

## 2007 BCSECCOM 254

April 30, 2007

### Headnote

#### Mutual Reliance Review System for Exemptive Relief Applications

National Instrument 51-102 *Continuous Disclosure Obligations*, s. 13.1 – all continuous disclosure requirements - A credit support issuer wants an exemption from having to file continuous disclosure documents to permit it to rely on the continuous disclosure documents of its credit supporter - The issuer is a credit support issuer that complies with all of the conditions for continuous disclosure relief in section 13.4 of National Instrument 51-102 *Continuous Disclosure Obligations*, except that it cannot provide the selected financial information required under subsection 13.4(2)(g); the issuer and the credit supporter will provide alternative narrative disclosure that satisfies the objectives of subsection 13.4(2)(g); the issuer has no assets, operations, revenues or cash flows other than those related to the issuance, administration and repayment of the notes guaranteed by the credit supporter

Multilateral Instrument 52-109 *Certification of Disclosure in Issuers' Annual and Interim Filings*, s. 4.5 – certification requirements - An issuer wants relief from the requirements in Parts 2 and 3 of MI 52-109 to file annual and interim certificates - The issuer has applied for and received an exemption from filing interim and annual financial statements

*Securities Act*, s. 91(1) – audit committee requirements - A credit support issuer wants an exemption from BC Instrument 52-509 *Audit Committees* - The issuer is a credit support issuer that cannot rely on the exemption in section 3(e) of BC Instrument 52-509 *Audit Committees* because it does not comply with all of the conditions for continuous disclosure relief in section 13.4 of National Instrument 51-102 *Continuous Disclosure Obligations* - The issuer has been granted discretionary relief from NI 51-102 requirements

National Instrument 58-101 *Disclosure of Corporate Governance Practices*, s. 3.1 – corporate governance disclosure requirements - A credit support issuer wants an exemption from NI 58-101 - The issuer is a credit support issuer that cannot rely on the exemption in s. 1.3(c) because it does not comply with all of the conditions for continuous disclosure relief in s. 13.4 of National Instrument 51-102 *Continuous Disclosure Obligations* - The issuer has been granted discretionary relief from NI 51-102 requirements

## 2007 BCSECCOM 254

National Instrument 44-101 *Short Form Prospectus Distributions*, s. 8.1 – prospectus form requirements Disclosure – A credit support issuer that cannot rely on the exemption in Item 13.1 of Form 44-101F1 wants an exemption from having to include in its short form prospectus earnings coverage ratios and incorporate by reference certain documents of its credit supporter - The issuer will provide all of the disclosure required by item 13.1 of Form 44-101F1 except the selected financial information required by item 13.1(f)(ii); the issuer will incorporate by reference in its short form prospectus alternative narrative disclosure of its credit supporter that satisfies the objectives of item 13.1(f)(ii); the issuer has no assets, operations, revenues or cash flows other than those related to the issuance, administration and repayment of the notes guaranteed by the credit supporter

### **Applicable British Columbia Provisions**

National Instrument 51-102, ss. 13.1 and 13.4

Multilateral Instrument 52-109, s. 4.5

*Securities Act*, R.S.B.C. 1996, c. 418, s. 91(1)

BC Instrument 52-509

National Instrument 58-101, s. 3.1

National Instrument 44-101, s. 8.1

Form 44-101F1, Items 6.1, 11.1(1) and 13.1

In the Matter of  
the Securities Legislation of

British Columbia, Alberta, Saskatchewan, Manitoba, Ontario, Quebec, New  
Brunswick, Nova Scotia, Prince Edward Island and Newfoundland and Labrador  
(the Jurisdictions)

and

In the Matter of  
the Mutual Reliance Review System for Exemptive Relief Applications

and

In the Matter of  
American Express Credit Corporation (Amex Credit USA)

and

American Express Canada Credit Corporation  
(Amex Credit Canada and together with Amex Credit USA, the Filers)

MRRS Decision Document

## 2007 BCSECCOM 254

### **Background**

The local securities regulatory authority or regulator (the Decision Maker) in each of the Jurisdictions has received an application from the Filers for a decision under the securities legislation of the Jurisdictions (the Legislation) that the Filers be exempt from the following requirements contained in the Legislation:

- (a) the requirement under the Legislation that Amex Credit Canada comply with the requirements of National Instrument 51-102 – *Continuous Disclosure Obligations* (NI 51-102) (the Continuous Disclosure Relief);
- (b) the requirement under the Legislation that Amex Credit Canada comply with the requirements of Multilateral Instrument 52-109 – *Certification of Disclosure in Issuers' Annual and Interim Filings* (the Certification Relief);
- (c) the requirements under the Legislation that Amex Credit Canada comply with requirements relating to audit committees (the Audit Committee Relief);
- (d) the requirement under the Legislation that Amex Credit Canada comply with the requirements of National Instrument 58-101 – *Disclosure of Corporate Governance Practices* (the Corporate Governance Relief); and
- (e) the requirement under the Legislation that Amex Credit Canada: (i) include in Future Prospectuses (as defined below) filed with the Decision Makers for Future Offerings (as defined below) its earning coverage ratios required under Section 6.1 of Form 44-101F1 promulgated under National Instrument 44-101 (NI 44-101) and (ii) incorporate by reference in Future Prospectuses filed with the Decision Makers for Future Offerings any of the documents specified under paragraphs 1 through 4, 6 and 7 of Section 11.1(1) of Form 44-101F1 (the Prospectus Disclosure Relief).

Under the Mutual Reliance Review System for Exemptive Relief Applications:

- (a) the Ontario Securities Commission is the principal regulator for this application; and
- (b) this MRRS Decision Document evidences the decision of each Decision Maker.

## 2007 BCSECCOM 254

### **Interpretation**

Defined terms contained in National Instrument 14-101 – *Definitions* have the same meaning in this decision unless otherwise set forth herein.

### **Representations**

The decision is based on the following facts represented by the Filers:

1. Amex Credit USA is incorporated under the laws of the State of Delaware and was incorporated in 1962. Its principal executive offices are located at One Christina Centre, 301 N. Walnut Street, Suite 1002, Wilmington, Delaware, 19801-2919, USA.
2. Amex Credit USA is a wholly-owned subsidiary of American Express Travel Related Services Company, Inc. (TRS), which itself is a wholly-owned subsidiary of American Express Company.
3. Amex Credit USA is the beneficial owner of all of the outstanding voting securities of Amex Credit Canada.
4. Amex Credit USA is primarily engaged in the business of financing most non-interest-bearing charge cardmember receivables arising from the use of various American Express cards in the United States and in designated currencies outside the United States. Amex Credit USA also purchases certain interest-bearing and discounted revolving credit and extended payment plan receivables and lines of credit and loans.
5. Amex Credit USA has non-convertible debt securities outstanding with an “approved rating” (as defined in NI 44-101) and Amex Credit USA has not been the subject of an announcement by an “approved rating organization” (as defined in NI 44-101) that the “approved rating” given by the organization may be down-graded to a rating category that would not be an “approved rating”.
6. Amex Credit USA has a class of securities registered under Section 12(b) of the United States *Securities Exchange Act of 1934* (the 1934 Act).
7. Amex Credit USA has filed with the United States Securities and Exchange Commission (the SEC) all filings required to be made with the SEC under the 1934 Act, including without limitation, any required during the last 12 calendar months.

## 2007 BCSECCOM 254

8. Amex Credit USA is not registered or required to be registered as an investment company under the United States *Investment Company Act of 1940*, as amended.
9. Amex Credit USA is not a commodity pool issuer.
10. Amex Credit USA is not a reporting issuer or the equivalent in any of the Jurisdictions.
11. Amex Credit USA has fully and unconditionally guaranteed the Notes (as defined below) and no other subsidiary of Amex Credit USA has provided a guarantee or alternative credit support for the Notes.
12. Amex Credit Canada is a wholly-owned subsidiary of Amex Credit USA and is an unlimited liability company incorporated under the laws of the province of Nova Scotia on April 15, 2004. Its principal executive offices are located at 101 McNabb Street, Markham, Ontario L3R 4H8.
13. Amex Credit Canada and Amex Credit USA filed an application dated June 3, 2005 with the Decision Makers seeking, among other things, exemptive relief from various prospectus eligibility and prospectus form requirements.
14. The Decision Makers granted relief from various prospectus eligibility and prospectus form requirements to Amex Credit Canada and Amex Credit USA on July 29, 2005.
15. Amex Credit Canada filed a preliminary short form base shelf prospectus with the Decision Makers on October 6, 2005 and the Decision Makers issued a MRRS Decision Document in respect thereof on October 7, 2005.
16. Amex Credit Canada filed a final short form base shelf prospectus with the Decision Makers on October 28, 2005 concerning the planned distribution by Amex Credit Canada of non-convertible medium term notes in respect of which Amex Credit USA has provided a full and unconditional guarantee of the payments to be made by Amex Credit Canada, as stipulated in the terms of the medium term notes or in an agreement governing the rights of holders of the medium term notes, that results in the holder of such medium term notes being entitled to receive payment from Amex Credit USA upon demand following any failure by Amex Credit Canada to make a payment (such medium term notes, together with similar medium term notes to be issued by Amex Credit Canada under any Future Prospectuses, the Notes) and the Decision Makers issued a MRRS Decision Document in respect thereof on October 31, 2005.

## 2007 BCSECCOM 254

17. Since October 31, 2005, Amex Credit Canada has issued non-convertible medium term notes under its short form base shelf prospectus in the aggregate principal amount of Cdn. \$2.3 billion.
18. Amex Credit Canada is a reporting issuer or the equivalent in each of the Jurisdictions.
19. Amex Credit Canada is not in default of any applicable requirements of the Legislation.
20. Amex Credit Canada does not have any securities outstanding other than the types of securities listed in Section 13.4(2)(c) of NI 51-102.
21. Amex Credit Canada files in electronic format with the Decision Makers copies of all documents that Amex Credit USA is required to file with the SEC under the 1934 Act, at the same time or as soon as practicable after the filing by Amex Credit USA of those documents with the SEC.
22. Amex Credit Canada has no assets, operations, revenues or cash flows other than those related to the issuance, administration and repayment of the Notes and is a “finance subsidiary” as defined in Rule 3-10(b) of Regulation S-X promulgated by the SEC.
23. The Notes have received an “approved rating” (as defined in NI 44-101) and the Notes have not been the subject of an announcement by an “approved rating organization” (as defined in NI 44-101) that the “approved rating” given by the organization may be down-graded to a rating category that would not be an “approved rating”.
24. Amex Credit Canada meets the eligibility requirements set out in Section 13.4(2) of NI 51-102 except that Amex Credit USA does not meet the test set forth in Section 13.4(2)(g)(i)(B) and it is unable to prepare the table required by Section 13.4(2)(g)(ii).
25. Amex Credit Canada meets the eligibility requirements of Item 13.1 of Form 44-101F1 except that Amex Credit USA does not meet the test set forth in Item 13.1(f)(i)(B) and it is unable to prepare the table required by Item 13.1(f)(ii) of Form 44-101F1.
26. Amex Credit Canada may in the future file additional short form base shelf prospectuses together with applicable prospectus supplements and pricing supplements in each of the Jurisdictions (the Future Prospectuses) in respect of

## 2007 BCSECCOM 254

the issuance by Amex Credit Canada of additional medium term notes from time to time (the Future Offerings). All medium term notes issued by Amex Credit Canada pursuant to any Future Offering will have an “approved rating”.

27. If Amex Credit Canada were incorporated under United States law, it would be permitted under Section 3.2 of NI 71-101 to effect a direct offering of the Notes in Canada based on compliance with United States prospectus requirements with certain additional Canadian disclosure so long as Amex Credit USA fully and unconditionally guarantees payment of principal and interest due under such securities.

### **Decision**

Each of the Decision Makers is satisfied that the test contained in the Legislation that provides the Decision Maker with the jurisdiction to make the decision has been met.

### *Continuous Disclosure Relief*

The decision of the Decision Makers under the Legislation is that the Continuous Disclosure Relief is granted provided that:

- (a) Amex Credit Canada and Amex Credit USA continue to satisfy all the conditions set forth in subsection 13.4(2) of NI 51-102, other than paragraph 13.4(2)(g);
- (b) Amex Credit USA discloses in each of its quarterly reports on Form 10-Q and each of its annual reports on Form 10-K filed with the SEC and the Decision Makers, any significant restrictions on the ability of Amex Credit USA to obtain funds from its subsidiaries by dividend or loan;
- (c) Amex Credit USA discloses in each of its quarterly reports on Form 10-Q and each of its annual reports on Form 10-K filed with the SEC and the Decision Makers: (i) the nature of any restrictions on the ability of consolidated subsidiaries and unconsolidated subsidiaries of Amex Credit USA to transfer funds to Amex Credit USA in the form of cash dividends, loans or advances (i.e., borrowing arrangements, regulatory constraints, foreign government, etc.) and (ii) the amount of “restricted net assets” (calculated in the manner specified in paragraph (d) below) for unconsolidated subsidiaries and consolidated subsidiaries of Amex Credit USA as of the end of its most recently completed fiscal year (with such amounts for unconsolidated subsidiaries and consolidated subsidiaries disclosed separately), provided that, the disclosure contemplated in paragraphs (c)(i) and (c)(ii) above are only required to be provided when

## 2007 BCSECCOM 254

the “restricted net assets” of consolidated and unconsolidated subsidiaries of Amex Credit USA, and Amex Credit USA’s equity in undistributed earnings of 50% or less owned persons accounted for by the equity method, together exceed 25% of the consolidated net assets of Amex Credit USA as of the end of its most recently completed fiscal year;

- (d) “Restricted net assets” shall be calculated in the manner specified in this paragraph (d). “Restricted net assets” of subsidiaries shall mean that amount of Amex Credit USA’s proportionate share of net assets (after intercompany eliminations) reflected in the balance sheets of its consolidated and unconsolidated subsidiaries as of the end of the most recent fiscal year which may not be transferred to Amex Credit USA in the form of loans, advances or cash dividends by the subsidiaries without the consent of a third party (i.e., lender, regulatory agency, foreign government, etc.). Not all limitations on transferability of assets are considered to be restrictions for purposes of calculating “restricted net assets”, which considers only specific third party restrictions on the ability of subsidiaries to transfer funds outside of the entity. For example, the presence of subsidiary debt which is secured by certain of the subsidiary’s assets does not constitute a restriction for purposes of calculating “restricted net assets”. However, if there are any loan provisions prohibiting dividend payments, loans or advances to Amex Credit USA by a subsidiary, these are considered restrictions for purposes of computing “restricted net assets”. When a loan agreement requires that a subsidiary maintain certain working capital, net tangible asset, or net asset levels, or where formal compensating arrangements exist, there is considered to be a restriction because the lender’s intent is normally to preclude the transfer by dividend or otherwise of funds to Amex Credit USA. Similarly, a provision which requires that a subsidiary reinvest all of its earnings is a restriction, since this precludes loans, advances or dividends in the amount of such undistributed earnings by the entity. Where restrictions on the amount of funds which may be loaned or advanced differ from the amount restricted as to transfer in the form of cash dividends, the amount least restrictive to the subsidiary shall be used. Redeemable preferred stocks and minority interests shall be deducted in computing net assets for purposes of these calculations;
- (e) Amex Credit Canada continues to have minimal or no assets, operations, revenues or cash flows other than those related to the issuance, administration and repayment of the Notes;
- (f) Amex Credit Canada files with the copy of each quarterly report of Amex Credit USA on Form 10-Q and each annual report of Amex Credit USA on



## **2007 BCSECCOM 254**

Form 10-K, a statement that the financial results of Amex Credit Canada are included in the consolidated results of Amex Credit USA; and

- (g) the Continuous Disclosure Relief granted herein shall only be valid until December 31, 2012.

### *Certification Relief*

The further decision of the Decision Makers under the Legislation is that the Certification Relief is granted provided that:

- (a) the Filers continue to satisfy the conditions of the Continuous Disclosure Relief, above; and
- (b) the Certification Relief granted herein shall only be valid until December 31, 2012.

### *Audit Committee Relief*

The further decision of the Decision Makers under the Legislation is that the Audit Committee Relief is granted provided that:

- (a) the Filers continue to satisfy the conditions of the Continuous Disclosure Relief, above; and
- (b) the Audit Committee Relief granted herein shall only be valid until December 31, 2012.

### *Corporate Governance Relief*

The further decision of the Decision Makers under the Legislation is that the Corporate Governance Relief is granted provided that:

- (a) the Filers continue to satisfy the conditions of the Continuous Disclosure Relief, above; and
- (b) the Corporate Governance Relief granted herein shall only be valid until December 31, 2012.

### *Prospectus Disclosure Relief*

The further decision of the Decision Makers under the Legislation is that the Prospectus Disclosure Relief is granted provided that:

## **2007 BCSECCOM 254**

- (a) Amex Credit Canada and Amex Credit USA satisfy the conditions set forth in Item 13.1 of Form 44-101F1 and NI 44-101, other than Item 13.1(f) of Form 44-101F1, unless otherwise exempted therefrom;
- (b) Amex Credit USA provides the disclosure contemplated in paragraphs (b) and (c) of the Continuous Disclosure Relief granted above in each of its quarterly reports on Form 10-Q and each of its annual reports on Form 10-K incorporated by reference by Amex Credit Canada into any Future Prospectus filed with the Decision Makers in respect of any Future Offering, but for clarity excluding the Amex Credit USA report on Form 10-K for the fiscal period ended December 31, 2006;
- (c) Amex Credit Canada has minimal or no assets, operations, revenues or cash flows other than those related to the issuance, administration and repayment of the Notes, at the time a Future Prospectus is filed in respect of a Future Offering;
- (d) if Amex Credit Canada files a Future Prospectus in respect of a Future Offering on or before May 15, 2007, the Filers include the disclosure for Amex Credit USA's fiscal period ended December 31, 2006, contemplated in paragraphs (b) and (c) of the Continuous Disclosure Relief granted above, directly in the Future Prospectus;
- (e) each Future Prospectus includes a statement that the financial results of Amex Credit Canada are included in the consolidated financial results of Amex Credit USA; and
- (f) the Prospectus Disclosure Relief granted herein shall only be valid for Future Prospectuses filed with the Decision Makers prior to December 31, 2012.

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Ontario Securities Commission