

Companion Policy 51-509CP
to
BC Instrument 51-509
Issuers Quoted in the U.S. Over-the-Counter Markets

PART 1 – DEFINITIONS AND REPORTING ISSUER DESIGNATION

1.1 Reporting issuer designation

(1) BC Instrument 51-509 *Issuers Quoted in the U.S. Over-the-Counter Markets* designates as a reporting issuer (OTC reporting issuer) an issuer that:

- has issued a class of securities that are quoted on the OTC Bulletin Board or the Pink Sheets and has no securities listed or quoted on another North American exchange or quotation system listed in the instrument (OTC issuers), and
- meets one or more of the tests for a significant connection to British Columbia 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 generally. The instrument requires an OTC reporting issuer to make some additional disclosure, and restricts the use of some of the registration, prospectus, take-over bid and disclosure exemptions.

(2) This Companion Policy explains how the Commission interprets and applies the instrument.

1.2 Definitions

Terms used in the instrument that are defined in the Act, National Instrument 14-101 *Definitions* and National Instrument 51-102 *Continuous Disclosure Obligations* have the same meanings. For example,

- “investor relations activities” and “reporting issuer” are defined in the Act
- “1934 Act”, “prospectus requirement”, “registration requirement”, “securities legislation”, and “SEC” are defined in National Instrument 14-101 *Definitions*
- “AIF” and “MD&A” are defined in National Instrument 51-102 *Continuous Disclosure Obligations*

1.3 Reporting issuer designation

(1) *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, an OTC issuer’s business is directed or administered in or from British Columbia if:

- its head office, or another office where executive functions take place, is located in British Columbia,
- some or all of its directors are located in British Columbia, or

- any director, officer, consultant or other person who carries out executive functions for the issuer does so from an office in British Columbia, or is resident in British Columbia

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 perform. These functions include responsibility for important corporate activities, such as exploration, product development, asset acquisition and development, financing, investor relations, and operations.

Generally, an OTC issuer's business is not directed or administered in or from British Columbia if the only connection to the province is the location in British Columbia of:

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

(2) *Investor relations activities*

If an OTC issuer employs or retains an individual or a firm located in British Columbia to conduct investor relations activities, the issuer is carrying out investor relations activities from British Columbia.

The Act defines "investor relations activities." For the purposes of the instrument, generally these activities would 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 if the OTC issuer compensates the publisher or writer for doing so. Generally, these activities would also include providing information to potential investors who request information, or to potential private placement investors.

An OTC issuer is carrying out investor relations activities in British Columbia if it communicates from anywhere with persons in British Columbia, or communicates from British Columbia with persons anywhere, in a way that promotes, or reasonably could be expected to promote, the purchase or sale of its securities.

(3) *New OTC issuers*

If an OTC issuer has distributed a security to a British Columbia resident before its ticker-symbol date, it will be a reporting issuer under section 3(c) of the instrument. This provision applies only to OTC issuers with ticker-symbol dates on or after September 15, 2008.

1.4 Ceasing to be a reporting issuer

An OTC reporting issuer may cease to be a reporting issuer under three circumstances:

- a) it satisfies all the conditions in section 4(1) of the instrument, including filing a notice in Form 51-509F1 *OTC Issuer Ceases to be an OTC Reporting Issuer in*

British Columbia, and it does not otherwise meet the definition of reporting issuer in the Act,

- 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(b) of the instrument and it does not otherwise meet the definition of reporting issuer in the Act, or
- c) it receives an order from the Commission that it is no longer a reporting issuer.

BC Instrument 11-502 *Voluntary Surrender of Reporting Issuer Status* is not available to an OTC reporting issuer.

An OTC reporting issuer that ceases to be an OTC reporting issuer under the instrument continues to be a reporting issuer under the Act if it meets the definition of reporting issuer in the Act. 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 the Act if it had filed and obtained a receipt for a prospectus or if it has exchanged its securities in connection with an amalgamation.

An OTC reporting issuer that ceases to be a 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 section 4(1) of the instrument would again become an OTC reporting issuer if it subsequently re-located its head office to British Columbia and was an OTC issuer at that time.

1.5 Forms to be filed on ceasing to be an OTC reporting issuer

Section 4(1) of the instrument provides that if an OTC reporting issuer has no significant connection to British Columbia for at least one year, it may cease to be an OTC reporting issuer on filing BC Form 51-509F1 *OTC Issuer Ceases to be an OTC Reporting Issuer*. BC Form 51-509F1 also requires the issuer to disclose whether or not it will remain a reporting issuer in British Columbia.

BC Form 51-509F4 *Issuer Ceases to be an OTC Reporting Issuer* is the form that is required to be filed 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(b) of the instrument. BC Form 51-509F4 requires the issuer to disclose whether or not it will remain a reporting issuer in British Columbia. If the issuer will not remain a reporting issuer in British Columbia, filing the form will help prevent the Commission from placing the issuer on the defaulting issuer list, or cease trading the issuer's securities, for failure to file documents.

PART 2 – DISCLOSURE

2.1 Disclosure obligations of OTC reporting issuers

An OTC reporting issuer has the same disclosure obligations as other reporting issuers under the Act and regulations, 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, Auditing Standards and Reporting Currency*
- (d) National Instrument 52-108 *Auditor Oversight*

BC Instrument 52-511 *Relief for Venture Issuers from Certain Certification Requirements* is extended to OTC reporting issuers and renamed *Relief for Venture Issuers and OTC Reporting Issuers from Certain Certification Requirements*.

2.2 Guidance

These policies provide guidance to reporting issuers about disclosure obligations

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

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

2.3 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 the Act and regulations.

2.4 Exemptions for SEC filers and their insiders

An OTC reporting issuer that has a class of securities registered under section 12 of the United States *Securities Exchange Act of 1934* or is required to file reports under section 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* provides 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, in section 85(b)

of the Act and Part 7 of National Instrument 51-102 *Continuous Disclosure Obligations*, are to issue a news release and file the news release and a material change report on SEDAR.

Insiders of OTC reporting issuers that are SEC filers may have exemptions from insider reporting requirements.

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

- National Instrument 51-102 *Continuous Disclosure Obligations*
- National Instrument 52-107 *Acceptable Accounting Principles, Auditing Standards and Reporting Currency*
- National Instrument 52-109 *Certification of Disclosure in Issuer's Annual and Interim Filings*
- National Instrument 58-101 *Disclosure of Corporate Governance Practices*
- National Instrument 71-101 *The Multijurisdictional Disclosure System*
- National Instrument 71-102 *Continuous Disclosure and Other Exemptions relating to Foreign Issuers*

2.5 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 is, 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.

2.6 Investor relations information

The required form under section 8 of the instrument is Form 51-509F2 *Notice of Investor Relations Activities*. If the investor relations 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 filing the news release on Form 51-509F2.

2.7 Personal information forms

Under Section 90 of the Act, the Executive Director may require a director, an officer, a promoter or a control person of an issuer, within the time specified, to provide information.

Effective September 30, 2008, the Executive Director requires:

- each director, officer, promoter and control person of an OTC issuer that becomes a reporting issuer under the instrument to provide information within 10 days of the OTC issuer becoming a reporting issuer under the instrument, except for a promoter of an OTC issuer that becomes an OTC reporting issuer more than two years after its ticker-symbol date, and

- each person that becomes a director, officer or control person of an OTC reporting issuer to provide information within 10 days of the person becoming a director, officer or control person of an OTC reporting issuer,

except that personal information forms required to be filed before December 31, 2008 are not required to be filed until that date, unless the executive director specifically requires.

BC Policy 13-601 *Required Forms* sets out this requirement and specifies Form 51-509F3 *Personal Information Form and Authorization of Indirect Collection, Use and Disclosure of Personal Information* for this purpose. If a promoter or control person is not an individual, then its directors, officers and control persons must provide information on this form.

The Commission does 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

3.1 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 September 15, 2008.

A person who acquires securities of the issuer after September 15, 2008 and before the issuer's ticker-symbol date, may sell his or her securities in a private transaction 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 September 15, 2008 and before the ticker symbol date may trade those securities only:

- into a formal take-over bid using the exemption in section 2.16 of National Instrument 45-106 *Prospectus and Registration Exemptions*, or
- from an account in his own name through an investment dealer who executes the trade through the OTC Bulletin Board or Pink Sheets.

3.2 Legending seed stock

Since investors may trade shares purchased before the issuer's ticker-symbol date under available exemptions before the restriction on resale applies to the issuer's securities, the issuer may wish to legend all share certificates, so that if the shares are traded to an investor in British Columbia, the investor will be aware that a restriction applies to the shares in the investor's hands. The legend is important because it helps to ensure that the shareholder complies with restrictions on transfer.

3.3 Resale of private placement securities acquired after ticker-symbol date

Section 12 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 the OTC Bulletin Board or Pink Sheets.

PART 4 – OTHER EXEMPTION RESTRICTIONS

4.1 Directors, officers, employees, consultants

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 trades of the issuer's securities by the issuer or a control person to a director, officer, employee, consultant (or other person described in section 2.24 of that instrument). Section 2.25 requires non-management shareholders to approve those trades if the limitations in that section are exceeded.

PART 5 –TRANSITION

5.1 Financial reporting obligations 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, 2008. Therefore, an issuer whose financial year ends on December 31, 2008 would be required to file its first annual audited financial statements and related MD&A for the financial year ended December 31, 2008. The filing deadline would be 120 days later, on April 30, 2009.
- (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, 2008 and ends after September 15, 2008. Therefore, an issuer whose financial year ends on December 31, 2008 would be required to file its first interim financial statements and related MD&A for the nine-month period ended September 30, 2008. The filing deadline would be 60 days later, on December 1, 2008.

The Continuous Disclosure Filing Calendar on our website describes the deadlines reporting issuers must meet in filing required continuous disclosure.

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.

5.2 Audit committee rule

An OTC reporting issuer that is not a reporting issuer in any other Canadian jurisdiction is not required to comply with National Instrument 52-110 *Audit Committees* until its first annual meeting after September 30, 2008 or, if it has not held an annual meeting by then, until September 30, 2009.