dealers under Registration and Prospectus Exemptions". Section 44 of the Act and BC Instrument 32-501 contain certain limited exemptions from the requirements to register as an adviser.

Part 4 Rescinded

Part 5 Rescinded

Part 6 Isolated Trade Exemption: Sections 45(2)(3) and 74(2)(2) of the Act

6.1 Statutory Framework - Section 45(2)(3) of the Act provides an issuer or an owner of a security with a registration exemption and section 74(2)(2) of the Act provides an issuer with a prospectus exemption for an isolated trade.

6.2 Inappropriate Use of the Isolated Trade Exemption - The isolated trade exemption is intended to be relied on rarely and is not available for registrants or others whose usual business is trading in securities. Reliance on this exemption might be appropriate, for example, when an individual who is not involved in the business of trading wishes to make a single trade of a security that the individual owns to another person. The exemption would not be available to the individual for any subsequent trades

for a period of time adequate to ensure that each transaction was truly isolated and unconnected.

Issuers, particularly reporting issuers, that are regularly accessing the capital markets will seldom find the isolated trade exemption available. The isolated trade exemption is not available when a trade or distribution is made to more than one person, even if the other transactions are carried out under different exemptions or in different jurisdictions. Similarly, an issuer conducting a public offering of securities under a prospectus in one jurisdiction may not concurrently use the isolated trade exemption to issue securities in another jurisdiction, as that would indicate continued or successive transactions of a like nature. The Commission also takes the position that it is abusive to rely on the isolated trade exemption to distribute securities to persons, such as unsophisticated individuals, who under the Act are intended to have the full benefit of regulatory protections.

Part 7 Exempt Purchaser Exemption: Sections 45(2)(4) and 74(2)(3) of the Act

7.1 Statutory Framework - Sections 45(2)(4) and 74(2)(3) of the Act provide registration and prospectus exemptions where the purchaser is designated as an exempt purchaser in an order by the Executive Director. Section 88 of the Rules deals with applications for designation as an exempt purchaser. See BC Policy 12-602, “Exempt Purchaser Status” for guidelines to follow in applying for exempt purchaser status.

Part 8 \$150,000 Exemption: Sections 45(2)(5) and 74(2)(4) of the Act

8.1 Statutory Framework - Sections 45(2)(5) and 74(2)(4) of the Act provide registration and prospectus exemptions where the purchaser purchases as principal and the trade is in a security that has an aggregate acquisition cost to the purchaser of not less than the prescribed amount. The prescribed amount is \$150,000 under sections 90 and 129 of the Rules.

8.2 Rescinded

8.3 Rescinded

8.4 Type of Consideration - Where permitted under applicable corporate or other governing legislation, consideration for a distribution under section 74(2)(4) may include a promise to pay (e.g. a promissory note). Payment by way of promissory notes is not permitted for shares issued under the corporate legislation of British Columbia, Ontario or Canada, which require that shares be fully paid prior to issuance. For those issuers not precluded from accepting promissory notes, such as limited partnerships, the Commission takes the position that consideration may include a promise to pay only if the purchaser is certain, or virtually certain, to be called upon to make payment. This would disqualify commitments under various tax oriented arrangements where the issuer or promoter has held out to the investor a hope or expectation that payment of a promissory note will be waived.

The \$150,000 exemption cannot be used to settle outstanding debt of an issuer owed to a purchaser.

8.5 Where the Consideration Includes a Promise to Pay - Where consideration includes a promise to pay, the present value of the consideration must exceed \$150,000. The interest rate to be used in the present value calculation is:

- (a) the actual rate of interest charged on the promissory note, provided that the rate was at least equal to the prime rate plus 1% at the date of the subscription agreement, was on commercially reasonable terms, and the security is issued within 90 days of the date of the subscription agreement; or
- (b) the higher of the actual rate of interest charged on the promissory note and the prime rate at the date of issue of the security plus 1%.

On commercially reasonable terms means on terms no more favourable than those that would be available from a lender that is at arms length to the purchaser. It is the responsibility of the issuer to retain documents to demonstrate that the interest rate was on commercially reasonable terms.

If the promise to pay is on demand, a reasonable maturity date must be assumed for the present value calculation based on the most probable payment date.

Any guarantees or non-recourse financing arrangements of the issuer to repay certain amounts to the purchaser must be quantified on a present value basis and deducted from the purchase price of the securities for the purpose of computing the aggregate acquisition cost. For example, in an offering of real estate securities, guarantees would include, but would not be limited to, rental revenue, cash flow or repurchase guarantees.

Part 9 Asset and Resource Property Exemptions: Sections 45(2)(6), 45(2)(21), 74(2)(5) and 74(2)(18) of the Act

9.1 Statutory Framework - The asset exemption in sections 45(2)(6) and 74(2)(5) of the Act provides registration and prospectus exemptions where the trade is by an issuer in a security of its own issue as consideration for part or all of another person's assets, so long as the fair value of the other person's assets is not less than the prescribed amount. The prescribed amount is \$150,000, under sections 90 and 129 of the Rules.

The resource property exemption in sections 45(2)(21) and 74(2)(18) of the Act provides registration and prospectus exemptions where the trade is by an issuer in a security of its own issue as consideration for the acquisition of mining, petroleum or natural gas properties or any interest in them.

The inclusion of the term “interest” recognizes that transactions dealing with the exploration of natural resources may not involve the transfer of 100% of the property to one person. Rather, transactions may involve the acquisition of an interest in a natural resource property, including the profits derived from the property.

9.2 Fair Value - When issuing securities, issuers must comply with the requirements under applicable corporate or other governing legislation that the securities be issued for fair value. Where securities are issued for non-cash consideration such as assets or resource properties, it is the responsibility of the issuer and its board of directors to determine the fair market value of the assets or resource properties and to retain records to demonstrate how that fair market value was determined.

9.3 Direct and Indirect Acquisitions Under the Asset Exemption - The asset exemption (sections 45(2)(6) and 74(2)(5)) is available where the asset is acquired directly by the issuer of the securities. The asset exemption is not available for the distribution of securities of an issuer as consideration for an acquisition:

- (a) by a subsidiary of the issuer, whether the subsidiary is wholly-owned or not; or
- (b) by the parent of the issuer.

Discretionary orders have been granted for the distribution of securities of an issuer as consideration for the acquisition by the issuer’s wholly-owned subsidiary of assets having a fair value of not less than \$100,000.

9.4 Direct and Indirect Acquisitions Under the Resource Property Exemption - The resource property exemption (sections 45(2)(21) and 74(2)(18)) is available where the resource property interest is acquired directly by the issuer of the securities. The exemption is not available for the distribution of securities of an issuer as consideration for:

- (a) an acquisition by a subsidiary of the issuer, whether the subsidiary is wholly-owned or not;
- (b) an acquisition by the parent of the issuer; or
- (c) an acquisition of securities of another issuer that owns a resource property interest.

The Commission would consider granting a discretionary order for the distribution of securities of an issuer as consideration for an acquisition by a wholly-owned subsidiary of the issuer of a 100% interest in a resource property.

Part 10 Statutory Transaction Exemption: Sections 45(2)(9) and 74(2)(8) of the Act

10.1 Statutory Framework - Sections 45(2)(9) and 74(2)(8) of the Act provide registration and prospectus exemptions where a trade is made in connection with an amalgamation, merger, reorganization or arrangement where:

- (a) a disclosure record, as described in section 74(2)(8) of the Act, is prepared and delivered to each security holder whose approval is required before the transaction can proceed, and
- (b) the transaction is approved by the security holders.

10.2 Types of Transactions - The statutory transaction exemption may be used for trades of securities by issuers and security holders in connection with an amalgamation, merger, reorganization or arrangement involving two or more issuers. To the extent the trade occurs as a consequence of the security holder approval required under the exemption, there is no offer to acquire securities and therefore no take over bid or issuer bid.

10.3 Disclosure Record - The statutory transaction exemption requires that an information circular in the required form (BC Form 54-901F) be delivered to the security holders whose approval is required. The information circular must contain prospectus level disclosure about each issuer whose securities are being issued.

Part 11 Employee and Management Company Exemptions: Sections 45(2)(10) and 74(2)(9) of the Act and Sections 89(f) and 128(g) of the Rules

11.1 Statutory Framework - The employee exemptions in sections 45(2)(10) and 74(2)(9) of the Act provide registration and prospectus exemptions where the trade is by an issuer in a security of its own issue with an employee, senior officer or director of the issuer, or of an affiliate of the issuer, or a trustee on behalf of such a person, or an issuer all of whose voting securities are owned by one or more of the persons, so long as the person is not induced to purchase by expectation of employment or continued employment.

The management company exemptions in sections 89(f) and 128(g) of the Rules provide registration and prospectus exemptions where the trade is by a reporting issuer to an individual employed by a person providing management services to the reporting issuer, so long as the individual is not induced to purchase by expectation of employment or continued employment with either the exchange issuer or the person providing the management services.

11.2 Meaning of “Employee” - The employee exemption is available to an issuer for a trade to a bona fide employee. The following persons would be considered bona fide employees:

- (a) an individual who is considered an employee under the Income Tax Act, (i.e. for whom deductions must be made at source);
- (b) an individual who is a full-time dependent contractor, that is one who works full-time for an issuer providing services normally provided by an employee and is subject to the same control and direction by the issuer over the detail and methods of work as an employee of the issuer, but for whom income tax deductions are not made at source;
- (c) a part-time dependent contractor, that is an individual who works for an issuer on a continuing and regular basis for a minimum amount of time per week providing services normally provided by an employee and is subject to the same control and direction by the issuer over the details and methods of work as an employee of the issuer, but for whom income tax deductions are not made at source.

11.3 Management Services - Management services referred to under the management company exemption are narrowly interpreted by the Commission as being limited to administrative or operational services required for the ongoing successful operation of the business enterprise of the exchange issuer. Management services do not include promotional or investor relations services.

Part 12 Take Over Bid and Issuer Bid Exemptions: Sections 45(2)(25), 45(2)(28), 74(2)(22) and 74(2)(25) through 74(2)(27) of the Act

12.1 Trades by a Holder - Sections 45(2)(25) and 74(2)(22) of the Act provide registration and prospectus exemptions to a holder of a security of an offeree issuer to trade a security of the offeree issuer to the offeror under a take over bid or issuer bid. The registration exemption allows holders to tender into the bid directly without having to go through a registrant. The prospectus exemption allows a control person or a person holding securities subject to resale rules to tender into the bid. The exemptions are available both for bids that comply with the disclosure and procedural requirements of sections 105 to 110 of the Act, including the preparation and delivery of a take over bid or issuer bid circular (“non-exempt bids”), and bids that are exempt from such requirements (“exempt bids”).

12.2 Trades by Offeror in Non-Exempt Bid - Sections 45(2)(28) and 74(2)(27) of the Act provide registration and prospectus exemptions for a trade made in a security of an offeror under a take over bid or issuer bid where a securities exchange take over bid circular or securities exchange issuer bid circular was filed by the offeror. No prospectus is required since the bid circulars are required to contain prospectus level disclosure.

12.3 Trades by Offeror in Exempt Take Over Bid - Sections 45(2)(28), 74(2)(25) and 74(2)(26) of the Act provide registration and prospectus exemptions for a trade made in a security of an offeror with the security holders of an offeree issuer under an exempt take over bid. Given the nature of the take over bids that have been exempted, exemptions from the prospectus requirements have also been provided.

12.4 Resale Rules - The resale rules applicable to securities traded by an offeror to the security holders of an offeree issuer are set out in National Instrument 45-102 *Resale of Securities* (NI 45-102).

The exemptions in sections 45(2)(28) and 74(2)(25), (26) and (27) are not available for a take over bid where none of the offeree security holders are in British Columbia. Section 2.17 of NI 45-106 provides an exemption where the offer is made to security holders outside British Columbia.

Part 13 Rescinded

Part 14 Rescinded

Part 15 Control Person Exemptions

15.1 Statutory Framework - Under section 1(1) of the Act, a trade in a previously issued security from the holdings of a control person is a distribution. Therefore, in order to trade a security a control person must file a prospectus, unless an exemption is available. The following are some of the exemptions that may be available to control persons:

- (a) Sections 45(2)(5) and 74(2)(4) of the Act provide registration and prospectus exemptions where the securities have an acquisition cost of not less than 150,000 and the purchaser is purchasing as principal.
- (b) Sections 45(2)(17)(ii) and 74(2)(16)(ii) of the Act provide registration and prospectus exemptions where each party to the trade is, prior to making the trade, a promoter of the issuer (available only where the control person is also a promoter of the issuer).
- (c) Sections 45(2)(18) and 74(2)(17) of the Act provide registration and prospectus exemptions where each party to the trade is, prior to making the trade, a control person of the issuer.

15.2 Special Requirements for Control Persons - It is in the public interest for the market to know in advance that a control person intends to sell securities. (There are some exceptions, such as when the control person is tendering into a take over bid). The exemptions contained in sections 74(2)(3),(4), (6) and (16)(ii) of the Act may not be used by a control person unless the control person complies with the requirements of

section 136 of the Rules. Section 136 of the Rules requires the filing of Form 45-102F1 within the time periods set out in NI 45-102.

Section 137 of the Rules requires a report in BC Form 55-901F (insider report) to be filed within 3 days of the sale by a control person of securities under any exemption under section 74(2) of the Act. This includes the exemptions set out in the Rules and in Commission Rules such as NI 45-106, which fall under section 74(2)(28) of the Act.

Part 16 Shares for Debt Exemption: Sections 89(c) and 128(e) of the Rules

16.1 Statutory Framework - Sections 89(c) and 128(e) of the Rules provide registration and prospectus exemptions to a reporting issuer where the trade is in a security of its own issue to settle a debt.

16.2 Interpretation of “Genuine Debt” - A genuine debt is one that was incurred for value, on commercially reasonable terms, and that, on the date the debt was incurred, the issuer believed would be repaid in cash.

16.3 Settlement of Debt - An issuer may distribute securities to settle a debt only after the debt becomes due, as evidenced by the creditor issuing an invoice, demand letter or other written statement to the issuer indicating that the debt is due. The shares for debt exemption may not be relied on for the issuance of securities by an issuer to secure a debt that will remain outstanding after the issuance.

Part 17 Bonus or Finder’s Fee Exemption: Sections 89(e) and 128(f) of the Rules

17. Statutory Framework - Sections 89(e) and 128(f) of the Rules provide registration and prospectus exemptions to a reporting issuer where the trade is in a security of its own issue as consideration for a loan or loan guarantee, or for services performed by a finder in connection with arranging a loan or loan guarantee, the issuer acquiring or disposing of assets, other than proceeds of a distribution, or the issuer making a distribution under any exemption in section 74(2) of the Act to persons not resident in British Columbia. This includes the exemptions in the Rules and in Commission Rules, such as NI 45-106, which fall under section 74(2)(28) of the Act. The finder may be resident in British Columbia or elsewhere.

Part 18 Rescinded

Part 19 Filing and Other Requirements

19.1 Filing of Required Forms - Section 182(1) of the Act authorizes the Executive Director to specify the form, content and other particulars of a record required to be prepared, filed, furnished, or sent in a required form under the Act, the Regulation or the Rules. The person filing the form is responsible for ensuring that the form is filed in the required form. See BC Policy 13-601 “Required Forms” for how to complete forms.

19.2 Report of exempt distribution - Section 139 of the Rules requires an issuer to file a report for distributions under certain prospectus exemptions. Form 45-106F1 is the required form of report in BC. The report must be filed within 10 days of the distribution. In the event of a continuous offering where subscription funds are held in trust pending a closing of the offering, a Form 45-106F1 must be filed within 10 days of each closing.

An issuer conducting a continuous offering may wish to set fixed closing dates in a manner that would avoid the issuer having to file a report several days in a row or every few days. Where an issuer conducting a continuous offering has more than one closing within a 10 day period, it is acceptable to file one report disclosing all distributions within the 10 day period.

Part 20 Resale Rules

20.1 Statutory Framework - A security issued in reliance on an exemption is usually subject to restrictions on its resale. Any trade that is not made in accordance with the applicable resale rules is deemed to be a distribution and therefore can only be done under a prospectus or a prospectus exemption.

To determine the applicable resale rules, refer to section 1(1) of the Act (see the definition of “distribution”) and NI 45-102.

In certain circumstances, a purchaser of securities may be able to rely on registration and prospectus exemptions to sell securities instead of waiting until the resale rules have been satisfied. For example, where a person subject to resale restrictions wants to sell securities of an issuer worth at least \$150,000 to a single purchaser, this sale can be made under the exemption in section 74(2)(4) of the Act at any time without regard to the resale restrictions in NI 45-102.

Part 21 Discretionary Orders

21.1 Types of Applications - The procedures described in this Part apply to all applications made to the Commission or the Executive Director for a decision under the following sections of the Act, the Rules and the Company Act as well as under National Policy Statements or National Instruments:

Section of the Act

1(1) - paragraph (e) of the definition of “reporting issuer”

3.1

3.2

33

48

60

76
84
88
91
114
119(2)
123
124(b)
130
169(4)

Section of the Rules

3(8)
124
133(2)
137(2)

Section of Company Act

87(2)
155
226(2)
262(4)

For those sections not referred to above, applicants should refer to the particular section to see if a different application process is specified.

21.2 Applications under Sections 48 and 76 of the Act - If an issuer or other person wishes to trade or distribute securities and cannot use any of the statutory exemptions set out in the Act or Rules, the issuer or other person must either meet the requirements of sections 34 and 61 of the Act, as appropriate, or obtain a discretionary order under sections 48 and 76 of the Act. Where a statutory exemption can be relied on for any part of a proposed transaction, an exemption order for that part of the transaction should not be sought.

The Commission and the Executive Director may only issue discretionary orders under sections 48 and 76 of the Act if they consider that it would not be prejudicial to the public interest to do so.

21.3 Applications in More than One Jurisdiction - Where an application for a discretionary order is made in more than one Canadian jurisdiction, that application should be made simultaneously in all the jurisdictions in which relief is required under National Policy 12-201 *Mutual Reliance Review System for Exemptive Relief Applications*.

21.4 Submission of Applications - If an issuer is seeking relief, the application should be addressed to the Director, Corporate Finance. If the application relates to registration, exchanges or marketplaces, it should be addressed to the Director, Capital Markets Regulation. You can submit your application at the BC Securities Commission by:

Internet: www.bcsc.bc.ca

Fax: (604) 899-6506

Courier or Mail: British Columbia Securities Commission
P.O. Box 10142, Pacific Centre
701 West Georgia Street
Vancouver, B.C.
V7Y 1L2

Applications should be submitted well in advance of the proposed transaction for which an order or decision is sought as neither the Commission nor the Executive Director will issue orders that have a retroactive effect. Applications must be complete when submitted and should consist of:

- (a) two copies of an application letter setting out the information described in section 21.5 of this Policy, either originally signed by the applicant or, if submitted by the applicant's agent, accompanied by a verification described in section 21.5 of this Policy;
- (b) two copies of all supporting material;
- (c) two copies of the draft order or decision in the form described in section 21.6 of this Policy and, at the applicant's option, a computer disk containing the draft order in Microsoft Word 6.0 for Windows; and
- (d) the applicable filing fee as described in section 21.7 of this Policy.

Follow-up material filed in respect of an application should be addressed to the staff member reviewing the application and the envelope and covering letter should be marked "Follow-up Material". Any revised draft order or waiver submitted as follow-up material should be accompanied by a black-lined copy indicating the amendments made by the applicant.

21.5 Required Elements of the Application - Each application should be divided into sections and include, where relevant, the following information:

21.5.1 Applications by or on Behalf of Issuers

- (a) **Summary**

- (i) the name of the issuer;
- (ii) the name of the applicant (if different from the issuer);
- (iii) the section of the Act, Rules, Company Act, National Policy Statement or National Instrument under which the application is made; and
- (iv) the nature of the relief sought.

(b) The Issuer

- (i) the name of the issuer;
- (ii) jurisdiction and date of incorporation, organization or continuation;
- (iii) capital structure - authorized and issued capital and debt obligations;
- (iv) whether the issuer is a reporting issuer;
- (v) whether the issuer is an exchange issuer;
- (vi) the name of any exchange or quotation system on which the issuer's securities are listed;
- (vii) recent trading price and volume data for any class of securities involved in the application; and
- (viii) a statement from the issuer as to whether the issuer, if it is a reporting issuer, is in default of any requirement of the Act, Regulation or Rules and if so, describing the circumstances of the default.

As the Commission and Executive Director will generally not grant orders to an issuer that is in default of a requirement of the Act, Regulation or Rules, the applicant should ensure that the issuer is not in default prior to making an application for discretionary relief.

(c) Applicant Applying on Behalf of the Issuer - If the applicant is a person applying on behalf of the issuer, include those items in paragraph (b) that are relevant to the applicant and explain the applicant's relationship to the issuer.

21.5.2 Applications by Non-Issuers - Applications by non-issuers, such as an application by a registrant for an exemption order under section 48 of the Act, should include information similar to that itemized in sections 21.5 (a), (b) and (c) above, that is relevant to the application.

21.5.3 All Applications

(a) Order or Decision Sought - Applications should clearly set out all relevant information and arguments in support of the request for the order or decision. The submission should clearly describe how the relief sought would fall within the spirit and intent of the securities and corporate legislation. The information and argument should include:

- (i) the facts on which the application is based;
- (ii) the reasons for making the application; and
- (iii) other relevant considerations including:
 - case law;
 - prior decisions of the Commission or Executive Director in similar circumstances;
 - parallels between existing statutory exemptions and the discretionary exemption sought;
 - related decisions of other regulatory agencies;
 - similar applications pending in other jurisdictions; and
 - supporting documents (these may be included as schedules or exhibits to the application, and references in the application may be made to them).

(b) Verification - Each application must be signed by the party submitting it and must contain a statement certifying the truth of the facts it contains. If the application is made by an agent for the applicant and not signed by the applicant, this certification may be omitted if the application is accompanied by a separate written statement signed by the applicant authorizing the agent to prepare and file the application and confirming the truth of the facts contained in the application. Sample language might include:

“We authorize _____ to make and file the attached application and confirm the truth of the facts contained in it.

Dated on _____, 20__.

Authorized Officer”

21.6 Conventions for Drafting Orders or Decisions - Applicants should refer to the Commission Documents Database (under Decisions and Orders) on the Commission’s website at bcsc.bc.ca. for examples of orders or decisions that the Commission and the Executive Director have granted. Draft orders or decisions should not be submitted in the format used by other jurisdictions. The use of formats other than British Columbia’s will result in unnecessary delays as the applicant will be asked to resubmit the draft order before the application is assigned to an analyst for review.

(a) Headings

- (i) Every draft order should have a heading that:
- (ii) refers to the Act, Rules, Company Act, Local Policy, National Policy Statement or National Instrument under which the order or decision is requested; and
- (iii) sets out the name of the issuer, if applicable, and the name of any party seeking the order or decision.

The draft order should also have a subheading that refers to the section of the Act, Rules, Company Act, Local Policy, National Policy Statement or National Instrument under which the order or decision is requested.

(b) Recitals - The first recital should state the name of the applicant, whether the application is being made to the Commission or the Executive Director, the section of the legislation or policy under which the order or decision is requested, and the specific requirements from which the applicant is seeking relief.

Subsequent recitals should set out the relevant facts and provide the background information necessary to show what transactions are contemplated and why the order or decision sought should be granted. These recitals, in the form of representations by the applicant, should also demonstrate that the applicant falls within the spirit and intent of the securities or corporate legislation and that the granting of the order or decision would not be prejudicial to the public interest.

The last recital should confirm that the specific requirements of the legislation or policy have been satisfied. For example, the last recital for orders under section 76 of the Act should read:

“The Executive Director considers that to do so would not be prejudicial to the public interest;”

(c) Operative Part of the Order or Decision - The operative part of the order or decision should begin with the words “IT IS ORDERED” and should then set out, in point form, the specific statutory or policy relief sought.

The wording should reflect the discretionary power granted to the Commission or the Executive Director under the section authorizing the relief sought.

In most cases, conditions, such as filing requirements and resale restrictions, that would have applied had the applicant been able to rely on a parallel statutory exemption will be incorporated as part of the order or decision. If the applicant feels that certain conditions are inappropriate in the particular circumstances of the case, reasons should be given in the application.

21.7 Filing Fees - Each application must be accompanied by the filing fee prescribed in section 22 of the Regulation. Applications will not be assigned for review until the fee is received. Fees should be paid by cheque payable to the “British Columbia Securities Commission”.

Due to resource limitations and the large number of expedited applications which are received, applicants who seek expedited review should provide evidence that immediate attention to the application is necessary and reasonable under the circumstances. If staff are unable to begin their review of the application promptly, staff will advise the applicant that the application will be dealt with in the normal course.

21.8 Procedure For Processing Applications - On receipt of a complete application, a member of the Commission’s staff will be assigned to review the application and recommend disposition. The staff member may contact the applicant if further information or clarification is required. Where the applicant does not provide this information or clarification within a reasonable period of time, the Commission or Executive Director, on its or his own motion or on the recommendation of the staff member, may decide to treat the application as abandoned.

21.9 Confidentiality¹ - Orders and decisions are, as a matter of course, filed in public files and published on the Commission’s website (bcsc.bc.ca). Materials filed in support of applications (including denied or withdrawn applications) may be accessible to the public under the *Freedom of Information and Protection of Privacy Act*, S.B.C. 1992, c.61.

Applicants who wish to maintain confidential treatment of an order, a decision or materials filed in support of an application must make a separate submission to the Commission seeking confidentiality under section 169(4) of the Act. The Commission will not grant an application for confidential treatment of material under section 169(4) unless it considers that the material discloses intimate financial, personal or other information, and the desirability of avoiding disclosure of the information in the interests of any affected person outweighs the desirability of adhering to the principle of public disclosure.

¹ BC Policy 13-602 *Confidentiality of Records* supersedes section 21.9.

Where the Commission accedes to a request for confidentiality, the material will not be published or placed in the public file. However, the Commission may still be obliged to make materials available to the public should an application be made under the Freedom of Information and Protection of Privacy Act.

September 8, 2005

Douglas M. Hyndman
Chair