2004

Securities Regulation in British Columbia

WORKING TO MAKE BC THE BEST PLACE TO INVEST & THE BEST PLACE TO RAISE CAPITAL

Guide for **Issuers**

British Columbia Securities Commission

BCSC

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Introduction

This Guide is to help you understand what is expected of issuers under British Columbia securities laws and to give you guidance on how to comply with those laws. Our system of securities regulation is designed to protect investors while minimizing the regulatory burden on industry. We have:

- established principles of regulation to ensure that investors in both the primary and secondary markets get the information they need to make investment decisions
- imposed requirements only to the extent they are necessary for the protection of investors and markets
- designed outcomes-based regulatory requirements with the flexibility to suit a wide range of issuers and businesses

We think it is important that people like you, who must comply with the requirements, are able to do so using your own judgment and experience. There is no avoiding the fact that securities regulation is a complex area, so there will always be times when you need to get professional advice. However, we believe that this should not be necessary for routine compliance matters, and that the system should be simple enough to understand so that you are able to make better judgments about when to get professional advice, and are able to better instruct your professional advisers when you do so. To create this sort of regulatory environment, we have:

- kept the rules as few and as simple as possible
- written them in plain language
- established guidance and created training programs for issuers and other *market participants*

We have adopted this approach because we believe it works. Investors get the information and protection they need, and issuers do a better job of compliance because they understand what is expected of them.

How to use this Guide The Guide should be read together with the *Securities Act* and the *Securities Rules*.

The Act and Rules define and interpret certain words. Many of these words are used in this Guide. To draw your attention to these words, we have italicized them the first time they appear in a Section of the Guide. Unless indicated otherwise, the definitions for the italicized words are in section 1 of the Act or section 1 of the Rules.

To help the reader's understanding of the regulatory regime, this Guide often repeats or paraphrases requirements in the Act, Rules and other instruments. The text as found in those instruments governs.

How to navigate the Act and Rules Parts 1 to 5 of the Act and Parts 1 to 9 of the Act and Rules correspond, in terms of subject matter, to the same parts of the Canadian Securities Administrators' (CSA's) national numbering system.

How to get more help This Guide is only part of our system of guidance for issuers. If you have specific questions that are not answered in this Guide, you can get answers by contacting us by phone or e-mail in the manner described on our website **www.bcsc.bc.ca.** The website also has the text of the Act, Rules, forms and other instruments.

I. Application

A ISSUERS THAT REPORT IN OTHER PROVINCES

Interface exemptions Most issuers are subject to securities regulation in more than one province. To avoid imposing different requirements on those who are subject to the securities legislation in other provinces, the Rules include "interface" exemptions that generally allow those issuers to satisfy the requirements in British Columbia by complying with the requirements of another province ("province" includes the territories), filing in British Columbia what they file in that province, and providing investors here with what they provide investors in that province.

In order to rely on the interface exemptions an issuer must comply with the requirements in another province. This means that an issuer that is exempted from complying with those requirements would generally not be able to rely on the interfaces. However, the Commission is considering excluding from this requirement certain blanket exemptions in other provinces that are broadly available to a class of issuers.

The interfaces require compliance with home jurisdiction requirements. If an issuer makes a good faith effort to comply with home jurisdiction requirements, Commission staff are unlikely to bring forward an enforcement case for breach of the interface provision. A plaintiff using the civil remedies provisions in the legislation would have to prove both causation and damages. The issuer is also entitled to a number of protections against abusive litigation (see Part VII, Section C of this Guide).

Scope The interface exemptions for issuers generally apply to filing and disclosure requirements under the legislation. They do not extend to the prohibitions against wrongful conduct or the civil liability regime found in the Act (see Part III, Section C and Parts V and VII of this Guide).

The Rules contain these interface exemptions for issuers:

- accounting principles and auditing standards under other Canadian securities laws (Rules, s. 15)
- independence of directors under other Canadian securities laws (Rules, s. 17(b))
- audit committee requirements in other provinces (Rules, s. 20)
- exempt trades under other Canadian securities laws (Rules, s. 76)
- exempt trade by securityholder in another province (Rules, s. 77(1)(j))
- filings by eligible institutional investors (Rules, s. 89(a)(iii))
- exempt offerings occurring in British Columbia and another province (Rules, s. 90)

- prospectus offerings in British Columbia and another province (Rules, s. 96)
- financial statement requirements for prospectus offerings in British Columbia and another province (Rules, s. 102)
- requirements for offerings in British Columbia and another province under an offering memorandum (Rules, s. 111)
- reports of exempt trades (Rules, s. 113)
- periodic disclosure (Rules, s. 143)
- timely disclosure (Rules, s. 146)
- insider reporting (Rules, s. 152(1))
- list of insiders (Rules, s. 152(2))
- eligible institutional investor alternative monthly reporting (Rules, s. 154)
- personal information forms (Rules, s. 155(4))

The Rules also contain exemptions for British Columbia issuers subject to designated SEC requirements. Among other things, these Rules require these issuers to file in British Columbia the documents they file with the SEC. This includes documents either filed or furnished under US law.

Exceptions There are no interface exemptions for:

- the requirement to prepare disclosure documents in plain language (Rules, ss. 91,144 and 147 and BCI 62-502, s. 24)
- the requirement to file copies of documents you send to securityholders or file with other regulators (Rules, s. 156)

The Commission recognizes that it may be difficult for issuers to comply with some of the form requirements in other jurisdictions, and at the same time meet the plain language requirement. It is not the Commission's intention to force issuers to re-write documents that comply with the requirements of another jurisdiction. If the issuer is qualified to use the interface exemption for filing a disclosure document, and the document complies with the requirements in the other jurisdiction, the issuer may file the document in British Columbia in the same form it uses in the other jurisdiction. The Commission does, however, expect issuers to be mindful of plain language principles and to use plain language in their disclosure documents to the extent it is practical for them to do so. See Part VI, Section A of this Guide for more information on plain language.

CMA offerings Section 18(3) of the Act is an exemption from the prospectus requirement for issuers whose continuous disclosure is up to date. The effect of this exemption is that once an issuer is a *public issuer*, it need not file a prospectus to do a public offering. This offering regime, called the Continuous Market Access system (CMA), is described in more detail in Part II, Section A-3 of this Guide.

Even if a public issuer is relying on the interface exemptions to comply with British Columbia regulatory requirements, it can offer securities in British Columbia using the CMA system. The only exceptions are when the issuer is:

- relying on a designated exemption to not file an AIF (Rules, s. 117)
- making an offering in British Columbia and another province and the Commission is the issuer's principal regulator under National Policy 43-201 *Mutual Reliance Review System for Prospectuses and Annual Information Forms* (Rules, s. 118)
- making an offering in the United States and British Columbia under the multijurisdictional disclosure system and British Columbia is the review jurisdiction for that offering (Rules, s. 119)

B ISSUERS THAT ARE INVESTMENT FUNDS

Investment funds, like other issuers, are generally subject to the provisions of the Act and Rules. These include the investor remedies regime (Act, Part 10; Rules, Part 12), the provisions relating to market participant conduct (Act, Part 6) and plain language requirements (for funds, in BCI 81-509, s. 3). We have issued separate guidance that describes how our legislation, together with national rules and policies, applies to investment funds.

C FOREIGN ISSUERS

In British Columbia there are exemptions for certain foreign issuers, their securityholders and those making a takeover bid for or soliciting proxies from securityholders of a foreign issuer. These exemptions are contained in BC Instrument 71-502 *Exemptions for Foreign Market Participants*. See Part VIII of this Guide for more details.

II. Raising Capital

This Part deals with public offerings and private placements of securities by issuers (other than *mutual funds* – see Part I, Section B). The public offerings section describes how to go public if you are not yet a public issuer and how to do subsequent offerings after you become one. The private placements section describes how to raise capital, whether or not you are a public issuer.

Part VIII of this Guide describes the special rules for *foreign issuers* (BCI 71-502, s. 1) that offer securities to investors resident in British Columbia.

A PUBLIC OFFERINGS

To do a public offering, you must be a *public issuer*. (If you were a reporting issuer in British Columbia on the date the former Act was repealed, you automatically became a public issuer.)

1. Becoming a Public Issuer

There are several ways to become a public issuer (Act, s. 1). You can:

- file a prospectus
- if you are a reporting issuer or the equivalent in another province, file a notice
- become listed on the TSX Venture Exchange
- complete a takeover bid, reverse takeover, *business combination* or other reorganization involving an exchange of securities with an existing public issuer
- be designated as a public issuer by the Commission

(a) Filing a prospectus

The most common means of becoming a public issuer is to file a prospectus that is receipted by the Commission (Act, s. 18(1)).

The process An issuer that wants to become a public issuer this way does so by preparing a prospectus using Form 41-901F/51-905F *Prospectus/Annual Information Form*. You can find this form and instructions for completing it on the Commission website at **www.bcsc.bc.ca**.

In most cases, an issuer becoming a public issuer by filing a prospectus is doing so in connection with its initial public offering (IPO), but you can become a public issuer by filing a prospectus whether or not you are doing an offering at the same time. (The requirement described below to retain an *underwriter* or *due-diligence provider* applies regardless.)

You must file your prospectus with the Commission through SEDAR. The prospectus is not effective until the Commission issues a receipt for it.

You are responsible for ensuring that your prospectus is complete and discloses in plain language all *material information*. (If it does not, you are exposed to civil liability and administrative sanctions.)

Before issuing a receipt Commission staff will review your prospectus and provide comments to the issuer. Once you resolve any staff concerns, the Commission will issue a receipt for the prospectus if to do so is in the public interest.

The role of Commission staff is not to redraft your document, but to focus on the primary public interest issues associated with the prospectus filing, such as any past conduct of the issuer or its *officers*, *directors* or *significant securityholders* that makes them unfit to participate in the public market.

Draft of prospectus We encourage you to file a draft of your prospectus on SEDAR before filing it in final form. The draft can take the form of a preliminary prospectus. Filing a draft will ensure that any staff concerns are resolved before the final prospectus is filed and expedite the issuance of a receipt. Issuers that do not file a draft could face considerable delays in obtaining a receipt. If you plan to pre-market your securities while your prospectus is being reviewed, filing a draft on SEDAR will also ensure that your underwriters and potential investors have access to the same information.

To expedite the review process your draft prospectus should be as complete as possible. It should contain all the information required by Form 41-901F/51-905F other than information, such as pricing, that is unknown at the time of filing. If other information is omitted Commission staff may not begin reviewing the draft until the missing information is supplied. The audit report on the financial statements in your draft prospectus may be unsigned. If so, you should file with your draft prospectus a comfort letter from the auditor prepared in accordance with Handbook requirements.

Issuance of receipt The Commission considers many factors in deciding whether it is in the public interest to issue a receipt. In some cases, we may require you to provide additional information or materials to allow us to make this decision.

The following are the most likely to raise public interest concerns:

- the issuer has significantly failed to comply with our requirements
- the past conduct of the issuer or its officers, directors or significant securityholders makes them unfit to be in the public markets — for example, one of these individuals has a history of bankruptcy or fails the criminal records check

- the issuer's officers and directors do not have the knowledge and expertise necessary to run a public company

We will also be concerned about any transaction involving the issuer that appears abusive or to have involved non-arm's length parties.

If the issuer cannot satisfy concerns raised by staff, we may refuse to issue a receipt. However, we will not do so without giving you an opportunity to be heard (Act, s. 21(2)).

While your prospectus is being reviewed you and your selling agent may conduct pre-marketing activities for your IPO as long as you meet the requirements in section 157 of the Rules relating to advertising (see Part III, Section D). However, until the Commission issues a receipt for your prospectus you cannot accept subscriptions. Once you resolve any staff comments, you finalize the prospectus and file it through SEDAR. The Commission will formally receipt the prospectus. You are now a public issuer and can proceed with your offering.

Financial statements Financial statements must be prepared in accordance with Canadian GAAP, audits and audit reports must comply with Canadian GAAS, and audit reports must be prepared and signed by those legally authorized to sign audit reports and subject to the requirements of the CPAB (Rules, ss. 9, 10 and 12). *SEC issuers* may provide financial statements and auditors' reports that comply with SEC requirements (Rules, s. 16). See Part III, Section A-2 of this Guide regarding reservations in an auditor's report.

The financial statements must disclose the reporting currency if it is not the Canadian dollar and the measurement currency if it is different from the reporting currency (Rules, s. 13).

Your prospectus must include audited annual financial statements with up to three years of comparative information (Rules, ss. 98 and 99), and unaudited comparative financial statements for the issuer's most recent interim period (Rules, s. 100) unless the results for the most recent interim period are included in the annual financial statements (Rules, s. 100(3)).

Despite the requirement that your financial statements must be prepared in accordance with Canadian GAAP, your comparative interim financial statements need not include three month comparative statements if they include year-to-date comparative statements.

The receipt for your prospectus will be evidence that the Commission has varied the Canadian GAAP requirement, as it is permitted to do under section 154 of the Act.

Financial statements – special situations If the issuer acquired its primary business within three years before the prospectus, you must include financial statements of the business before the acquisition so that three years of information is provided (Rules, s. 101(1)). If the issuer was formed as a result of a business combination or other reorganization within three years before the prospectus, you must include the financial statements of the person that carried on the

issuer's primary business before the reorganization so that three years of information is provided (Rules, s. 101(2)).

If the prospectus discloses a business combination that will be accounted for as a reverse takeover, the relevant financial statements are those of the entity whose business will be the ongoing business, if the offering is conditional on successful completion of the reverse takeover. If the offering is not conditional on successful completion of the reverse takeover, it is likely that the financial statements for both entities are material and should be included in the prospectus.

In some cases, including pro forma financial statements in your prospectus may be the most meaningful way to disclose material information about an acquisition or other reorganization (see Part III, Section A-3 of this Guide).

Auditor's consent You must file a consent from the auditor whose report is included in your prospectus (Rules, s. 11). You do not need to file the consent as a separate document if the consent is included in your prospectus.

Post-receipt pricing We will generally not issue a receipt for an IPO prospectus that excludes information about the price of the securities offered. Without this information, your disclosure about the anticipated proceeds of the offering and the intended use of those proceeds will be incomplete. Since a new public issuer does not have a continuous disclosure record, this lack of pricing and proceeds information means that purchasers would not have sufficient information about the issuer to make an informed investment decision.

For offerings after the IPO, a prospectus is not required under the CMA system, so the issue does not arise.

Delivery In carrying out your offering, you do not have to deliver the prospectus to a purchaser or prospective purchaser unless the purchaser requests it (Rules, s. 94). Part VI, Section B of this Guide discusses electronic delivery of documents.

Amendments If, after you file your prospectus and before the Commission issues a receipt for it, new material information arises, you will need to file an updated prospectus. Once the Commission has issued a receipt for your prospectus, you are a public issuer and you will disclose new material information by press release, as discussed in Part III, Section B below. If you provide a copy of your prospectus to a person after a receipt has been issued, to avoid making a misrepresentation you should also provide copies of any news releases that you have filed disclosing new material information.

Lapse of prospectus You cannot sell securities under the prospectus more than one year and 20 days after the date of the prospectus (Rules, s. 95), unless you are then entitled to rely on the CMA exemption in section 18(3) of the Act. If you cannot use CMA and want to continue

selling securities under your prospectus, you should file an updated prospectus sufficiently in advance of the lapse date to permit the updated prospectus to be reviewed and receipted.

Alternative forms, exemptions and variations We will accept various alternative documents as a prospectus instead of Form 41-901F/51-905F:

- an issuer filing a prospectus in another province can use a form of prospectus that complies with the requirements of that province, such as the Ontario long form or the short form under NI 44-101
- *SEC issuers* may use an offering or registration document that meets SEC requirements
- an issuer that is participating in a share exchange takeover bid or a business combination in British Columbia or another Canadian jurisdiction can file the takeover bid or information circular as its prospectus
- an issuer that has some characteristics of a *mutual fund* may use the simplified prospectus and AIF prescribed for mutual funds under National Instrument 81-101 *Mutual Fund Prospectus Disclosure*, with appropriate modifications.
- an issuer that is subject to the laws of a *designated foreign jurisdiction* (the UK, Australia or the US if listed on the NYSE, AMEX or NASDAQ) and satisfies other specified criteria may file an offering or registration document from one of those jurisdictions as its prospectus – see Part VIII of this Guide for more information about these issuers' filing options

These documents are still subject to the requirement that all material information about the issuer be disclosed, and they must be receipted by the Commission before the issuer becomes a public issuer (Act, ss. 20 and 18).

The Commission may vary a prospectus form requirement or rule or exempt an issuer from a prospectus requirement (Act, ss. 154 and 151). If the Commission issues a receipt for the issuer's prospectus, this receipt will also be evidence of any variation or exemption the issuer requests in connection with the prospectus filing. You should request any exemption in writing, either in a pre-filing application, or in the cover letter accompanying your prospectus. A pre-filing application is the better alternative if your request raises issues that may be difficult to resolve.

(b) Notice by Canadian reporting issuer

An issuer that is subject to continuous disclosure requirements in another province can become a public issuer by filing a notice in Form 44-901F/81-904F *Notice by Canadian Reporting Issuer to Become Public Issuer/Mutual Fund* (Act, s. 19(1)). If you are in compliance with the securities requirements of the jurisdiction of your principal regulator, we will issue a receipt immediately. If not, we will review the notice for public interest concerns before issuing a receipt (Act, s. 21(1)).

Once the Commission formally receipts your notice, you are a public issuer and subject to British Columbia's continuous disclosure requirements (subject to the interface exemptions described in Part I, Section A of this Guide). If for some reason staff intend to recommend that the Commission refuse to receipt your notice, the Commission will give you an opportunity to be heard (Act, s. 21(2)).

(c) Becoming listed on TSX Venture Exchange

An issuer that has had its securities listed on the TSX Venture Exchange at any time since the Act came into force is a public issuer. An issuer that becomes listed on the TSX Venture Exchange after the Act comes into force must file a notice disclosing that it has become a public issuer (Rules, s. 135(1)).

(d) Share exchange with public issuer

An issuer that completes a takeover bid, reverse takeover, business combination or other reorganization with a public issuer involving an exchange of securities becomes a public issuer and must file a notice (Rules, s. 135(1)). On the date the transaction is completed, the new public entity will become a public issuer and therefore subject to continuous disclosure requirements under the legislation, including the obligation to disclose as soon as practicable any material information about the new public entity that has not been previously disclosed (Act, s. 23). The new public issuer will be able to rely on the AIF of its predecessor, updated through news releases disclosing material information about the new public entity.

(e) Designation as a public issuer

An issuer may apply to the Commission for an order designating the issuer to be a public issuer (Act, s. 152). An order will generally only be granted to an issuer that has been the equivalent of a public issuer for at least one year in another jurisdiction that has reporting requirements similar to those under the legislation. An application for a designation order should include:

- the jurisdiction where the issuer is incorporated or organized
- the jurisdictions where the issuer has reporting obligations under securities laws and the periods of time it has been reporting
- the stock exchanges or trading or quotation systems on which the issuer's securities are traded or quoted
- the reason the issuer is applying to become a public issuer

In addition to any other conditions the Commission may impose, the designation order will usually require the issuer to file its continuous disclosure documents for the preceding 12 months or, if the documents have been filed on an electronic filing system of the foreign regulator that provides Internet access, instructions on how to access the documents.

2. Underwriters and Due-Diligence Providers

The requirement You must retain an *underwriter* or *due-diligence provider* to provide services in connection with the prospectus you file to become a public issuer, whether or not you are offering securities (Rules, s. 93(1)). The underwriter or due-diligence provider requirement exists to ensure that an independent third party conducts a review of the issuer's business, affairs and securities before the issuer goes public. However, there may be situations when an underwriter or due-diligence provider is not necessary and we will evidence an exemption from this requirement by issuing a receipt for the prospectus.

A registered *dealer* that trades a security in connection with a public offering can act as an underwriter.

A due-diligence provider can be a registered *adviser*, or another competent third party that has been approved by the Commission. The issuer must obtain from the due-diligence provider a written opinion that there are reasonable grounds to believe that the prospectus contains all material information about the issuer (Rules, s. 93(2)).

Both underwriters and due-diligence providers are subject to civil liability for *misrepresentations* in the issuer's prospectus if there is a public offering — see Part VII of this Guide. An underwriter or due diligence provider is not required for subsequent offerings.

Non-dealer/adviser due-diligence providers Those interested in acting as due-diligence providers must apply to the Commission for approval (Act, s.1). The application can be in connection with a specific issuer or offering or a class of issuers, or can be unlimited.

There are no prescribed proficiency or experience requirements for due-diligence providers that are not registered advisers but these factors are relevant:

- the applicant's knowledge, skills and experience relevant to the business of the issuer or class of issuers that the applicant intends to review
- the applicant's professional qualifications or equivalent proficiencies
- the tools and systems the applicant intends to use in its review
- the applicant's criteria for ensuring its independence from the issuer

3. Offerings After the IPO

No prospectus required Subject to some exceptions discussed below, once an issuer becomes a public issuer, it can sell its securities to residents of British Columbia at any time under the CMA exemption, so long as its continuous disclosure record is up to date and includes a current AIF (Act, s. 18(3)). If a new public issuer has been created as a result of a business combination or other reorganization, the new public issuer can rely on the AIF filed by the predecessor issuer.

This exemption allows a public issuer to raise new capital from the public without filing a prospectus. This is because, under the continuous disclosure requirements (see Part III of this

Guide), all material information about all public issuers is available to the market at all times (Act, s. 23). Therefore, if the issuer is in compliance with its continuous disclosure obligations, there is no new material information about the issuer to be disclosed at the time of the offering.

A significant securityholder of a public issuer may also sell securities under the CMA exemption. However, because of the common law due diligence defence, the securityholder does not have to know that the issuer is in compliance with its continuous disclosure obligations. Instead, the securityholder must have no reasonable grounds to believe that the issuer's continuous disclosure record is inaccurate.

News release It is likely that you will have to file a news release when you make a CMA offering. Under the continuous disclosure requirements, a public issuer must issue and file a news release whenever new material information about the issuer becomes available (Act, s. 23).

It is up to you to decide whether the offering is material. However, almost all offerings of securities to the public, and most non-public offerings, are likely to be material. In addition to the fact that the offering is taking place, these are the items that are likely to be material in connection with an offering (and therefore would be covered in the news release):

- the terms of the offering (for example, the number of securities being offered, the price, whether there is a minimum or maximum offering and the duration of the offering)
- the features of the securities
- how you intend to use the proceeds of the offering
- how you will deal with subscription money received from purchasers if the issuer does not complete any minimum offering
- whether there is an underwriter or due-diligence provider and, if so, the significant features of your agreement with the underwriter or due-diligence provider

Not all details about the offering will be material information. If there is non-material information that you would like to disclose publicly, but do not want to include in your news release, you may file supplementary disclosure including this information, either separately or as part of an offering document.

Completion or abandonment of an offering is also likely to be material information, which would require another news release

Resource issuers Resource issuers should keep in mind that a news release announcing an offering where money is being spent on a property material to the issuer will trigger the requirement to prepare and file a technical report using Form 43-101F1 *Technical Report* (Rules, s. 115 (1)). This is not required if the issuer previously filed a technical report on the property and the report is still current (Rules, s. 115 (2)). The report does not have to be an independent report under

NI 43-101 because no new material information should be disclosed in the news release announcing a CMA offering. The fact that an issuer has new resources or reserves, or a 100% increase in resources or reserves, would be announced in a separate news release. That news release would trigger an independent technical report under National Instrument 43-101 *Standards of Disclosure for Mineral Projects*.

Offering documents Under the CMA exemption from the requirement to file a prospectus, offering documents are optional. There is no prescribed form, so if you choose to use one, you can present information about the offering in a form that best suits the market for your securities. However, you must ensure that the information in an offering document is balanced, not misleading, and in plain language (Act, s. 28; Rules, s. 91). If the document contains a misrepresentation, the issuer and its directors and officers will be subject to enforcement action and, along with any underwriter or due-diligence provider, to civil liability (see Part VII of this Guide). This means that if new material information about the issuer arises during an offering that makes statements in the offering document misleading, you will have to communicate the new information to investors who are relying on the offering document.

The offering document is not the place to disclose material information for the first time. As described under Part III, Section B of this Guide, new material information must be disclosed by issuing and filing a news release (Act, s. 23). The disclosure in an offering document should all be based on information that is already in your continuous disclosure record, except for details about the offering itself.

If you deliver a copy of an offering document to a purchaser, you must file a copy of it within 10 days of the first time you do so (Rules, s. 114). There will normally not be any review of that document by Commission staff at the time of filing, but it may be reviewed later as part of a continuous disclosure review.

Registration exemption — risk acknowledgement There is a corresponding registration exemption available for public issuers wishing to sell securities to the public without involving a dealer (Rules, s. 62). This exemption allows a public issuer to sell securities under CMA so long as the issuer receives a signed risk acknowledgement in the required form from each purchaser. You are also subject to the general requirements described under Part V of this Guide.

Purchasers under a risk acknowledgement have no special remedies, other than the right of action for damages for a misrepresentation discussed in Part VII of this Guide.

You can find the required form of risk acknowledgment, Form 45-909F *Risk Acknowledgment – Public Issuers*, on the Commission website at **www.bcsc.bc.ca**

The exceptions There are five exceptions to a public issuer's ability to use the CMA exemption:

- if you do a prospectus offering in more than one province and the Commission is your principal regulator under National Policy 43-201 *Mutual Reliance Review System for Prospectuses and Annual Information Forms* (Rules, s. 118)
- if you do an offering into the United States under the multijurisdictional disclosure system and British Columbia is your review jurisdiction (Rules, s.119)
- if you rely on exemptions from filing an AIF (Rules, s. 117). This would include venture issuers that take advantage of the relief from filing an AIF under National Instrument 51-102 *Continuous Disclosure Obligations* and non-redeemable funds that rely on an exemption from filing an AIF in BC Instrument 81-510. For these issuers and others that have not filed a current AIF, the Rules also impose a 4-month hold period on securities issued under exemptions for which there are hold periods in other jurisdictions (Rules, ss. 85 and 88(2)). (The Commission plans to issue a blanket order that will reduce the hold period under section 85 of the Rules to 4 months.) The CMA system is therefore available as a package: if the issuer files an AIF and complies with continuous disclosure requirements, it can use the system to offer securities without a prospectus or hold period. Issuers that do not file an AIF must use a prospectus, or an exemption that will generally have a hold period
- if you are a foreign issuer that is not an SEC issuer listed on the New York Stock Exchange, American Stock Exchange or NASDAQ Stock Market, and you rely on exemptions from continuous disclosure requirements (Rules, s. 120)
- if you are a foreign issuer otherwise entitled to use CMA but are filing a prospectus in more than one province and the Commission is your principal regulator

Report of offering A public issuer that offers securities under the CMA exemption must provide details of the offering in a report filed with the Commission (Rules, s. 116(1)). You can find the required form of report, Form 45-911F *Report of Section 18(3) Offering by Public Issuer*, on the Commission website at **www.bcsc.bc.ca**

The deadlines for filing these reports are in the Rules (Rules, s. 116(2)). For information on how to file them, see the Commission website.

4. Offerings in Other Jurisdictions

MRRS If the Commission is your principal regulator under NP 43-201 and you file a prospectus here, either for your IPO or a subsequent offering, Commission staff will apply the prospectus review procedures described in NP 43-201, and issue any required MRRS decision documents, for the type of prospectus being filed (long form, short form, SHELF or PREP). If you file a long form prospectus, Commission staff will apply the jurisdiction's requirements that you followed in preparing your prospectus.

MJDS If you wish to file a prospectus for an offering in the United States under SEC rules to accommodate the multi-jurisdictional disclosure system, you may choose British Columbia as your review jurisdiction and Commission staff will apply the applicable national prospectus review procedures.

5. Offerings Through the Internet

If you publish a document that offers or solicits trades of securities on a website, you may be trading securities in British Columbia, and therefore subject to the Act and Rules, unless:

- the document clearly identifies the jurisdictions where the offering or solicitation is being made (and those jurisdictions do not include British Columbia)
- you take reasonable steps not to sell the securities to anyone resident in British Columbia

A foreign securities regulator may view publishing a document on a website to be an offering of securities in the foreign jurisdiction. You should be aware of any relevant guidelines on this issue. You can find information about the guidelines of various foreign regulators in a 1998 report of the Technical Committee of the International Organization of Securities Commissions (IOSCO) entitled *Securities Activity on the Internet*. That report is on the IOSCO website at **www.iosco.org**

B PRIVATE PLACEMENTS

A private placement is an offering under a prospectus exemption that may be done without a *dealer* involved. Normally, trades in securities can be done only through a dealer who is registered under the Act (Act, s.14). However, there are exemptions from this requirement that allow issuers to do offerings without a dealer. In most cases, parallel offering exemptions also exist (Rules, s. 84). (Offering exemptions for securityholders are found in sections 87 to 89 of the Rules.)

The exemptions There are exemptions from both the registration and prospectus requirements for 11 types of private placements:

1. offerings to those with a close connection to the issuer, called exempt purchasers
2. offerings to acquire assets
3. offerings to creditors to settle a debt
4. offerings in exchange for corporate finance services
5. offerings to those who are sophisticated or who can bear the risk of loss, called accredited investors
6. offerings for $150,000 or more
7. offerings made using an offering memorandum

8. offerings under the CMA exemption with a risk acknowledgement
9. offerings made under the *Employee Investment Act*
10. offerings to existing securityholders
11. offerings by significant securityholders

There is no required form of offering document for sales made under these exemptions except for private placements under an offering memorandum.

If you are a *private issuer*, see Part II, Section D of this Guide.

Purchasers' rights For some offerings described in this Section, purchasers have a right of action for damages for misrepresentations (which include material omissions) in your disclosure. Even where there is no required form of disclosure, the prohibitions against misrepresentations and unfair practices apply. See Part V of this Guide.

1. Offerings to Exempt Purchasers

The exemption You can sell securities to exempt purchasers without the involvement of a dealer (Rules, s. 54).

Exempt purchasers are those who, at the time they invest, have a close relationship with the issuer, or someone associated with the issuer, or whose association with the issuer justifies the exemption. The list of exempt purchasers includes (Rules, s. 54):

- *directors*, *officers* and *significant securityholders* of the issuer and their *family members*, close personal friends and close business associates
- the issuer's employees and consultants and their *spouses*

Family members, close personal friends, and close business associates A family member is a spouse, parent, grandparent, sibling, child or grandchild (Act, s.1).

A person's close personal friends are people who know the person well enough, and long enough, to assess the person's trustworthiness and capability. Individuals are not close personal friends just because they:

- belong to the same organization, association, religious group or other community
- are clients or former clients
- are friends of friends

A person's close business associates are people who know the person well enough, and long enough, through business dealings and observation, to assess their trustworthiness and capability. Individuals are not close business associates just because they:

- work for the same employer

- have been introduced so they can be persuaded to purchase securities
- are clients or former clients
- are business associates of business associates

Large numbers of trades to purported close personal friends and close business associates may trigger a review by Commission staff to verify that all purchasers in fact meet the criteria described above. Advertising for purchasers in these categories is a strong indication that the criteria are not present.

Employees and consultants A person is not a consultant unless the person is working under a written contract (Rules, s. 48). In making trades to employees and consultants, you have to make sure that the circumstances surrounding the trade would not be an unfair practice (see Part V of this Guide). For example, tying a person's employment or engagement with the issuer to their agreeing to purchase securities could constitute an unfair practice.

2. Offerings to Acquire Assets

You can issue securities to a person as consideration for an interest in a mining, petroleum or natural gas property, or for property that has a fair value of at least $150,000, without the involvement of a dealer. The person you issue the securities to must be acquiring them as principal (Rules, s. 55).

3. Offerings to Creditors to Settle a Debt

You can issue securities to a creditor to settle or partially settle a debt without the involvement of a dealer, so long as the creditor is acquiring the securities as principal (Rules, s. 56).

4. Offerings in Exchange for Corporate Finance Services

You can issue securities as consideration for corporate finance services without the involvement of a dealer. The person you issue the securities to must be acquiring them as principal (Rules, s. 57).

The types of services that would normally be permitted under this exemption are:

- providng a loan or a loan guarantee
- the following services:
  - arranging a loan or loan guarantee
  - helping the issuer to acquire or dispose of assets, except proceeds of a distribution
  - helping the issuer to make an offering of its securities to persons not resident in British Columbia

Paying an insider or associate for these services is generally not appropriate as directors and officers should be performing these functions as part of their regular services for the issuer.

5. Offerings to Accredited Investors

You can sell securities to accredited investors without the involvement of a dealer (Rules, s. 59).

Accredited investors are those who, at the time they invest, are sophisticated or can bear the risk of loss. The list of accredited investors includes (Rules, s. 1):

- institutional investors such as *Canadian financial institutions*, and the Business Development Bank of Canada
- registered dealers and *advisers* and their *representatives*
- registered charities, if they receive advice from a registered adviser
- wealthy individuals (those holding cash and securities worth more than $1 million, net assets worth more than $5 million or with a family income over $300,000 annually)
- companies, partnerships and trusts with net assets of at least $5 million
- *public mutual funds* and other investment funds that satisfy certain criteria
- those designated by the Commission as accredited investors

A person can apply to be designated an accredited investor in all circumstances, or for a specific transaction. These are the factors that the Commission will consider in deciding whether or not to designate a person as an accredited investor:

- the person's financial sophistication or ability to withstand financial loss, or both
- the person's relationship with the issuer and its management
- the person's ability to bargain on an equal footing with the issuer

6. Offerings of At Least $150,000

You can sell securities to a purchaser for $150,000 or more without the involvement of a dealer (Rules, s. 60).

Each purchaser under this exemption must purchase securities having a total cost of $150,000 or more. You may accept only cash or a promise to pay in payment for these securities. Where payment includes a promise to pay, the present value of that payment must exceed $150,000 and the purchaser must be certain or virtually certain of making the later payments. Your governing corporate legislation may also include rules about payment for shares.

Each purchaser must also be purchasing as principal, which means that you cannot sell to a group of purchasers who have combined their resources into one entity to qualify for the $150,000 threshold.

7. Offerings Under the Offering Memorandum Exemption

The exemption You can sell securities under an offering memorandum without the involvement of a dealer (Rules, s. 61).

In addition to the general requirements described under Part V of this Guide, you must prepare disclosure in the required form (Rules, s. 105(1)).

If you are a public issuer, a reporting issuer or the equivalent in another province, or publicly traded, the required forms are those required under Multilateral Instrument 45-103 *Capital Raising Exemptions*. (Public issuers may prefer to use the CMA exemption coupled with the risk acknowledgement exemption discussed in the next Section (Act, s. 18(3); Rules, s. 62)). All other issuers must use Form 45-907F *Offering Memorandum* and Form 45-908F *Risk Acknowledgement – Non Public Issuers*. There are supplemental instructions to help those offering real estate securities or syndicated mortgages to complete the form.

Conditions of the exemption These are the main conditions you must meet to use this exemption:

- you must prepare an offering memorandum in the required form
- you must deliver the offering memorandum to each purchaser before he or she purchases (Rules, s. 61(1)(a))
- you must obtain a signed risk acknowledgement in the required form (Rules, s. 61(1)(b))
- you must file the offering memorandum with the Commission within 10 days of delivering it to the first purchaser (Rules, s. 105(4)); if you are a public issuer, it will become part of your *continuous disclosure record*

The information in the offering memorandum must be current when it is delivered to a purchaser and when the issuer accepts the purchaser's agreement to purchase the security; if the information changes, the issuer must disclose the changed information to the purchaser in writing before completing the purchase (Rules, s. 105(3)).

You should keep both the signed risk acknowledgement and the offering memorandum for six years – that is the period in which the Commission may take action against you for any contraventions of the legislation in connection with the offering (Act, s. 174). You will want to be in a position to demonstrate that an exemption was available and that you met your obligations. If you fail to keep these documents, you will be in the position of trying to demonstrate compliance without any supporting evidence.

Purchasers' rights Purchasers of securities of an issuer that is not a public or reporting (or equivalent) issuer, or publicly traded, under an offering memorandum have two unique rights:

1. Two Day Cancellation Right Each purchaser has two days in which to cancel the purchase (Act, s. 98); you have to hold their money in trust for those two days (Rules, s. 61(2)). How you hold purchasers' money for the two day cancellation period is up to you; common methods are to simply hold the cheque uncashed for that period, or to deposit the funds to a segregated account. However, whether you hold the funds directly or through an intermediary, it is still

your responsibility to make sure the purchaser's funds are returned if he or she cancels the purchase. To cancel the purchase, a purchaser must deliver a notice to you by midnight on the second business day after signing the agreement (Act, s. 98).

2. Rescission for Misrepresentation In addition to this cancellation right, a purchaser of securities of this type of issuer has a right to rescind (cancel) the purchase agreement within 180 days if the offering memorandum contains a *misrepresentation* (Act, s. 97). This "rescission" right is available regardless of whether the purchaser was relying on the misrepresentation when deciding whether to purchase the securities (Act, s. 106). If a purchaser sues for rescission, he or she cannot also claim damages.

All purchasers of securities under an offering memorandum have the right of action for damages discussed in Part VII of this Guide.

8. CMA Offerings Using a Risk Acknowledgement

The CMA exemption in section 18(3) of the Act allows a public issuer to offer securities to the public without filing a prospectus so long as the issuer has filed all continuous disclosure materials under the Act and Rules, including an AIF.

As described in Part II, Section A-3 of this Guide, there is a corresponding registration exemption available to allow public issuers to sell securities to the public without involving a dealer (Rules, s. 62). A public issuer can sell securities to any investor so long as the issuer receives a signed risk acknowledgement in the required form from each purchaser. You can find the required form of risk acknowledgment (Form 45-909F) on the Commission website at **www.bcsc.bc.ca**

Investors under a risk acknowledgement have no special remedies, other than the right of action for damages for a misrepresentation discussed in Part VII of this Guide.

9. Offerings Under the *Employee Investment Act*

You can sell securities under the *Employee Investment Act* exemption without the involvement of a dealer (Rules, s. 63).

This exemption allows an employee venture capital corporation registered under the *Employee Investment Act* with a restricted constitution to sell its securities to an employee of an eligible business or an *affiliate* of an eligible business. A restricted constitution is one that limits the employee venture capital corporation to investing in a particular eligible business and affiliates of that business. The exemption also allows an employee to trade to another employee of that business. Employee venture capital corporation and eligible business are defined in the *Employee Investment Act*.

This exemption is not available for publicly traded venture capital investment funds.

10. Offerings to Existing Securityholders

You can sell securities to your existing securityholders without the involvement of a dealer (Rules, s. 51(1)).

The existing securityholder must be a *bona fide* shareholder, not one who the issuer should reasonably have known acquired securities of the issuer solely for the purpose of relying on the exemption.

If the sale is not part of a general offering to your securityholders, or the securityholder is not exercising a previously issued right, there is an exception to this exemption if you are not a public issuer. In those circumstances, you cannot use this exemption to sell to securityholders who acquired your securities solely under the offering memorandum exemption, or solely through the exemption for trades under legal authority in section 73 of the Rules.

11. Offerings by Significant Securityholders

A significant securityholder – one holding 10% or more of any class of the issuer's voting securities, or who is able to affect materially the control of the issuer, alone or with another person – can sell securities to certain persons without the involvement of a dealer (Rules, s. 58).

12. General Requirements for Using the Exemptions

You are responsible for making sure that the conditions for using an exemption are met. For exemptions that are based on attributes of the purchaser, you may rely on purchasers' claims that they possess the required attributes, so long as you have no reasonable grounds to believe that the claims are false. We recommend you document the fact that you have met the conditions for using an exemption.

Acting on behalf of an issuer The Act defines trade to include "any act in furtherance" of a trade, which includes advertisements, solicitations and negotiations. Anyone who acts on your behalf in connection with an offering is therefore trading, but they can rely on the same exemption you have. If the person is a registered dealer, there is a specific exemption for trades made to or through a dealer (Rules, s. 47).

Other aspects of the Act still apply The exemptions are only from the trading and offering requirements, not from the operation of the Act generally. Therefore, if your securities have been cease traded or you have filed a confidential material information report (Rules, s. 145(5)), you cannot sell securities using the exemptions. Similarly, no one whose trading rights are restricted through registration conditions or a Commission order can trade using the exemptions.

Resale restrictions There are no restrictions on the resale of securities in British Columbia of *public issuers* or reporting issuers (or equivalents) in other provinces, unless:

- the issuer has not filed an AIF for its most recent year (a successor issuer can rely on an AIF filed by its predecessor issuer). This restriction would apply even if the issuer is a venture issuer that relies on the relief from filing an AIF under NI 51-102 or is a non-redeemable fund that relies on the AIF exemption in BC Instrument 81-510 (Rules, s. 117). For these issuers as well as issuers that are in default of their AIF filing obligations, the Rules impose a hold period on securities issued under exemptions for which there are hold periods in other jurisdictions (Rules, ss. 85 and 88(2)). (The Commission plans to issue a blanket order that will reduce the hold period under section 85 of the Rules to 4 months)
- the person selling owns more than 20% of the issuer's securities and the issuer is not qualified to use the CMA exemption

Securityholders of issuers that are not public issuers or reporting issuers (or equivalents) in other provinces can only sell their securities under the exemptions available to them under the Rules (Rules, ss. 77 and 87). For example, a securityholder of one of these issuers could sell his or her securities to an accredited investor.

Significant securityholders of issuers that are not public issuers or reporting issuers (or equivalents) in other provinces may sell their securities under the exemptions in the Rules available to all securityholders, or under a specific exemption available to significant securityholders (Rules, s. 58).

If you are not a public issuer entitled to rely on the CMA exemption in section 18(3) of the Act, you must take steps to ensure that purchasers know there are restrictions on their ability to sell their securities (Rules, s. 77(2)). There are several ways to do this, including printing the resale restrictions on your share certificates or setting the restrictions out in a subscription agreement.

Report of exempt offering An issuer that sells securities under the following exemptions must file a report of the offering in Form 45-910F *Report of Exempt Offering* (Rules, s. 112(1)):

- to a dealer as consideration for services
- to a securityholder of the issuer
- to an exempt purchaser, other than a director, officer or significant securityholder of the issuer or an employee or consultant of the issuer or an affiliate
- to acquire assets
- to an accredited investor
- for $150,000 or more
- under an offering memorandum, or
- under a similar exemption in another province

You can find this form on the Commission website at **www.bcsc.bc.ca**

The deadlines for filing these reports are in the Rules (Rules, s. 112(2)). For information on how to file them, see the Commission website.

13. Offerings in Other Jurisdictions

Offering from British Columbia If you sell securities to a person in another jurisdiction, the laws of both British Columbia and the other jurisdiction generally apply. In almost all cases, British Columbia will have a registration exemption that corresponds to the registration exemptions elsewhere in Canada. (In any event, if the trade takes place in both British Columbia and another Canadian jurisdiction and the trade is exempt under the laws of the other Canadian jurisdiction, it is also exempt in British Columbia (Rules, ss. 76 and 90)).

Whether the trade is taking place in British Columbia as well as in the other jurisdiction will depend on the facts of each case. However, in the following circumstances, it is likely that British Columbia laws apply to the trade:

- your head office or the residences of your key officers or directors are located in British Columbia
- your business is administered from, and your operations are conducted in, British Columbia
- you actively advertise or solicit purchasers for your securities from British Columbia

Indirect offering into British Columbia Where an offering is not made from British Columbia but the issuer has a significant connection with the province or its capital markets, the issuer should take precautions to avoid having the securities subsequently resold into British Columbia in a manner that would be considered an offering by the issuer. The following factors may indicate that a significant connection exists:

- a majority of trading in the issuer's securities is in British Columbia
- the issuer is a public issuer in British Columbia, or incorporated or organized there
- a significant portion of the issuer's assets are located in British Columbia
- a significant portion of the issuer's revenues are derived from British Columbia

Resale restrictions If the issuer is not a public issuer or is not entitled to use the CMA exemption, you will also want to take steps to ensure the securities remain outside British Columbia for the period that a purchaser in British Columbia would have to hold the security.

C NOT-FOR-PROFIT ISSUERS

If you are a not-for-profit issuer, you can sell securities. To be entitled to the exemption, no part of your earnings can accrue to securityholders and no commission can be paid. You will be required to provide an information statement to purchasers (Rules, s. 53). Like other issuers, you must not make a misrepresentation in your information statement (Act, s. 28).

D PRIVATE ISSUERS

A *private issuer* has 50 or fewer securityholders (not counting current or former employees), is not listed, quoted, or traded on any *marketplace*, and has only issued its securities under certain specified exemptions (Rules, s. 1). These exemptions include those for trades to existing securityholders, trades to exempt purchasers, trades to *accredited investors*, and trades for $150,000. Private issuers are not required to file exempt distribution reports (Rules, s. 112).

An exemption available only to private issuers is the exemption for trades that are not part of an offering to the public (Rules, s. 52). Whether an offering is an offering to the public will depend on the particular circumstances, but court decisions have interpreted this exemption fairly narrowly.

A private issuer will cease to be a private issuer, and therefore no longer be able to rely on this exemption or the exemption from filing distribution reports, if it issues securities other than under the specified exemptions available to it under the Rules.

III. Continuous Disclosure Requirements

A public issuer's *continuous disclosure record* must contain all *material information* about its business and affairs at all times (Act, s. 23). There are two types of continuous disclosure used to keep the continuous disclosure record up to date: periodic disclosure and timely disclosure.

Periodic disclosure is documents filed at regular intervals in accordance with the *regulations* (Act, s. 22). (Regulations include the Rules, and any other national or local rules or instruments that the Commission adopts.) Examples of periodic disclosure documents are AIFs, interim and annual financial statements, interim and annual MD&A, and proxy materials.

Timely disclosure refers to the public dissemination from time to time of material information — information that could reasonably be expected to affect the value or market price of any or all of the issuer's securities.

An issuer's continuous disclosure record includes all information that an issuer files or is required to file under Part 4 (Offerings) and Part 5 (Continuous Disclosure) of the Act and Rules.

A PERIODIC DISCLOSURE

1. Annual Information Form

Filing requirement All *public issuers*, except *venture issuers* who rely on the relief from filing an AIF under NI 51-102, must file an AIF each year (Rules s. 123).

A venture issuer is a public issuer not listed or quoted on any of the TSX, an exchange registered as a national securities exchange in the US, NASDAQ (including the SmallCap market and the National Market) or a *marketplace* outside of Canada and the US, other than one designated by the Commission (Rules, s. 122). (The Commission has designated the Freiverkehr der FWB Frankfurter Wertpapierbörse (Regulated Unofficial Market of the Frankfurt Stock Exchange) and the Freiverkehr der Börse Berlin-Bremen (Unofficial Regulated Market of the Berlin-Bremen Stock Exchange) for this purpose.) Thus, you are a venture issuer if you are listed only on the TSXV, CNQ, or OTC BB, or any combination of those marketplaces, or if you are not listed anywhere. If you are interlisted on TSXV and TSX, you are not a venture issuer.

The required form of AIF is 41-901F/51-905F *Prospectus/Annual Information Form* or, for issuers that are subject to the continuous disclosure requirements of another province, 51-102F2 *Annual Information Form*. You can find these forms and instructions on the Commission website at **www.bcsc.bc.ca**

CMA exemption Under the CMA system, a public issuer whose *continuous disclosure record* is up to date and includes a current AIF can issue securities without filing a prospectus (Act, s. 18(3)).

Thus, the CMA exemption is not available to venture issuers that take advantage of the AIF relief under NI 51-102 (Rules, s. 117). There is also a 4-month hold period on securities of issuers that have not filed an AIF, if the securities were acquired under exemptions for which there are hold periods in other jurisdictions (Rules, ss. 85 and 88(2)). (The Commission plans to issue a blanket order reducing the hold period in section 85 of the Rules to 4 months.)

The CMA system is therefore available as a package: if the issuer files an AIF and complies with continuous disclosure requirements, it can use the system to offer securities without a prospectus or hold period. Issuers that do not file an AIF must use a prospectus, or an exemption that will generally have a hold period.

See Part II, Section A-3 above for more details about the post-IPO offering process and the other exceptions to the CMA exemption.

All material information The AIF must include all *material information* about the issuer (Rules, s. 123(1)) and other information required by the form for it to be a complete picture of the issuer and its business. The British Columbia form of AIF is the same as the British Columbia prospectus form, except that Part 5 of that form, which requires disclosure about any offering the issuer is making under a prospectus, does not apply to an AIF. Instructions to the AIF form contain comprehensive guidance on how to complete it. There are also supplemental instructions to help non-redeemable investment funds complete the form.

Failure to file AIF If an issuer that is required to file an AIF fails to do so, it will be named on the Commission's defaulting issuers' list; if appropriate, the issuer or its management may also be subject to a cease trade order (CTO). (Part III, Section A-10 of this Guide contains more information about what will happen if you fail to file any required disclosure document.)

The Commission will not lift the CTO until the issuer files all documents it is required to file (completed in accordance with the Act and Rules) and pays any required fees (Act, s. 44(2)). In certain circumstances, the Commission will also apply a public interest test in determining whether to lift the CTO. If the issuer is a resource issuer, it will also have to file a technical report (National Instrument 43-101, s. 4.2).

Alternative documents We will accept various alternative documents as an AIF instead of Form 41-901F/51-905F:

- *SEC issuers* may use documents prepared in accordance with the 10-K, 10-KSB or 20-F forms
- an issuer that is participating in a share exchange takeover bid or a *business combination* in British Columbia or another Canadian jurisdiction can file the takeover bid or information circular as its AIF
- an issuer that is subject to the laws of a designated foreign jurisdiction (the UK, Australia or the US if listed on the NYSE, AMEX or NASDAQ) and meets other specified criteria may

file an offering or registration document, an AIF or an annual disclosure document from one of those jurisdictions as its AIF. See Part VIII of this Guide for more information about these issuers' filing options.

2. Financial Statement Disclosure

Accounting principles and auditing standards Financial statements must be prepared in accordance with *Canadian GAAP*, audits and audit reports must comply with *Canadian GAAS*, and audit reports must be prepared and signed by those legally authorized in Canada to sign audit reports (Rules, ss. 9, 10 and 12). Auditors must be, as of the date of the report, subject to requirements of the Canadian Public Accountability Board (Rules, s. 12(2)).

SEC issuers may use US GAAP and have audits done in accordance with the standards of the Public Company Accounting Oversight Board (United States) (Rules, s. 16).

Reservations in an auditor's report Financial statements accompanied by an auditor's report containing a reservation of opinion that is due to a departure from Canadian GAAP, or US GAAP in the case of an SEC issuer, will not comply with the Rules on accounting principles.

Issuers should be sensitive to the risks of imposing restrictions on the scope of an auditor's examination that may result in other kinds of reservations, or an otherwise incomplete report. If the auditor's report does not present a true and complete picture of the issuer's financial position, the issuer could face liability for misrepresentation.

US GAAP and GAAS There is no requirement for SEC issuers that use US GAAP to provide a reconciliation to Canadian GAAP. However, if an issuer changes from Canadian GAAP to US GAAP during its financial year, it may be appropriate to restate its interim financial statements for interim periods during that year. The issuer must disclose sufficient information to enable an investor to appreciate the impact of the change on the issuer to the extent this is material information. Providing restated interim financial statements for periods prior to the change, and a reconciliation to Canadian GAAP for periods after the change, may be meaningful ways to disclose material information about the change.

Disclosure of foreign currencies Issuers must disclose the reporting currency in their financial statements if that currency is not in Canadian dollars (Rules, s. 13(1)). They must also disclose if the measurement currency is different from the reporting currency (Rules, s. 13(2)).

Board approvals The Rules require Board approval of an issuer's financial statements (Rules, s. 14(2)). Your governing corporate legislation may also include rules in this area.

These approval requirements do not override your obligation to make timely disclosure of material information as described below. All new material information must be disclosed as soon as practicable.

Filing deadlines If you are not a venture issuer, you have to file your audited annual financial statements within 90 days of your year-end, and your interim statements within 45 days of the end of the period (Rules, ss. 127(a) and 129(a)).

If you are a venture issuer, you have to file your audited annual financial statements within 120 days of your year-end, and your interim statements within 60 days of the end of the period (Rules, ss. 127(b) and 129(b)).

Despite these deadlines, you must file your financial statements (and related MD&A) no later than the date you file them in another jurisdiction (Rules, s.130).

If filing deadlines are not met, late filing fees apply and the issuer may be subject to other sanctions (see Part III, Section A-10 of this Guide on failure to file).

Comparative statements In all cases, you must file comparative financial statements (Rules, ss. 126 and 128(1)).

Financial statements after becoming public issuer Once you become a public issuer, the first financial statements you must file will be those that cover any annual or interim periods that have passed since the periods covered by the statements in your prospectus (or the alternative disclosure you used to become a public issuer) (Rules, s. 131(1)).

If the statements are for periods that ended before you became a public issuer, you must file the statements within 20 days of becoming a public issuer if they are annual statements, or 10 days if they are interims. If the statements are for periods that ended after you became a public issuer, the usual filing deadlines apply (Rules, s. 131(2)).

For interim periods that ended before you became a public issuer, you do not need to provide comparative information on the same basis as information for your most recent interim period if it is not practicable to do so, or if the information would not be useful to a reasonable investor (Rules, s. 131(3)).

The objective is to ensure that your continuous disclosure record includes financial statements for all periods, starting with the earliest period covered in your prospectus. For this reason, the 20-day and 10-day filing requirements do not apply to a reporting issuer (or equivalent) in another province that becomes a public issuer by filing a notice because that issuer's financial statements will have already been filed on SEDAR (Rules, s. 131(4)).

Disclosure of non-GAAP financial measures Issuers may publish numerical measures of an issuer's historical or future financial performance, financial position or cash flow that are not required by GAAP. Disclosing these financial measures is not prohibited and can be useful. However, using non-GAAP financial measures creates the potential for misleading disclosure so you should follow these practices:

- explain the non-GAAP financial measures you have used and your reasons for making disclosure on this basis
- caution readers that the non-GAAP financial measures may not be comparable to similar measures used by other issuers
- provide a reconciliation from the non-GAAP financial measure to the most directly comparable measure calculated in accordance with GAAP
- present the non-GAAP financial measures consistently from period to period, or explain any changes if you do not

Certain issuers such as income trusts may disclose information about distributable cash. While actual cash distributions must be disclosed in the financial statements under GAAP, distributable cash is considered a non-GAAP financial measure.

Canadian GAAP requires issuers to disclose in the financial statements specified information about business segments. Such information is not considered to be a non-GAAP financial measure. However, if the segment information discussed in MD&A or elsewhere has been adjusted in any way from the segment disclosure in the financial statements, the adjusted information is considered a non-GAAP financial measure.

Reverse takeovers and business acquisitions The legislation does not require an issuer to file financial statements of an acquired business for periods completed before the acquisition. One exception is that Canadian GAAP requires the consolidated financial statements following a reverse takeover to be presented as a continuation of the financial statements of the legal subsidiary and to include comparatives for the legal subsidiary.

An issuer involved in a reverse takeover or an acquisition that is material information must disclose sufficient information about both the issuer and the operating business being acquired so that an investor is able to understand the resulting business and its future prospects. Providing financial statements of an acquired business, and pro forma financial statements, may be meaningful ways to disclose material information about the transaction.

If an issuer chooses to file financial statements of an acquired business, the notes to the statements should disclose the accounting principles used to prepare the financial statements (for example Canadian GAAP, US GAAP, or International Financial Reporting Standards).

3. Pro Forma Financial Statements

The purpose of pro forma financial statements is to show the impact of an acquisition, takeover bid, business combination or other reorganization on the issuer by adjusting the issuer's historical financial statements to give effect to the transaction. These statements will be most useful, and least likely to be misleading, if:

- you prepare the pro formas based on the issuer's financial statements, without any adjustments other than those necessary to reflect the transaction, that are based on firm commitments and have financial effects that can be objectively determined
- you use only reasonable assumptions in the preparation of the pro formas and fully describe those assumptions
- if the acquisition is not reflected in the issuer's most recent balance sheet, you prepare the pro forma balance sheet as at the date of the issuer's most recent balance sheet, as if the transaction occurred on that date
- you prepare pro forma income statements for the issuer's most recently completed financial year, and any subsequent interim period, as if the transaction occurred at the beginning of the issuer's most recently completed financial year (except for adjustments related to allocation of the purchase price)
- when you are making adjustments related to allocation of the purchase price, you use the purchase price allocation determined as if the transaction occurred on the date of the issuer's most recent balance sheet
- you explain in notes to the statements how you have dealt with any differences in financial year-ends or reporting periods among the issuers and businesses participating in the transaction

4. Management's Discussion and Analysis

The requirement A public issuer must provide interim and annual MD&A that is related to its financial statements (Rules, s. 124(1)). Venture issuers without significant revenue from operations in their last two years also have to provide a breakdown of certain material expenditures in their financial statements or MD&A (Rules, s. 125).

The Rules require Board approval of a public issuer's MD&A (Rules, s. 14(3)).

MD&A complements and supplements your financial statements. It is a narrative explanation, through the eyes of management, of how your company performed during the period covered by the financial statements, and of your company's financial condition and future prospects. Your MD&A must discuss material information that may not be fully reflected in the financial statements. Some examples are legal proceedings, contingent liabilities, defaults under debt, off-balance sheet financing arrangements or other contractual obligations.

The required form of MD&A is 52-901F *Management's Discussion & Analysis* or, for issuers that are subject to the continuous disclosure requirements of another province, 51-102F1 *Management's Discussion and Analysis*. You can find these forms and instructions on the Commission website at **www.bcsc.bc.ca**

Alternative documents SEC issuers may prepare their MD&A in accordance with US requirements designated by the Commission (Rules, s. 124(3)). The Commission has designated Item 303 of Regulation S-K and Item 303 of Regulation S-B under the 1934 Act for this purpose.

An issuer that is subject to the laws of a designated foreign jurisdiction (the UK, Australia, or the US if listed on the NYSE, Amex or NASDAQ) and satisfies other specified criteria may file MD&A that complies with those laws as their MD&A (BCI 71-502, s. 5(3)). See Part VIII of this Guide for more information about these issuers' filing options.

5. Delivery of Documents

In British Columbia an issuer is required to deliver continuous disclosure documents only on request (except proxy solicitation materials – see Part III, A-9 of this Guide). Your governing corporate legislation may also include rules about delivery of documents.

The requirement If a securityholder requests a copy of an issuer's AIF and the issuer relies on or intends to rely on the CMA exemption in section 18(3) of the Act, the issuer must deliver the AIF, or a prospectus filed in place of an AIF, "as soon as practicable" to the securityholder at no charge (Rules, s. 132(1)). (Where the securityholder is an objecting beneficial owner under National Instrument 54-101 *Communication with Beneficial Owners of Securities of a Reporting Issuer*, the issuer need only pay the costs of delivering the documents to the intermediary.) An issuer must also deliver on request copies of its annual and interim financial statements and the related MD&A (Rules, s. 130(1)). These delivery requirements are limited to AIFs, financial statements and MD&A filed within two years of the request (Rules, s. 132(2)).

This does not mean the issuer must send the document before it is filed, and in fact it would be giving selective disclosure if it did. However, the issuer should also not wait to send it until the next group mailing.

If a securityholder requests only financial statements or MD&A, the issuer must send both.

Disclosure Public issuers must also disclose in their AIFs and information circulars that copies of these documents are available on request and how to obtain them. These disclosure requirements are found in the forms themselves.

6. Change of Auditor

If a public issuer terminates an auditor's appointment or the auditor resigns or declines to stand for re-appointment (other than as required by law or because of a takeover bid, business combination or other reorganization), the issuer must disclose that change in a news release (Rules, s. 133 (1)(c)). The issuer must also disclose in a news release the appointment of the new auditor (Rules, s. 133(2)). The issuer must advise its former and new auditors in writing of the reasons for the

change and file that report. If either auditor disagrees with the issuer's description of those reasons or believes that relevant information wasn't disclosed, the auditor must advise the Commission (Rules, s. 133 (3)).

SEC issuers are exempt from these requirements if they comply with the SEC's requirements for changes in auditor, file the SEC documents with the Commission, and disclose the changes in a news release (Rules, s. 134).

7. Change of Status

An issuer that does any of the following must disclose it in a notice filed with the Commission (Rules, s. 135):

- becomes a public issuer, other than by filing a prospectus or a notice under s. 19 of the Act or applying to be designated a public issuer
- beases to be a public issuer, other than by filing a notice under section 158 of the Rules or applying to be designated not a public issuer under section 152(1) of the Act
- becomes or ceases to be a venture issuer
- changes its name

The notice must be in Form 51-906F *Notice of Change of Status*. You can find this form on the Commission website at **www.bcsc.bc.ca**

8. Change in Year-End

A public issuer that changes its financial year-end by more than 14 days must disclose this and the transition periods in a notice that it files with the Commission (Rules, s. 136 (1)). The notice must be in Form 51-907F *Notice of Change in Year-End*. You can find this form on the Commission website at **www.bcsc.bc.ca**

The filing deadlines for this notice are tied to the deadlines for your financial statements (Rules, s. 136 (2)).

An issuer does not have to file this notice if it has already disclosed its new year end in a change of status notice filed under section 135 of the Rules.

An issuer's transition year must be no more than 15 months and the first interim period must be no more than four months (Rules, s. 134(3)).

Again, SEC issuers may satisfy these requirements by complying with SEC requirements and filing their SEC documents with the Commission (Rules, s. 138).

9. Proxy Solicitation Materials

The requirement When a public issuer sends notice of a meeting to securityholders, it must include a form of proxy for each securityholder entitled to vote at the meeting (Rules, s. 139(1)). The form of proxy must include information about how the securityholder can exercise his or her voting rights and may confer discretionary authority to vote on the securityholder's behalf in certain circumstances (Rules, s. 139).

Anyone soliciting proxies in connection with that meeting, whether the issuer or another person, must also send an information circular to each securityholder whose proxy is solicited (Rules, s. 139(2)). The circular includes information about the issuer, management and the matters to be dealt with at the meeting. You can find the required form of circular, Form 54-902F *Information Circular*, on the Commission website at **www.bcsc.bc.ca**. For issuers that are subject to the continuous disclosure requirements of another province, the required form is 51-102F5 *Information Circular*.

Exemptions Not every person who provides information in connection with a securityholders' meeting must comply with the formal proxy solicitation requirements in the Rules. For example, the following are not soliciting proxies (Rules, s. 139(3)):

- a person performing an administrative act or professional service on behalf of a person soliciting a proxy
- a person acting as a intermediary
- a securityholder making a public announcement under corporate legislation of how he or she intends to vote and why
- a person communicating with securityholders to obtain the number of securities required for a shareholder proposal under corporate legislation

10. Failure to File

Meeting continuous disclosure obligations is a fundamental responsibility of every public issuer, and we take enforcement action against issuers that do not file disclosure as required. An issuer that fails to file a required record will be in default of its filing obligations and placed on the Commission's defaulting issuers' list.

Issuer CTOs If appropriate, the issuer may also be subject to a cease trade order (CTO) (Act, s. 44(1). If a CTO is issued against the issuer, this means no one can trade the issuer's securities until the order is lifted.

The Commission will lift the CTO as soon as practicable after the issuer files all documents it is required to file (completed in accordance with the Act and Rules), pays any required fees and, in

certain circumstances, after the Commission has completed a public interest review (Act, s. 44(2) and (3)).

Management CTOs If the failure to file is foreseeable and will last for a short period, you can apply for a management CTO, which only prohibits insiders from trading — other investors can trade as usual. We will consider granting a management CTO if:

- your business is operating in accordance with its business plan, with a functioning board of directors
- you are not in contravention of any other securities regulatory requirements in any jurisdiction
- the financial statements and any related audit reports will be filed within at least two months of the required filing date, and
- your company's securities are listed and actively traded on a Canadian stock exchange

You can find the details of how to apply on our website at **www.bcsc.bc.ca**

11. Compliance

(a) Continuous disclosure reviews

All issuers are subject to regular continuous disclosure reviews by the Commission to determine if they are in compliance with the legislation (Act, s. 43). The Commission selects issuers for a review primarily using a risk-based approach. However, some issuers are selected randomly to ensure all British Columbia-based issuers are potential candidates for a review.

(b) Orders

The Commission may make various orders if an issuer is not complying with the legislation. For example, we may cease trade an issuer's securities, prohibit a person from acting as a director or officer of an issuer or order that an issuer fix and refile its disclosure. Generally, these orders are made after a hearing (Act, s. 59).

B TIMELY DISCLOSURE

An effective system of securities regulation depends on *public issuers* making complete, accurate and timely disclosure of *material information*.

1. The Disclosure Obligation

News release A public issuer must disclose material information as soon as practicable. You make disclosure by issuing and filing a news release. The news release must contain all material

information about the matter being disclosed (Act, s. 23). The principle an issuer should follow in deciding what to disclose is to disclose sufficient information to enable an investor to understand the nature and relevance of the event, and the significance of its impact on the issuer's business.

If a public issuer's continuous disclosure record does not contain all material information about the issuer, then the issuer must issue and file a news release to bring the record current so that it does contain all material information. Similarly, if there is material information in the issuer's continuous disclosure record that has changed – and the change is material – the issuer must issue and file a news release.

Supplemental information In addition to the news release, you may file supplemental information if you wish, so long as all the material information is in the news release.

2. Meaning of Material Information

Market impact test Material information is information relating to the business, operations or securities of an issuer that would reasonably be expected to significantly affect the value or market price of the issuer or its securities. When you are determining whether something would significantly affect the value or market price of the issuer or its securities, you should assume that the market is behaving rationally.

Examples of information that may be material include:

- takeover bids, business acquisitions, *business combinations*, and other reorganizations
- important acquisitions or dispositions of properties, securities or other assets
- offering securities and the completion or abandonment of the offering
- redeeming securities
- the development of new products or business lines
- winning or losing significant contracts
- significant changes in your business plan
- changes in key personnel
- restatements of financial statements or MD&A

Lists like this are not exhaustive and do not substitute for your exercising your own judgment.

The materiality of information varies from one issuer to another according to the issuer's assets, earnings and capitalization, the nature of the issuer's operations and many other factors. For example, an agreement by a major mining company to option or continue work on a property held by a junior exploration company is likely to be material information for the junior, but may well not be material information for the major. Similarly, an agreement by a large manufacturer to sponsor or participate in the development of a nascent technology is likely to be material information for the issuer developing the technology, but not for the manufacturer.

Business acquisitions and combinations An issuer involved in an acquisition or business combination that is material information must disclose sufficient information to enable an investor to appreciate the impact of the acquisition on the issuer and its business. In some cases, disclosing historical financial statements of the acquired business may be the most meaningful way to disclose material information about the acquisition. Providing pro forma financial statements may also be helpful in disclosing the impact of the acquisition on the issuer.

Whether financial information about the acquired business is material information depends on several factors, including:

- the size of the operations of the issuer and the business
- the cost of the acquisition
- the resources that will be dedicated to the acquired business

One way of measuring the materiality of the information is to express the assets of or investments in the acquired business as a percentage of the issuer's assets, or the income of the acquired business as a percentage of the issuer's income.

External events The obligation to disclose material information would generally not require you to interpret the impact of external political, economic and social developments on your business, operations and securities. However, you are required to make timely disclosure of external events if the impact is material and the event is not widely known, or affects you differently than other issuers engaged in the same business.

Rumours You need not respond to rumours unless the issuer or its management is perceived by the market as the source of the rumour, or if the rumour involves *inside information* that appears to have leaked.

3. Establishing Material Information

Establishing if and when information is material requires the exercise of judgment; based on the information available to you at the time you are making the decision. To do that, you need to make reasonable inquiry to find out all the relevant information. Issuers are expected to have systems in place for managing disclosure and to monitor those systems for compliance and effectiveness. See Part III, Section C-4 of this Guide.

To determine when information becomes material, you should consider the following factors.

The type of information Is the issuer dealing with a takeover bid, major acquisition, or a restatement of its financial statements? Some information, by its nature, will generally always be material.

Prevailing market conditions Management should take into account the volatility of the issuer's securities in the context of prevailing market conditions. When markets are volatile the disclosure of a variance between previously published earnings projections or research milestones and actual results may have a greater impact on the market price of your securities than when markets are calm. You should consider the issuer's past experiences when determining if an event or new information is material information.

The specific facts Whether information is material will depend on the specific facts of each case. When facts arise that are clearly material, determining whether there is material information is not an issue. However, not all information presents itself all at once; information often evolves and changes over time. When information develops over time through a series of facts, like a business transaction that is being negotiated or results that are received by the issuer piecemeal, it can be difficult to determine when the information comprised by all the facts becomes material information.

For example, when a natural resources issuer is conducting a drilling program and is receiving results as the program proceeds, each analytical result of a drilled interval may not be material until put in context with the results thus far received, or yet to be received. However, depending on the issuer, a single spectacular drill hole or negative drill hole could be material on its own.

Uncertainty of relevant facts The analysis can become more complicated when uncertainty surrounds one or more of the relevant facts. When it is uncertain whether an event will happen, management should consider both the likelihood that the event will happen, and the anticipated impact of the event on the value or market price of the issuer or its securities if it were to happen, to decide whether the materiality threshold has been crossed, and if so, when.

For example, consider the issuer that begins merger discussions and it is reasonable to expect that the merger would significantly affect the value or market price of the issuer or its securities. The issuer might well not be obligated to disclose that initial discussions have begun, particularly if it is far from clear that the merger proposal is commercially attractive to the intended merger partner – the merger may be significant if it were to happen, but that is offset by the low probability of the event at that point in time. However, once negotiations reach the point where there is a real possibility that the merger could happen, the combination of probability and significance would constitute material information, triggering the disclosure obligation. (In this example, the issuer may choose to consider a confidential filing, as described in the next Section.)

4. Timing of Disclosure

As soon as practicable Once you have decided that information is material, you must disclose it as soon as practicable (you cannot defer public disclosure of material information simply by

delaying the *directors*' formal approval of the relevant matter). You will sometimes have to exercise judgment in deciding how soon to make disclosure, particularly in an emerging situation. You must consider the particular circumstances, which include the nature of the material information, other activities of the issuer (like a securities offering), and the likelihood of the information being leaked. The key factor to consider is the objective of the timely disclosure requirement: that all investors have access to current material information.

As soon as practicable includes time for the issuer to review the information and to ascertain its accuracy, relevance and impact on the issuer.

Confidential report The legislation provides that if, in the issuer's reasonable opinion, disclosure of material information would be unduly detrimental to the issuer's interests and the circumstances justifying non-disclosure are temporary, the issuer can fulfill its timely disclosure obligations by filing a confidential report with the Commission detailing the material information and the reasons why disclosure at that time would be unduly detrimental (Rules, s. 145).

For example, if an issuer is in technical default of a material loan but you believe that the lender will waive the default, disclosure of the lender's entitlement to call the loan could lead to an unwarranted loss of confidence in the issuer.

There is no required form for a confidential report of material information, however, a good way to detail the material information would be to prepare the text of the press release that you would have issued had you not opted to file confidentially.

At any point in the confidential filing process Commission staff may notify you that staff considers that the public interest in disclosing the material information outweighs the issuer's interest in keeping it confidential (Rules, s. 145(3)). If you do not disclose the information on receipt of this notice, staff may issue a cease trade order against the issuer until the disclosure is made.

If the issuer knows or should have known that the information has been selectively disclosed, or a reasonable person would believe there is a significant risk that may happen, you must disclose the information within one business day of the disclosure being made or the risk arising in order not to be in breach of the prohibitions against tipping and recommending (Rules, s. 145 (4)).

Once the reason for deferring disclosure of material information has ended, if the information is still material information, the issuer must disclose it. An issuer that has filed a confidential report cannot make an offering of its securities if the undisclosed information is still material, until it generally discloses the information.

Sometimes circumstances change and the information disclosed under the confidential filing process becomes moot or otherwise immaterial. In these cases, the issuer should advise the Commission of this. However, no public disclosure is required.

5. Forward-Looking Information

Disclosure practices An issuer may choose to provide a detailed forecast of future operating results or other types of forward-looking information. Because this type of disclosure has the potential to be misleading, you should follow these practices:

- state clearly that the information is forward-looking, and include appropriate cautionary language about the risks of relying on forward-looking information (these risks are acute for securityholders of issuers with a limited operating history)
- provide information only for a period that information can reasonably be estimated for
- ensure that the assumptions used are reasonable and supportable on an objective basis, for example, not too optimistic or aggressive
- explain the material assumptions used and the factors that may cause actual results to differ materially from the forward-looking information
- monitor the forward-looking information against subsequent events

If forward-looking information you have disclosed becomes misleading as a result of subsequent events (such as, for example, a key assumption becoming unrealistic), you must update it under your timely disclosure obligations if the change is material information. You are also required in your MD&A to discuss any forward-looking information disclosed for a prior period which, in light of intervening events and absent further explanation, may be misleading. In your MD&A it may also be useful to compare your actual operating results to previously disclosed forward-looking information for the relevant period and explain the material differences.

Safe harbour The Act includes a safe harbour for preparers of forward-looking information (Act, s.117). Issuers and management are not liable for misrepresentations in forward-looking information if:

- you identify the information as forward-looking information
- you state the material factors considered and the assumptions used to develop the forward-looking information
- the person making the statements contained in the forward-looking information has a reasonable basis for doing so

Involvement of experts An issuer that chooses to disseminate forward-looking information takes responsibility for its reliability. There is no requirement in the legislation for forward-looking information to be audited; nor is there any requirement for an expert to prepare the information (except in the case of mining or oil and gas disclosure). However, in some cases having an expert prepare, review or audit forward-looking information may improve its quality,

NI 43-101 *Standards of Disclosure for Mineral Projects* requires that all disclosure – forward-looking or otherwise – about mineral projects that contains scientific or technical information must be based

on the report or other information of a qualified person. NI 43-101 also contains rules relating to the disclosure of preliminary assessments (which contain forward-looking information).

NI 51-101 *Standards of Disclosure for Oil and Gas Activities* requires oil and gas issuers to file annual reports disclosing reserves data and other information which is forward-looking. These reports must be evaluated by a qualified reserves evaluator or auditor.

C HANDLING INSIDE INFORMATION

1. Prohibition Against Trading or Disclosing Inside Information

Inside information Our system of securities regulation is based on the premise that all investors have equal access to *material information*.

There will be periods of time when an issuer has material information that it has not publicly disclosed. This may occur because the issuer is taking steps to determine the accuracy, relevance or impact of the information. It may occur because the issuer has determined that disclosure would be detrimental to its interests and the circumstances that justify the non-disclosure are temporary. During this period of time, the information is *inside information*. Inside information is material information that has not been publicly disclosed.

Connected persons The legislation prohibits a *connected person* who has inside information about a *public issuer*, or any other issuer whose securities are publicly traded, from:

- trading in securities of the issuer or entering into an equity monetization transaction in connection with those securities (Act, s. 30(2))
- telling anyone else the inside information ("tipping")(Act, s. 30(3))
- recommending or encouraging another person to trade in those securities (Act, s. 30(4))

A publicly disclosed compensation agreement is not a derivative (Rules, s. 3) and can be entered into even if there is undisclosed material information.

See Part III, Section F-1 of this Guide for information on equity monetization transactions.

Connected persons include (Act, s. 30(1)):

- the public issuer's *insiders*, *officers,* employees, *affiliates* and *associates*
- parties to major transactions with the issuer (and their insiders, officers and employees)
- persons engaged in business with the issuer (and their directors, officers and employees)
- "tippees" — those who acquire inside information from any of these persons, or from any one who they know, or ought reasonably to know, acquired the information from any of these persons

Directors are *insiders* under the legislation. The definition of *director* includes anyone who performs functions on behalf of an issuer similar to a director of a corporation, and would generally include a manager or distributor of a public mutual fund.

2. "Necessary Course of Business" Exception

The exception You may inform another person of undisclosed material information if it is necessary in the course of the issuer's or the person's business (Act, s. 30(3)). This would generally cover communications with:

- vendors, suppliers or strategic partners
- employees, officers, board members and *significant securityholders*
- lenders, legal counsel, auditors, *underwriters* and financial and other professional advisers
- parties to negotiations
- labour unions and industry associations
- government agencies and non-governmental regulators
- credit rating agencies

When it may not apply Generally speaking, it is inappropriate to rely on the necessary course of business exception to disclose inside information to:

- investors under a private placement
- analysts, institutional investors or other market professionals
- the media

We recognize that industry practice and disclosure standards elsewhere in Canada suggest that giving inside information to potential parties to a private placement may be "necessary in the course of business." We do not believe this is a helpful way to think about this exception because it might lead you to think that it is acceptable to sell securities in a private placement on the basis of inside information. This is not correct. Issuers must disclose material information to the market as a whole in a timely manner and, under corporate law, directors must issue securities for fair market value.

The TSX Venture exchange's policies assist public issuers to raise capital under a private placement without the need for issuers to give investors inside information. For example, a capital pool company must disclose information about a potential qualifying transaction as soon as there is an agreement in principle, even if the agreement is conditional on completing a separate financing. Where the exchange determines that the financing is integral to the transaction, it will permit the issuer to reserve a price for the financing based on the market price of the company at the time

it announces the proposed transaction. The company would then be able to negotiate the private placement without having to provide inside information.

Disclosure by tippees Persons who receive information under the "necessary in the course of business" exception are "tippees". If you do disclose material information under this exception, you should make sure those receiving the information understand that they cannot pass the information on to anyone else (other than in the necessary course of business), trade on the information or recommend or encourage another person to trade in your securities, until the information has been generally disclosed. One thing you might do when someone, such as the issuer's professional advisors, underwriter or assay lab, will receive information that may be material is to inquire into the person's policies for confidentiality and prohibitions on trading.

Getting the person who receives the information to sign a confidentiality agreement can be a good practice and may help to safeguard the confidentiality of the information. However, such an agreement does not replace the need for the disclosure to be in the necessary course of business.

3. Areas of Risk

There are some situations in which you are particularly vulnerable to making "selective disclosure" — disclosure of inside information to one person or a small group of persons.

Private communications Selective disclosure can occur at private meetings with analysts, institutional investors or other market professionals, at industry conferences or in various other settings.

Financial information such as sales and profit figures or earnings guidance is often material information. Assay results, results of clinical trials and pending business acquisitions are also often material information. Public issuers should take care not to disclose this type of information to anyone other than in the necessary course of business, until the information is generally disclosed. Even within these constraints there is plenty of scope to hold a useful dialogue about the issuer's current business and prospects.

Partial disclosures You cannot make material information not material by breaking the information into seemingly non-material pieces. At the same time, disclosure of non-material information to analysts is not prohibited, even if this information, when combined with information the analyst has from other sources, helps the analyst complete a "mosaic" of information that, taken together, is inside information.

Analyst reports It is not unusual for analysts to ask the issuer to review earnings estimates that they are preparing, but it is easy to contravene the tipping prohibition if you confirm the estimate or indicate that it is too high or too low, or confirm the analyst's key assumptions.

Even confirming to an analyst information previously made public could contravene the tipping prohibition if a long time has passed since the original disclosure. For example, if you disclosed expected earnings for a quarter near the beginning of the quarter, confirming them privately to the analyst near the end of the quarter may be tipping because it is likely that the confirmation is based on actual performance that has not been generally disclosed.

Distributing an analyst report to people outside the issuer can be construed as a statement by the issuer that the contents of the report are true or the assumptions are reasonable. If you wish to distribute analyst reports, the safer practice is to post all analyst reports on the issuer on your website with an appropriate disclaimer.

If you choose to refer to an analyst report rather than distribute it, you should only provide the analyst's name and the firm he or she works for. If you post a report or the name of an analyst on your website, you should post all reports and the names of all analysts.

Analysts, institutional investors and other market professionals who do receive inside information from a company are tippees. Since the risk of receiving inside information is common for these persons, it makes sense for them to have procedures to help them identify situations where they may have received inside information and to set up guidelines for dealing with inside information.

Websites Websites are an effective way for public issuers to provide information to securityholders, but posting information on a website does not satisfy a public issuer's legal obligation to disclose material information as soon as practicable – the issuer must do that by issuing and filing a news release.

It is very important for a public issuer to ensure that the information on its website is consistent with the information in its continuous disclosure record and does not contain material information that is not in its continuous disclosure record.

To avoid administrative sanctions and civil liability, care should be taken to ensure a public issuer's website does not disclose inside information or contain a misrepresentation.

Chat rooms, bulletin boards and e-mails Avoiding these forums will help protect your company from the liability that could arise from the well-intentioned efforts of employees to correct rumours or defend the company. If your website allows viewers to send you e-mail messages, remember the risk of selective disclosure when responding.

4. Practices to Consider

Compliance system A public issuer's compliance system includes all of the issuer's processes for ensuring that important information comes to the attention of management, determining materiality, disclosing material information in compliance with its legal obligations, and monitoring that system to review and improve its effectiveness.

There are some practices that issuers can adopt to manage disclosure effectively. The practices listed here are fairly comprehensive, and not all of them would make sense for every issuer. Each issuer will have to decide which ones, if any, to adopt, and implement them to suit their own circumstances.

These or similar practices can assist in establishing defences under the legislation should the issuer make a misrepresentation or fail to make timely disclosure. The legislation provides a systems defence against civil liability to an issuer and its directors if the issuer employed a reasonable system to ensure compliance with the legislation, including a process for monitoring the effectiveness of the system (Act, s. 109). The legislation also provides a due diligence defence against civil liability to persons who conduct a reasonable investigation and do not know or have reason to believe there has been a breach of the legislation (Act, ss. 110 and 111).

There are several ways an issuer can monitor the effectiveness of its compliance system. One is to study a particular event that led to the release of material information – assessing how the information was handled, whether the system provided good guidance and whether it was followed – and to make improvements to procedures as warranted.

Corporate disclosure policy A written corporate disclosure policy gives your company a process for managing and disclosing material information. It promotes an understanding of legal requirements among your directors, officers and employees and the role that each person must play in the issuer's compliance system. The process of creating a policy is itself a benefit, because it forces a critical examination of your current disclosure practices.

The objective of your policy is to promote consistent disclosure practices aimed at informative, timely and broadly disseminated disclosure of material information to the market.

One size does not fit all. Your policy should be practical to implement, based on the nature, size and stage of development of the issuer's business. It should be simple enough to be easily understood by those it applies to, and reviewed periodically and whenever there is a change in the law or the issuer's business.

Topics you would generally see in a corporate disclosure policy are:

- the process for determining material information
- when to disclose material information
- maintaining the confidentiality of inside information
- how to deal with unintentional selective disclosure
- managing contact with analysts, institutional investors, other market professionals and the media
- website policy
- policy on forward-looking information

- dealing with rumours
- trading restrictions and quiet periods

If your policy is to be effective, you likely have to assign someone at a senior level to be responsible for developing and implementing your disclosure policy, monitoring its effectiveness and ensuring it is followed.

Board and audit committee reviews Having your board or audit committee review disclosures of earnings guidance and other financial information before they are published will improve their quality.

Issuing your earnings news release concurrently with the filing of your quarterly or annual financial statements provides a complete financial picture to the market.

Limited spokespersons Limiting the number of people who are authorized to speak on behalf of the issuer helps to reduce the risk of unauthorized disclosures and statements that are inconsistent with your continuous disclosure record or things other people speaking for the issuer have said.

Quiet periods and insider trading blackout periods Observing a quarterly quiet period, during which no earnings guidance is issued or comments about the current quarter's operations or expected results are made, is a good practice for avoiding selective disclosure problems. The period would end on the release of the quarterly earnings announcement and can begin as early as the end of the related quarter.

You may also choose to prohibit trading by your insiders, officers and employees during the quiet period as part of a policy that monitors the trading activity of your insiders and ensures they know they cannot trade when they have inside information. Insider trading blackout periods may also be appropriate when exploration results or the result of clinical trials are received but not yet disclosed.

Documenting discussions Documenting discussions on how you handle material information can provide evidence that your system is followed. This could be in the form of minutes that include the names of those present, the nature of the material information and the results of the discussions.

D ADVERTISING

An issuer is free to advertise in British Columbia so long as the advertisement (Rules, s. 157):

- is identified as an advertisement

- states whether the issuer is listed, quoted or traded on a marketplace
- if applicable, states that there are restrictions on the resale of the issuer's securities
- directs the public to the issuer's *continuous disclosure* record and any related offering document and states how the documents can be obtained

1. Avoiding Misrepresentations

To avoid misleading disclosure, you should avoid partial disclosure. For example, if the advertisement mentions a benefit but not the conditions and risks attached to that benefit, a reasonable investor could infer there are none. If the matter was material, this would be a *misrepresentation*.

Another example where care is required is use of words like "preferred", "guaranteed", "liquid" and "indemnity", which have specific meanings and should not be used if those meanings do not apply in the circumstances.

2. Advertising in Other Canadian Jurisdictions

The rules in other Canadian jurisdictions are more restrictive. For example, in other Canadian jurisdictions no one is allowed to advertise over radio or television except during a distribution of securities under a receipted prospectus, and special rules apply. You should be aware of the relevant policies elsewhere in Canada, including National Policy 21 *National Advertising – Warnings*, Interim National Policy 42 *Advertising of Securities on Radio or Television* and National Policy 47-201 *Trading Securities Using the Internet and Other Electronic Means*.

E CORPORATE GOVERNANCE

1. Audit Committee

A *public issuer* must have an audit committee unless its board has less than five members and performs the responsibilities of an audit committee (Rules, ss. 18(1) and (2)). A majority of the members of the committee must be independent (Rules, s. 18(3)). The test for director independence is set out in section 17 of the Rules.

A public issuer must take reasonable steps to ensure that its audit committee is independent of the issuer's management and represents the interests of its securityholders. This obligation does not narrow the general duties that members of the audit committee have as directors. In exercising their audit committee functions, IOSCO requires audit committee members to focus on the interests of securityholders. The issuer must authorize the audit committee to perform all requirements in section 19 of the Rules (Rules, ss. 18(4) and (5).

The audit committee must meet a number of requirements, including:

- overseeing the process of selecting and appointing the external auditor
- overseeing the conduct of the audit,
- determining the terms of reference reporting process
- ensuring that the auditor is independent of management
- considering the appropriateness of audit fees
- meeting with the auditor without management present (Rules, s. 19)

In determining if the auditor is independent, there are a number of standards to refer to including the rules of the local accounting institutes, reports of the International Federation of Accountants and other relevant sources.

SEC issuers who meet the criteria set out in the Rules are exempt from the audit committee requirements in the Rules (Rules, s. 20).

2. Disclosure

Management must provide disclosure about the issuer's governance structure in the information circular. Part III, Section A-9 discusses the proxy solicitation and disclosure requirements under the legislation. Where no information circular is filed in a given year, this disclosure must be made in the issuer's AIF, if the issuer files one.

F INSIDER REPORTING REQUIREMENTS

New *insiders* of *public issuers* must file an insider report within 10 days of becoming an insider, but only if they hold securities of the issuer on that date. If the insider does not own securities at that time, they must report within 10 days of their first trade in the issuer's securities (Act, s. 25; Rules, s. 148(1)). After that, they must report all trades in securities of the public issuer within 10 days (Act, s. 26; Rules, s. 148(2)). They must report trades of all securities that they own or have control over. (A person has control of a security if, among other things, the person directly or indirectly, directs the trading or voting of the security (Act, s. 3).)

A filing fee applies to an insider report that is filed late. An insider that fails to comply with the legislation may also face regulatory or criminal sanctions.

Insiders include *directors, senior officers* and *significant securityholders* of an issuer, and directors and *officers* of the issuer's subsidiaries and significant securityholders if the director or officer's responsibilities routinely provide the individual with access to *inside information* about the issuer. Director includes anyone who performs functions on behalf of an issuer similar to a director of a corporation, and would generally include a promoter.

1. Equity Monetization Transactions

Insiders must report transactions involving *derivatives*. The reporting deadlines are the same as for other trades (discussed above). A derivative is a security whose value is derived from, or materially varies with, the value or market price of the issuer's securities. These include equity monetization arrangements that allow you to receive a cash amount or otherwise capture the economic benefit of your securities without actually trading them. ("Monetization" means converting an asset – for example, a security – into cash.)

A publicly disclosed compensation arrangement is not a derivative and a report is not required. This exclusion applies only to public issuers and other issuers that are publicly traded since insider reporting obligations only apply to public issuers, and civil liability for insider trading, tipping and recommending only applies to issuers that are publicly traded.

You can find comprehensive information about how to report equity monetization transactions and other derivative transactions in CSA Staff Notice 55-308 *Questions on Insider Reporting*, CSA Staff Notice 55-312 *Insider Reporting Guidelines for Certain Derivative Transactions (Equity Monetization)* and other documents found on the Commission website at **www.bcsc.bc.ca**

2. Senior Officers

A senior officer is any officer of an issuer whose responsibilities routinely provide the officer with access to inside information about the issuer. (An officer is anyone who works in an executive capacity, i.e. has the capacity to make significant senior level business decisions relating to the issuer.) Officers who, if they are properly fulfilling the functions associated with their position, have routine access to inside information include the issuer's chief executive officer, chief financial officer, chief operating officer and investor relations officer.

3. Significant Securityholders

A significant securityholder is any person who owns or controls 10% or more of any class of an issuer's voting securities or is able to affect materially the control of that issuer. When calculating the 10% threshold, you should exclude any securities that a *registrant* holds during a public offering.

4. List of Insiders

A public issuer must maintain a list of its directors and senior officers (Rules, s.151). Issuers should note the definitions in the Act of directors and officers. As noted above, directors include all those carrying out the function, whatever title they've been given. Senior officers are not all people in your organization with titles, but only those with routine access to undisclosed material information.

An issuer may satisfy this requirement by complying with the requirements of another province designated by the Commission (Rules, s. 152(2)). The Commission expects to designate National

Instrument 55-101 *Exemption from certain insider reporting requirements* when the proposed amendments come into effect that require issuers to maintain a list of insiders.

5. Reporting Exemptions

Corporate events and automatic purchase plans If your holdings change due to a stock dividend, stock split, consolidation, amalgamation, reorganization, merger or other similar event, you may wait to report the change until the next time you report any other change in your holdings (Rules, s. 149(2)).

Delayed reporting is also permitted in certain cases if your holdings change as a result of the operation of an automatic purchase plan (Rules, s. 148(3) and (4)).

Eligible institutional investors Insiders who are *eligible institutional investors* (these include financial institutions, pension funds, *mutual funds* other than *public mutual funds*, and portfolio managers) may report their trades using an alternative monthly reporting system. Reporting is only required if their holdings exceed certain thresholds as of month end (Rules, s. 153). An insider that is involved in a takeover bid, business combination or reorganization with the issuer cannot rely on this exemption (Rules, s. 153(2)).

Eligible institutional investors and their *affiliates* and *associates* may also have "aggregation relief". In some circumstances, they may treat securities they hold through different business units separately for reporting purposes (Rules, ss. 153(8) and (9)).

6. Form to Use

Subject to some limited exceptions, insiders must file their reports electronically at **www.SEDI.ca**. For instructions on how to do this, and for other specific information on how to fulfill your insider reporting obligations, see the SEDI User Guide, the SEDI Online Help File and CSA Staff Notice 55-308 *Questions on Insider Reporting* and visit the Corporate Finance section of the Commission's website at **www.bcsc.bc.ca**

IV. Exemptions for Corporate Transactions

An issuer can carry out the following transactions without the involvement of a *dealer*:

A BUSINESS COMBINATIONS, REORGANIZATIONS, TAKEOVER BIDS AND WINDINGS UP

An issuer can trade securities to effect a *business combination* or other reorganization, a takeover bid, or the winding up or dissolution of the issuer without the involvement of a *dealer* (Rules, s. 64). Because of the relationship of a securityholder to one of the issuers involved in the transaction, available disclosure about the transaction, or compliance with other statutory or court ordered requirements, securityholders do not need the protection of a *registrant*.

A business combination is an amalgamation, merger, arrangement or similar transaction.

A reorganization includes court-ordered arrangements under corporate law, bankruptcy law, or other acts affecting the rights between entities, securityholders and creditors.

This exemption does not extend to those raising money for the purpose of financing the bid, business combination or reorganization.

B DIVIDENDS IN KIND

An issuer can issue its own securities as dividends using the exemption for trades by an issuer to its existing securityholders (Rules, s. 51). Part II, Section B-10 of this Guide discusses this exemption.

An issuer can also trade securities of a *public issuer* or reporting issuer in another Canadian jurisdiction that it holds to existing securityholders as a dividend in kind without involving a *dealer* (Rules, s. 65). The existing securityholder must be a *bona fide* shareholder, not one who acquired securities of the issuer solely for the purpose of relying on the exemption. This exemption is limited to securities of public and reporting issuers because they are subject to continuous disclosure requirements. Therefore, securityholders have adequate information about the issuer and its securities.

C DIRECT PURCHASE PLANS

Direct purchase plans are designed to allow investors to acquire small quantities of fractional shares of an issuer at a lower cost and are set up primarily as regularly scheduled investments in

securities of an issuer. These plans operate in a manner similar to a dividend reinvestment plan except that investors are not required to own a qualifying share.

A *public issuer* can sell its securities to investors under a direct purchase plan without involving a *dealer*, subject to these conditions (Rules, s. 66):

- only 2% of the issuer's securities can be issued in any one year under the plan
- the administrator of the plan must be a Canadian financial institution, a person authorized in a foreign jurisdiction to carry on banking, insurance or trust business, or a designated entity
- only a registered dealer or *adviser* and their *representatives*, or an equivalent entity in another province, may provide advice on the merits or suitability of securities under the plan

This exemption is limited to securities of public issuers because they are subject to continuous disclosure requirements and therefore there is information in the market about them.

V. Market Participant Conduct

Because the Commission's responsibilities include protecting the integrity of the capital markets and the confidence of investors, the legislation imposes duties on market participants (which include issuers) and prohibits certain conduct. It is important that issuers are aware of these provisions because if one is contravened, the issuer and its management may be subject to regulatory or criminal sanctions. In some cases, contraventions of the legislation can also give rise to actions for civil liability (see Part VII of this Guide).

Any activity in furtherance of a trade is included in the definition of trade which means that advertising, solicitation, negotiations and any other activity to encourage trading of your securities is also caught.

A MANIPULATION AND FRAUD

Any conduct relating to trading in a security that results in manipulation or fraud is prohibited (Act, s. 27).

B MISREPRESENTATIONS

Misrepresentations are prohibited (Act, s. 28). In the *public issuer* context, there are two common situations where this prohibition is relevant. One is the disclosure of information to investors. In this context, you cannot provide untrue material information, omit material information, or omit other information necessary to prevent a statement from being misleading. Disclosure of material information is discussed in this Guide under Part III, Section B.

The second situation is the relationship between a person engaged in promotional activities on behalf of an issuer and an investor. In this context, a misrepresentation is untrue information or the omission of information about something that a reasonable investor would consider important in making a decision to buy or sell a security.

C UNFAIR PRACTICES

A person must not engage in an *unfair practice* (Act, s. 29(1)). This means that high-pressure sales tactics, taking advantage of an investor's physical or mental infirmity, ignorance, illiteracy, age or

lack of sophistication and imposing inequitable terms or conditions on a sale is not permitted (Act, s. 29(2)).

D INSIDER TRADING, TIPPING OR RECOMMENDING

A *connected person* (Act, s. 30(1)) must not trade securities of a public issuer or recommend another person trade the securities, if the person has *inside information* (Act, s. 30(2) and (4)). A connected person also must not tell anyone else the inside information. These prohibitions are discussed in this Guide under Part III, Section C-1.

E FALSE OR MISLEADING STATEMENTS TO COMMISSION

You must not make or give false or misleading statements or information to the Commission or Commission staff (Act, s. 40). This includes any verbal or written statements or information provided in the course of dealings with Commission staff on a filing or application.

F OBSTRUCTION OF JUSTICE

A person must not destroy, conceal or withhold any information or document needed for a hearing, compliance review or investigation (Act, s. 41).

G CONTRAVENTIONS ATTRIBUTABLE TO OTHERS

If an issuer contravenes the legislation or a Commission decision, any employee, *officer*, *director,* agent or *significant securityholder* of the issuer who authorized, permitted or acquiesced in the contravention is also considered to have committed the same contravention (Act, s. 173).

VI. General Requirements and Guidelines for Issuers

A DUTY TO USE PLAIN LANGUAGE

You must prepare the following disclosure documents using plain language (Rules, ss. 91, 144 and 147 and BCI 62-502, s. 24):

- prospectus
- offering memorandum
- AIF
- MD&A
- information circular
- news releases containing material information
- confidential material information reports
- takeover bid and issuer bid materials

This means that the form, style and language of the document must enable an ordinary investor to understand it (Rules, s. 8).

There are many resources available on the subject of plain language, but here are some basic principles for you to consider when preparing these documents:

- use short sentences
- use definite, unambiguous, everyday language
- use the active voice
- avoid superfluous words
- organize the document in clear, concise sections, paragraphs and sentences
- avoid jargon
- do not rely on glossaries and defined terms unless it helps the reader understand the information
- avoid boilerplate wording
- avoid multiple negatives
- avoid technical terms where possible (if you use them, include definitions or explain them)
- use charts and tables where it makes information easer to understand

B ELECTRONIC DELIVERY OF DOCUMENTS

You can deliver documents to investors electronically (other legislation may be relevant).

If you choose electronic delivery, you need to ensure that it is as effective and timely as delivery by more traditional means. If it is not, you will not have met the delivery obligations under the legislation.

Consent If you wish to use electronic delivery, obtaining a consent is a good way to ensure that the recipient knows you will be delivering electronically. A consent can set out how and when electronic delivery will occur – and be evidence that you and the recipient have agreed on the process.

Here are the types of things to consider including in a consent:

- the documents that may be delivered
- how documents will be delivered
- what software and other systems requirements the recipient will need
- how an investor can revoke the consent

Delivery system An effective delivery system will likely have the following elements:

- ease of access by the intended recipients, which includes making the document available for a reasonable period of time, and allowing the recipient to download a printable version of the document
- proof that the document has been delivered or otherwise made available to the person
- protections against the alteration or corruption of documents

Hyperlinks You should use caution when using hyperlinks in a document, unless the hyperlink is to another point in that same document. If you are hyperlinking to information outside the document, you risk incorporating the hyperlinked information into the document and becoming legally responsible for its accuracy. Also, hyperlinks to a separate document raise the question of which documents are being delivered.

Keep in mind that the SEDAR Filer Manual prohibits hyperlinks between documents.

Proxy materials – execution requirements Under the Rules, a proxy must be signed by a securityholder to be valid (Rules, s. 122). Electronic signature is acceptable.

C ADDITIONAL FILING REQUIREMENTS

If a *public issuer* sends a document to its securityholders or files a document with a *marketplace*, *regulatory organization*, government agency, or other entity that regulates trading in securities or administers or enforces securities laws, that contains *material information* not already filed with the Commission, it must file the document with the Commission (Rules, s.156).

D PERSONAL INFORMATION FORMS (PIFS)

A *public issuer* must provide the Commission with personal information about a *director* or *officer* within 30 days of the individual becoming a director or officer (Rules, s. 155 (1)).

If you are listed on a Canadian *marketplace*, you may comply by providing a copy of the PIF or statutory declaration you filed with the marketplace (Rules, s. 155 (3)). If you are not listed on a Canadian marketplace but are qualified to file a short form prospectus under National Instrument 44-101 *Short Form Prospectus Distributions*, you may comply by filing the form in Appendix A to that instrument (Rules, s. 155(4)).

VII. Investor Remedies

A LIABILITY

Rights of action The legislation provides a statutory right of action for damages:

- for a *misrepresentation* by a *public issuer*, against the issuer, its *directors*, *officers*, *significant securityholders*, experts, and in connection with a public offering, against *due-diligence providers* and *underwriters* (Act, s. 90)
- for a misrepresentation by a significant securityholder, against the security holder, its directors, officers, experts and others (Act, s. 91)
- for not making timely disclosure about a public issuer, against the public issuer and its directors, officers and significant securityholders (Act, s. 92)
- for a misrepresentation in a private placement offering memorandum, of an issuer that is not a public issuer or has no securities that are publicly traded against the issuer and its directors and officers (and rescission against the issuer, as well as the right to cancel the contract within two days, without cause) (Act, ss. 96, 97 and 98)
- or rescission, for making an offering without a prospectus or a prospectus exemption, against the person making the offering (Act, s. 99)
- for a misrepresentation in a takeover bid or issuer bid document, against the offeror, its directors, officers, and experts (Act, s. 100)
- for misrepresentation in a takeover bid directors' or officer's circular, against those directors or officers (Act, s. 101)
- rescission and other remedies, for contravening the takeover bid and issuer bid provisions in the legislation, against the person contravening the provision (Act, s. 102)
- or an accounting, for trading, or recommending to others that they trade, on *inside information*, or passing on inside information to others, against the person who does so (Act, ss. 104 and 105)

The rights relating to a misrepresentation by a public issuer or significant securityholder apply to a misrepresentation in any document that is filed or generally disclosed or in an oral statement if general disclosure was reasonably foreseeable (Act, s. 89).

Where a plaintiff brings an action for a misrepresentation, the plaintiff does not have to prove that he or she relied on the misrepresentation in order to sue (Act, s. 106).

Not all investors may sue for a misrepresentation by a public issuer or significant securityholder. The investors who can sue are those who traded securities during the period when the contravention was occurring.

Multijurisdictional offerings In addition, the legislation provides specific rights of action for a misrepresentation in a prospectus where the issuer makes a multijurisdictional offering (Act, s. 126). If an issuer offers securities concurrently in British Columbia and under a prospectus in another Canadian jurisdiction, investors resident in British Columbia have the same rights and remedies as those purchasing under the prospectus in the other jurisdiction (except for the right to cancel the purchase within two days).

B DEFENCES

Besides any defences available at common law, there are defences in the Act for issuers and their *directors* and *officers*.

An issuer and its directors have a defence if the issuer used a reasonable system to ensure compliance with the Act and Rules and a reasonable process for monitoring the effectiveness of that system (Act, s. 109).

There is also a due diligence defence available to all defendants for misrepresentation claims (Act, s. 110). To claim this defence, defendants have to show that after reasonable investigation at the time of the misrepresentation, they had no reasonable grounds to believe there was a misrepresentation. A similar due diligence defence is also available where there has been a failure to disclose (Act, s. 111).

Where the action is for misrepresentation or failure to disclose material information, an issuer, its directors and officers may rely on a confidential filing defence if the procedure described in Part III, Section B-4 of this Guide was followed and other conditions were met.

Other defences of interest to issuers include:

- where there is a misrepresentation in a document, the defendant did not consent to disclosing or filing the document, did not know or have reasonable grounds to believe that it would be disclosed or filed, and objected in writing when it was made publicly available (Act, s. 115)
- where the action is for a misrepresentation, the defendant was reasonably relying on disclosure by another issuer or a public official (Act, s. 118)
- where the action is for a misrepresentation in forward-looking information, the required cautions were included and there was a reasonable basis for the information (Act, s. 117)

Part III, Section B-5 of this Guide contains more information about this defence and forward-looking information generally

- where the action is for misrepresentation based on an expert's opinion or report, the expert consented to the use of the report and other conditions are met (Act, s. 114)

C PROTECTIONS FOR DEFENDANTS

There are also protections for defendants. Two of these protections – court approval to commence an action and court approval of any proposed settlement – are intended to discourage strike suits (Act, ss. 119 and 120).

The legislation also limits the damages payable by issuers and individual defendants and provides for proportionate liability. These provisions do not apply if the defendants acted knowingly or were reckless or willfully blind (Act, s. 121; Rules, s. 168).

VIII. Foreign Issuers

In British Columbia there are exemptions for certain *foreign issuers*, their securityholders and those making a takeover bid for or soliciting proxies from securityholders of a foreign issuer. These exemptions are contained in BC Instrument 71-502 *Exemptions for Foreign Market Participants*.

Issuers based outside Canada A foreign issuer is an issuer whose *principal market* is outside Canada or that is based in a jurisdiction outside Canada (BCI 71-502, s. 1). Generally an issuer is considered to be based outside Canada if:

- the issuer's head office is located, or its *directors* and *key officers* reside, outside Canada (the "mind and management" test)
- the issuer's business is administered from and its operations are conducted outside Canada

For issuers based outside Canada, the principal market is the jurisdiction whose *marketplace* accounts for the largest annual trading volume in the issuer's securities, averaged over its last two financial years.

Issuers based in Canada An issuer based in Canada may use the exemptions for foreign issuers if its principal market is outside Canada (BCI 71-502, s. 1). For Canadian-based issuers, the principal market is outside Canada only if the foreign marketplace had more than 60% of the issuer's annual trading volume over each of its past two financial years. Otherwise the issuer's principal market is the Canadian marketplace where its securities trade.

CMA exemption Issuers that rely on the exemptions available under BCI 71-502, and that are not SEC issuers listed on NYSE, AMEX or NASDAQ, cannot use the CMA exemption (available for *public issuers* in section 18(3) of the Act) (Rules, s. 120). They can use any other exemption available for issuers in British Columbia, including the interface exemptions if they are subject to the requirements in another jurisdiction, or can file a prospectus to offer securities in British Columbia.

A foreign issuer that is otherwise entitled to use CMA cannot do so if the Commission is the principal regulator for a prospectus offering that is made elsewhere in Canada (Rules, s. 120(4)).

BCI 71-502 The only exemptions specifically for foreign issuers are in BCI 71-502. Foreign issuers that cannot rely on these exemptions must comply with the legislation, rely on an exemption available to all issuers or apply for discretionary relief.

A EXEMPT FOREIGN ISSUERS

Offerings and continuous disclosure An *exempt foreign issuer* is a foreign issuer that is a *public issuer* with substantially similar reporting obligations as a public issuer under the laws of a *designated foreign jurisdiction* (the UK, Australia, or the US if listed on the NYSE, AMEX or NASDAQ) (BCI 71-502, s. 1). These issuers can use the documents they prepare under those laws to comply with all requirements under Parts 4 (Offerings) and 5 (Continuous Disclosure) of the legislation. However, if the Commission is the principal regulator for an offering that is made elsewhere in Canada, the relief from Part 4 is not available (BCI 71-502, s. 5(2)).

Accounting principles and auditing standards Exempt foreign issuers do not have to comply with Canadian accounting principles, auditing standards or auditor qualification requirements, if they comply with the requirements of their designated foreign jurisdiction relating to the same subject matter (BCI 71-502, s. 5(4)). Financial statements that comply with International Financial Reporting Standards and International Standards on Auditing are also acceptable.

Corporate governance Exempt foreign issuers are exempt from British Columbia rules relating to corporate governance if they comply with the corporate governance requirements of their designated foreign jurisdiction (BCI 71-502, s. 5(5)).

Becoming a public issuer An issuer subject to the laws of a designated foreign jurisdiction may apply to the Commission for an order designating the issuer to be a public issuer (Act, s. 152). See Part II, Section A-1(e) of this Guide for information on this process.

Notice of reliance If you wish to rely on these exemptions, you must file a notice stating this (BCI 71-502, s. 13(1)). You can find the required form of notice, Form 71-502F7 *Notice by Foreign Issuer of Intention to Rely on BC Instrument 71-502*, on the Commission website at **www.bcsc.bc.ca**

You must submit to the jurisdiction of British Columbia courts and appoint an agent with an address in British Columbia as your agent for service of any process for any proceeding under the Act or relating to the issuer's securities (BCI 71-502, s. 13(2)). The required form of notice includes wording for this purpose.

B LIMITED CONNECTION FOREIGN ISSUERS

A *limited connection foreign issuer* is an issuer that is based outside Canada, or whose principal market is outside Canada, that is not an exempt foreign issuer, and that has less than 10% of its equity securities owned by Canadian residents (BCI 71-502, s. 1).

In determining the percentage of securities owned by Canadian residents, an issuer should:

- use reasonable efforts to identify securities held by a broker, *dealer,* bank, trust company or nominee or any of them for the accounts of Canadian resident customers
- count securities beneficially owned by residents of Canada as reported on reports of beneficial ownership, including insider reports
- assume that a customer is a resident of the jurisdiction in which the nominee has its principal place of business if, after reasonable inquiry, information regarding the jurisdiction of residence of the customer is unavailable

Continuous disclosure These issuers do not have to comply with Part 5 (Continuous Disclosure) of the legislation if they comply with the continuous disclosure requirements in their relevant jurisdiction – i.e. the jurisdiction of the issuer's principal market or, if the issuer is not traded on a market, the jurisdiction of its head office (BCI 71-502, s. 7(2)).

Unlike exempt foreign issuers, limited connection foreign issuers cannot use the offering documents they prepare under the laws of their relevant jurisdiction to comply with Part 4 of the legislation, unless they obtain discretionary relief.

Accounting principles and auditing standards Limited connection foreign issuers do not have to comply with Canadian accounting principles, auditing standards or auditor qualification requirements, if they comply with the requirements of their relevant jurisdiction relating to the same subject matter (BCI 71-502, s. 7(3)). Financial statements that comply with International Financial Reporting Standards and International Standards on Auditing are also acceptable.

Corporate governance Limited connection foreign issuers are exempt from British Columbia rules relating to corporate governance if they comply with the corporate governance requirements of their relevant jurisdiction (BCI 71-502, s. 7(4)).

Notice of reliance If you wish to rely on these exemptions, you must file a notice stating this. You can find the required form of notice, Form 71-502F7 *Notice by Foreign Issuer of Intention to Rely on BC Instrument 71-502*, on the Commission website at **www.bcsc.bc.ca** (BCI 71-502, s. 13(1)).

C CONDITIONS FOR USING THE FOREIGN ISSUER EXEMPTIONS

Issuers who use these exemptions must comply with various requirements, including the following:

- exempt foreign issuers relying on the exemptions from Part 4 must:

- apply the securities laws in the foreign jurisdiction for the benefit of British Columbia purchasers as if they were residents of the foreign jurisdiction (BCI 71-502, s. 5(1)(a) and (b)). Securities laws include the requirements of any *marketplace* that the issuer is subject to in that jurisdiction
- file any offering documents sent to British Columbia purchasers (BCI 71-502, s. 5(1)(c))

- exempt and limited connection foreign issuers relying on the exemptions from Part 5 must file a notice in the required form on SEDAR, and either their continuous disclosure documents or a statement explaining where investors will find the documents on the foreign regulator's electronic filing system (BCI 71-502, ss. 5(3)(b) and 7(2)(b)). You can find the required form of notice, Form 71-502F3 *Notice by Foreign Issuer - Continuous Disclosure,* on the Commission website at **www.bcsc.bc.ca**

Change in status An exempt foreign issuer or limited connection foreign issuer must file a notice if it does any of the following (BCI 71-502, s. 14):

- changes its name
- changes its foreign issuer category
- changes its designated foreign jurisdiction (exempt foreign issuers only)
- changes its relevant jurisdiction (limited connection foreign issuers only)
- ceases to rely on the foreign issuer exemptions

Civil liability All foreign *public issuers* and their *directors* and *officers* are subject to civil liability in British Columbia based on British Columbia rules, like any other public issuer.

D ADDITIONAL FILING REQUIREMENTS

If an exempt foreign issuer or a limited connection foreign issuer that is a *public issuer* sends a document to its securityholders or files a document with a *marketplace*, *regulatory organization*, government agency, or other entity that regulates trading in securities or administers or enforces securities laws, that contains *material information* not already filed with the Commission, it must file the document with the Commission. Alternatively, the issuer may file a notice indicating that the document is available on an electronic filing system of the foreign regulator, with instructions on how to locate the document. The requirements for this filing are set out in sections 11 and 12 of BCI 71-502.

E TAKEOVER BIDS

A person making a takeover bid for an exempt foreign issuer or a limited connection foreign issuer does not have to comply with British Columbia takeover bid requirements if it:

- follows the laws of the jurisdiction of the foreign issuer as if the takeover bid were being made in that jurisdiction
- applies the foreign laws for the benefit of securityholders resident in British Columbia as if they were residents of the foreign jurisdiction
- files a notice in the required form and the foreign takeover bid documents or, if the documents are on an electronic filing system of the foreign regulator, a statement explaining how to access them (BCI 71-502, ss. 5(7) and 7(6)). You can find the required form of notice, Form 71-502F4 *Notice by Person Making Takeover Bid for Foreign Issuer,* on the Commission website at **www.bcsc.bc.ca**

F PROXY SOLICITATION

A person soliciting proxies from the securityholders of an exempt foreign issuer or limited connection foreign issuer does not have to comply with British Columbia proxy solicitation requirements if it:

- follows the laws of the jurisdiction of the foreign issuer
- applies the foreign laws for the benefit of securityholders in British Columbia as if they were residents of the foreign jurisdiction
- files a notice in the required form and the foreign proxy solicitation documents (or, if the documents are on an electronic filing system of the foreign regulator, a statement explaining how to access them) (BCI 71-502, ss. 5(8) and 7(7)). You can find the required form of notice, Form 71-502F5 *Notice by Person Soliciting Proxies from Securityholders of Foreign Issuer*, on the Commission website at **www.bcsc.bc.ca**

G INSIDER REPORTING

A securityholder of an exempt foreign issuer or a limited connection foreign issuer does not have to comply with British Columbia insider reporting requirements if the securityholder complies with the corresponding requirements in the jurisdiction of the foreign issuer (BCI 71-502, ss. 5(6) and 7(5)).

H SENDING DOCUMENTS TO CANADIAN SECURITYHOLDERS

Foreign issuers who wish to communicate with their securityholders should be aware that, in order to reach the beneficial owners of their securities, they will need to pay the fees of intermediaries and depositaries. We refer you to National Instrument 54-101 *Communication with Beneficial Owners of Securities of a Reporting Issuer*.

I LANGUAGE

If a document that is filed under a foreign issuer exemption is not in English, it must be accompanied by an English translation (BCI 71-502, s. 10).

IX. Leaving the System

If you have 50 or fewer security holders (both debt and equity), not including current or former employees, and your securities are not traded through a *marketplace*, you may surrender your *public issuer* status by filing a notice (Rules, s. 158). You will cease to be a public issuer on the date specified in your notice or, if you do not specify a date, the date you file your notice.

You may file the notice by fax. The fax number is listed in the "Contact" section of the Commission's website at **www.bcsc.bc.ca**. We will acknowledge receipt of the notice. The acknowledgement is proof that you have filed the notice. If you do not receive an acknowledgement, you should telephone us. The telephone number is also listed in the "Contact" section of our website.

If you do not fit these criteria but wish to surrender your public issuer status, you can apply to be designated not to be a public issuer (Act, s. 152(1)). This application must include reasons why the issuer should no longer be a public issuer.

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Fax: 604.899.6506, Outside the Greater Vancouver area: Tel: 1.800.373.6393 (BC and Alberta only), E-mail: inquiries@bcsc.bc.ca Web: **www.bcsc.bc.ca**