

Companion Policy 51-105CP

Multilateral Instrument 51-105 *Issuers Quoted in the U.S. Over-the-Counter Markets*

Part 1 - General Comments

1.1 Introduction

This Companion Policy sets out how the Canadian Securities Administrators (we) interpret or apply the provisions of Multilateral Instrument 51-105 *Issuers Quoted in the U.S. Over-the-Counter Markets* (Instrument) and related securities legislation.

Except for Part 1, the numbering of Parts and sections in this Companion Policy correspond to the numbering in the Instrument. Any general guidance for a Part appears immediately after the Part name. Any specific guidance on sections in the Instrument follows the general guidance. If there is no guidance for a section, the numbering in this Companion Policy will skip to the next provision that does have guidance.

The Instrument designates or determines as a reporting issuer (OTC reporting issuer) in a jurisdiction of Canada an issuer that:

- (a) has issued a class of securities that are quoted on any of the over-the-counter markets in the United States of America, including the OTC Bulletin Board, the Pink OTC Markets and reported in the grey markets, and has no securities listed or quoted on another North American exchange or quotation system listed in the Instrument (OTC issuer), and
- (b) meets one or more of the tests for a significant connection to that jurisdiction set out in section 3 of the Instrument.

An OTC reporting issuer must comply with the requirements of securities legislation that apply to reporting issuers in that jurisdiction generally. The Instrument requires an OTC reporting issuer to make some additional disclosure, and restricts the use of some of the prospectus, take-over bid and disclosure exemptions.

Because an OTC reporting issuer is likely to be an unlisted reporting issuer under National Instrument 45-106 *Registration and Prospectus Exemptions*, section 2.25 of that instrument applies to distributions of the issuer's securities by the issuer or a control person to a director, executive officer, employee, consultant or other person described in section 2.24 of that instrument. Section 2.25 of that instrument requires non-management shareholders to approve those distributions if the limitations in that section are exceeded.

1.2 Definitions

Unless defined in the Instrument, terms used in the Instrument or in this Companion Policy have the meaning given to them in the securities legislation of each jurisdiction, in

National Instrument 14-101 *Definitions* or in National Instrument 51-102 *Continuous Disclosure Obligations*. For example,

- (a) “reporting issuer” is defined in the securities legislation of each jurisdiction,
- (b) “1934 Act”, “local jurisdiction”, “jurisdiction of Canada”, “prospectus requirement”, “securities legislation”, and “SEC” are defined in National Instrument 14-101 *Definitions*, and
- (c) “AIF” and “MD&A” are defined in National Instrument 51-102 *Continuous Disclosure Obligations*.

1.3 Reporting issuer designation and determination

Direction and administration of business

An OTC issuer’s business may be directed or administered in or from more than one jurisdiction. For the purposes of section 3 of the Instrument, generally, we will consider that an OTC issuer’s business is directed or administered in or from a jurisdiction if:

- (a) its head office, or another office where executive functions take place, is located in that jurisdiction,
- (b) some or all of its directors are located in that jurisdiction, or
- (c) any director, officer, consultant or other person who carries out executive functions for the issuer does so from an office in that jurisdiction, or is resident in that jurisdiction.

Executive functions are those a president, a vice president, a secretary, a treasurer or a general manager of a corporation or other entity, or the chair of a board of directors, normally performs. These functions include responsibility for important corporate activities such as exploration, product development, asset acquisition and development, financing, investor relations and operations.

Generally, we will not consider that an OTC issuer’s business is directed or administered in or from a jurisdiction if the only connection to the jurisdiction is the location, in the jurisdiction, of:

- (a) an asset of the issuer, such as a mineral property or distribution or warehouse facility, or
- (b) sales personnel, or an expert, none of whom performs executive functions for the issuer.

Promotional activities

If an OTC issuer employs or retains an individual or a firm located in a jurisdiction of Canada to conduct promotional activities, we will likely conclude that the OTC issuer is carrying out promotional activities from that jurisdiction.

The Instrument defines “promotional activities.” For the purposes of the Instrument, we will consider generally that these activities include communications through an investment newsletter or other publication that promotes, or reasonably could be expected to promote, the purchase or sale of securities of the OTC issuer. Generally, we will consider that these activities also include providing information to potential investors who request information, or to potential private placement investors.

We will consider that an OTC issuer is carrying out promotional activities in a jurisdiction of Canada if it communicates from anywhere with persons in that jurisdiction, or communicates from a jurisdiction of Canada with persons anywhere, in a way that promotes, or reasonably could be expected to promote, the purchase or sale of its securities.

Ticker-symbol date

In the Instrument, the ticker-symbol date is the date an issuer is first assigned a ticker-symbol on any market or quotation system anywhere in the world. If an issuer’s ticker-symbol changes, that is not a “ticker-symbol date” under the Instrument.

New OTC issuers

If an OTC issuer has distributed a security to a resident of a jurisdiction of Canada before the ticker-symbol date, it will be a reporting issuer under paragraph 3(c) of the Instrument if the security distributed is of the class of securities that became the issuer’s OTC-quoted securities. This provision applies only to an OTC issuer with a ticker-symbol date on or after the effective date of the Instrument in that jurisdiction. The effective date of the Instrument is **, 2012. Issuers with ticker-symbol dates prior to **, 2012 do not become OTC reporting issuers until the conditions in section 3(a) or (b) of the Instrument are met.

The condition in (c) which makes an issuer an OTC reporting issuer if it sells seed stock to a Canadian resident only applies to an issuer whose ticker-symbol date is on or after the effective date of the Instrument.

Application to existing reporting issuers

The Instrument applies to a reporting issuer that is an “OTC issuer” as defined in section 1 of the Instrument and an issuer that has become a reporting issuer under section 3 of the Instrument.

1.4 Ceasing to be an OTC reporting issuer

OTC reporting issuers may cease to be OTC issuers as well as cease to be reporting issuers. In certain circumstances, they may cease to be OTC issuers but remain reporting issuers in one or many of the jurisdictions.

Ceasing to be an OTC issuer and a reporting issuer in jurisdictions other than Québec

Other than in Québec, an OTC reporting issuer may cease to be an OTC issuer and a reporting issuer under one of the following three circumstances:

- (a) it satisfies all the conditions in subsection 4(1) of the Instrument, including filing Form 51-105F1 *Notice - OTC Issuer Ceases to be an OTC Reporting Issuer*, and it does not otherwise meet the definition of reporting issuer in securities legislation;
- (b) it ceases to be an OTC issuer because a class of its securities becomes listed or quoted on one of the exchanges or quotation systems listed in section 1 of the Instrument and it does not otherwise meet the definition of reporting issuer in securities legislation;
- (c) it receives an order from the securities regulatory authority in the jurisdiction that it is no longer a reporting issuer in that jurisdiction.

Ceasing to be an OTC issuer and a reporting issuer in Québec

In Québec, an OTC reporting issuer may cease to be an OTC issuer and a reporting issuer if pursuant to making an application for a decision to revoke its OTC reporting issuer status, it receives an order from the securities regulatory authority that it is no longer a reporting issuer. The application must be made pursuant to section 69 of the Québec *Securities Act*.

Other cessation procedures unavailable

BC Instrument 11-502 *Voluntary Surrender of Reporting Issuer Status* and CSA Staff Notice 12-307 *Applications for a Decision that an Issuer is not a Reporting Issuer* are not available to an OTC reporting issuer.

Regaining OTC reporting issuer status

An OTC reporting issuer that ceases to be an OTC reporting issuer might become an OTC reporting issuer again if its circumstances change. For example, an OTC reporting issuer that ceased to be an OTC reporting issuer because it satisfied all the conditions in subsection 4(1) of the Instrument and did not otherwise meet the definition of reporting issuer in securities legislation, or, in Québec, obtained a decision revoking its reporting issuer status, would again become an OTC reporting issuer if it subsequently re-located its head office to a jurisdiction of Canada and was an OTC issuer at that time.

Ceasing to be an OTC issuer but remaining a reporting issuer

An OTC reporting issuer that ceases to be an OTC reporting issuer under the Instrument continues to be a reporting issuer under securities legislation if it meets the definition of reporting issuer in securities legislation. For example, if an issuer ceases to be an OTC reporting issuer because its securities have become listed on NASDAQ, it would remain a reporting issuer under securities legislation if it had filed and obtained a receipt for a prospectus in a jurisdiction of Canada or if it has exchanged its securities with another reporting issuer in a jurisdiction of Canada or with the holders of the securities of that other reporting issuer in connection with an amalgamation.

Forms to be filed on ceasing to be an OTC reporting issuer in jurisdictions other than Québec

Subsection 4(1) of the Instrument provides that, except in Québec, if an OTC reporting issuer has no significant connection to any jurisdiction of Canada for at least one year, it may cease to be an OTC reporting issuer on filing Form 51-105F1 *Notice - OTC Issuer Ceases to be an OTC Reporting Issuer*. Form 51-105F1 also requires the issuer to disclose whether or not it will remain a reporting issuer in a jurisdiction of Canada.

Form 51-105F4 *Notice - Issuer Ceases to be an OTC Reporting Issuer* is the form that is required to be filed, except in Québec, for an OTC reporting issuer that ceases to be an OTC issuer because a class of its securities becomes listed or quoted on one of the exchanges or quotation systems listed in section 1 of the Instrument. Form 51-105F4 requires the issuer to disclose whether or not it will remain a reporting issuer in a jurisdiction of Canada. If the issuer will not remain a reporting issuer in a jurisdiction of Canada, filing the form will help prevent the securities regulatory authorities from placing the issuer on the defaulting issuer list, or cease trading the issuer's securities, for failure to file documents.

Part 2 – Disclosure

5. Additional disclosure requirements

National Instruments

An OTC reporting issuer has the same disclosure obligations as other reporting issuers under securities legislation, subject to Part 2 of the Instrument. For example, an OTC reporting issuer is subject to requirements in addition to those described in the Instrument, including:

- (a) National Instrument 43-101 *Standards of Disclosure for Mineral Projects*, which will require most OTC reporting issuers in the mineral business to file with their first AIF a technical report for each material mineral property
- (b) National Instrument 51-101 *Standards of Disclosure for Oil and Gas Activities*, which will require most OTC reporting issuers in the oil and gas business to file, when they first file audited annual financial statements, a statement of reserves data and other information, a report of an independent qualified reserves auditor, and a related report of management and directors
- (c) National Instrument 52-107 *Acceptable Accounting Principles and Auditing Standards* which sets out the accounting principles and auditing standards that must be used by reporting issuers

- (d) National Instrument 52-108 *Auditor Oversight* which sets out the requirements that must be satisfied by auditors of reporting issuers, including the requirement that an auditor must be a participating audit firm with the Canadian Public Accountability Board

Most instruments that impose disclosure obligations have companion policies that also provide guidance.

National Policies

The following policies provide additional guidance to reporting issuers about disclosure obligations;

- (a) National Policy 51-201 *Disclosure Standards*
- (b) National Policy 58-201 *Corporate Governance Guidelines*

Disclosure obligations of insiders of OTC reporting issuers

Insiders of an OTC reporting issuer have the same disclosure obligations as insiders of other reporting issuers under Canadian securities legislation.

Exemptions for SEC filers and their insiders

An OTC reporting issuer that has a class of securities registered under section 12 of the 1934 Act or is required to file reports under paragraph 15(d) of that Act may have exemptions from most continuous disclosure requirements available to it. However, section 6 of the Instrument and BC Instrument 71-503 *Material Change Reporting by OTC Reporting Issuers* provide that an OTC reporting issuer is not exempt from material change reporting requirements.

An OTC reporting issuer must comply with the same timely disclosure requirements for material change reporting as other reporting issuers. The requirements are to issue a news release and file the news release and a material change report on SEDAR. An OTC reporting issuer that files a Form 8-K *Current Report* with the SEC disclosing the material change may file the Form 8-K *Current Report* on SEDAR as its material change report.

An insider of an OTC reporting issuer that is incorporated outside of Canada and is an SEC filer is exempted from insider reporting requirements if the insider files insider reports with the SEC under U.S. federal securities law. However, an insider of an OTC reporting issuer that is exempted from filing insider reports under U.S. federal securities law must file insider reports in Canada.

The most common exemptions from continuous disclosure requirements for SEC filers and their insiders are in:

- (a) National Instrument 51-102 *Continuous Disclosure Obligations*

- (b) National Instrument 52-107 *Acceptable Accounting Principles and Auditing Standards*
- (c) National Instrument 52-109 *Certification of Disclosure in Issuers' Annual and Interim Filings*
- (d) National Instrument 58-101 *Disclosure of Corporate Governance Practices*
- (e) National Instrument 71-101 *The Multijurisdictional Disclosure System*
- (f) National Instrument 71-102 *Continuous Disclosure and Other Exemptions relating to Foreign Issuers*

Exemptions for designated foreign issuers and their insiders

The continuous disclosure and other exemptions for a designated foreign issuer under National Instrument 71-102 *Continuous Disclosure and Other Exemptions Relating to Foreign Issuers* are available to an OTC reporting issuer that is a designated foreign issuer.

7. Registration statement

The requirement to file a registration statement under section 7 of the Instrument applies only to an issuer that becomes an OTC reporting issuer under the Instrument on its ticker-symbol date. If it does, 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.

8. Promotional activities

The required form under section 8 of the Instrument is Form 51-105F2 *Notice of Promotional Activities*. If the promotional activities are a material change then the requirements for material change reporting apply. In that case, the OTC reporting issuer may comply with its obligation to file a news release under section 7.1 of National Instrument 51-102 *Continuous Disclosure Obligations* by including in Form 51-105F2 *Notice of Promotional Activities* the information required by section 7.1(a) of National Instrument 51-102 *Continuous Disclosure Obligations*.

10. Personal information form and authorization

Securities regulatory authorities do not make any of the information provided in these forms public, unless required under freedom of information legislation.

Part 3 – Resale of Private Placement Securities

11. Resale of seed stock

The restrictions on resale of seed stock in Part 3 of the Instrument apply only to seed stock that a person purchases after the effective date of the Instrument in the jurisdiction of Canada where the purchaser resides.

A person who acquires securities of the issuer after the effective date and before the ticker-symbol date, may sell his or her securities using any available exemption until the issuer's ticker-symbol date.

On and after an OTC reporting issuer's ticker-symbol date, a person who acquired securities of the issuer after the effective date and before the ticker-symbol date may trade those securities only under the circumstances and conditions set out in section 11 of the Instrument.

13. Resale of private placement securities acquired after ticker-symbol date

Section 13 of the Instrument restricts the resale of securities acquired in a private placement after the issuer's ticker-symbol date to trades that meet the conditions of the section, which include a hold period, volume limitations, and a requirement that the sale be made through an investment dealer who executes the trade through an over-the-counter market in the United States of America.

No other exemptions from the prospectus requirement(s) apply to the first trade by a holder of a security of an OTC reporting issuer distributed to that person after the ticker-symbol date under an exemption from the prospectus requirement(s).

Part 4 – Other Restrictions

15. Securities for services

An OTC issuer may only issue securities for services to any of its directors, officers, or consultants if the conditions in this section are met and there is an available exemption from the prospectus requirements.

Part 6 – Transition and Coming into Force

19. Transition - financial disclosure for non-SEC filers

The Instrument provides a transition period for an OTC reporting issuer that is not an SEC filer.

- (a) **annual** – the issuer's first financial year for which it must file annual financial statements and related MD&A is the financial year that begins on or after January 1, 20XX. Therefore, an issuer whose financial year ends

on December 31, 20XX would be required to file its first annual audited financial statements and related MD&A for the financial year ended December 31, 20XX. The filing deadline would be 120 days later, on April 30, 20XX.

- (b) **interim** – the issuer’s first period for which it must file interim financial statements and related MD&A begins on or after January 1, 20XX and ends after September 15, 20XX. Therefore, an issuer whose financial year ends on December 31, 20XX would be required to file its first interim financial statements and related MD&A for the nine-month period ended September 30, 20XX. The filing deadline would be 60 days later, on December 1, 20XX.

Section 4.1 of National Instrument 51-102 *Continuous Disclosure Obligations* requires an issuer to file annual financial statements that include comparative information for the immediately preceding year and that are audited. An OTC reporting issuer must ensure that it has financial statements for its comparative period audited.

Part 7 – Process for exemptive relief applications

Exemptive relief requests from the application of the Instrument will be considered on a coordinated review basis under section 3.4 of National Policy 11-203 *Process for Exemptive Relief Applications in Multiple Jurisdictions*. This section states that the principal regulator reviews the application, and each non-principal regulator coordinates its review with the principal regulator. The decision of the principal regulator to grant exemptive relief evidences the decision of each non-principal regulator that has made the same decision as the principal regulator.

For an application for an exemption from a requirement in the Instrument, the factors a filer should consider in identifying the principal regulator for the application based on the most significant connection test are, in order of influential weight:

- (a) location of direction or administration of the OTC reporting issuer’s business; if direction or administration of the OTC reporting issuer’s business occurs in more than one location, the location of the OTC reporting issuer’s most senior officer,
- (b) location of conduct of majority of promotional activities of the OTC reporting issuer, and
- (c) location of majority of Canadian security holders of the OTC reporting issuer.