CSA/ACVM Canadian Securities Administrators Autorités canadiennes en valeurs mobilières

CSA Staff Notice 12-307
Applications for a Decision that an Issuer is not a Reporting Issuer

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Purpose

This Notice provides information and guidance on coordinated review applications that may be made under National Policy 11-203 *Process for Exemptive Relief Applications in Multiple Jurisdictions* (NP 11-203) for a decision that an issuer is not a reporting issuer (a decision). Among other things, this Notice covers:

- how an issuer can apply for a decision under a simplified procedure if it meets certain conditions,
- how an issuer can apply for a decision if it is not eligible to use the simplified procedure,
- how an issuer can describe the decision it wants in a way that addresses legislative differences between jurisdictions,
- how a foreign issuer with a small securityholder presence in Canada can apply for a decision, and
- the procedure for dissolved issuers.

In this Notice, "securityholder" means, for a security, the beneficial owner of the security.

The Simplified Procedure

The local securities regulatory authority or regulator (the Decision Maker) in each of Alberta, Saskatchewan, Manitoba, Ontario, Québec, New Brunswick, Prince Edward Island, Nova Scotia, Newfoundland and Labrador, Yukon, the Northwest Territories and Nunavut (the Jurisdictions) has adopted a simplified procedure for certain coordinated review applications (NP 11-203 describes the process for a coordinated review application) in which an issuer is seeking a decision that it is not a reporting issuer under the securities legislation of the Jurisdictions (the Legislation).

The simplified procedure is available to a reporting issuer:

- that is not a reporting issuer in British Columbia (including an issuer that has voluntarily surrendered its reporting issuer status under British Columbia Instrument 11-502 *Voluntary Surrender of Reporting Issuer Status*),
- that is seeking a decision that it is not a reporting issuer, from the Decision Maker in each of the Jurisdictions in which it is a reporting issuer,
- whose outstanding securities, including debt securities, are beneficially owned, directly or indirectly, by fewer than 15 securityholders in each of the jurisdictions of Canada and fewer than 51 securityholders in total worldwide,

- whose securities, including debt securities, are not traded in Canada or another country on a marketplace as defined in National Instrument 21-101 *Marketplace Operation* or any other facility for bringing together buyers and sellers of securities where trading data is publicly reported, and
- that is not in default of any of its obligations under the Legislation as a reporting issuer.

A reporting issuer may request a decision under the simplified procedure by submitting, to each of the Jurisdictions in which it is seeking the decision, the fees applicable under the Legislation, a draft decision document and a letter in duplicate prepared by or on behalf of the issuer that:

- states that the issuer is seeking a decision of the Decision Makers that it is not a reporting issuer,
- references the simplified procedure in this Notice, and
- includes representations that the applicant meets each of the criteria set out in the simplified procedure in this Notice.

Schedule 1 includes a sample application letter and form of decision document. In some cases, staff may request additional information from the reporting issuer. The reporting issuer should make its application in paper and electronic format as described in section 5.5 of NP 11-203.

The procedure will simplify the process in certain routine circumstances for a reporting issuer submitting a coordinated review application under NP 11-203 for decision that it is not a reporting issuer.

Applying for relief in British Columbia

The simplified procedure is not available in British Columbia. If a reporting issuer has no more than 50 securityholders (both debt and equity) and its securities are not traded through any exchange or market, it may surrender its status as a reporting issuer in that province by filing with the British Columbia Securities Commission the notice described in British Columbia Instrument 11-502 *Voluntary Surrender of Reporting Issuer Status*. The issuer would then apply for relief in other jurisdictions using the simplified procedure under this Notice.

OTC reporting issuers

The simplified procedure and the modified approach described in this Notice are not available to a reporting issuer that is an OTC reporting issuer under Multilateral Instrument 51-105 *Issuers Quoted in the U.S. Over-the-Counter Markets*.

What to do when the simplified procedure in this Notice and BC Instrument 11-502 is not available

If an issuer cannot meet all of the simplified procedure criteria in this Notice or in BC Instrument 11-502 (if the issuer is a reporting issuer in British Columbia), the issuer should submit an application under the standard procedure for a coordinated review application under NP 11-203 using the form of decision document attached as Annex C to NP 11-203. The reporting issuer should submit its application to each jurisdiction where the issuer is a reporting issuer.

An issuer wanting to avoid the minimum 10-day waiting period under BC Instrument 11-502 (which is a condition precedent to the other jurisdictions making a decision under the simplified procedure) should follow the standard procedure for a coordinated review application.

How to describe the decision the issuer wants
The legislation varies among the jurisdictions in how it authorizes regulators to terminate reporting issuer status. An issuer should include the language in the legislation of its principal regulator in its draft decision document. Where Québec is not the principal regulator and the issuer requires a decision in Québec, the issuer should also include the wording "revoke the issuer's status as a reporting issuer" in its draft decision document if the language in the legislation of the principal regulator uses the phrase "ceased to be a reporting issuer". The form of decision document in Schedule 1 to this Notice sets out the applicable language for each principal regulator.

Going-private transactions
Where the issuer is in the process of completing a going-private transaction following which it will want to stop being a reporting issuer, the issuer may apply for relief using the simplified procedure in this Notice prior to completing the transaction. A jurisdiction cannot make a decision until the transaction is complete and the issuer can represent that it has satisfied all the criteria for the simplified procedure.

Successor reporting issuers
In circumstances where an issuer has exchanged its securities with another party (or that party's securityholders) in connection with a statutory arrangement or procedure, the issuer should consider whether any other party in the transaction will or has become a reporting issuer following the exchange. If so, the issuer should disclose the name of that party in its application to stop being a reporting issuer and provide a brief summary of the statutory arrangement or procedure and the parties involved.

Issuers subject to business corporations legislation in certain jurisdictions
In certain jurisdictions of Canada, the local business corporations legislation:

- contains certain provisions that apply to reporting issuers that were incorporated, continued or amalgamated under the business corporations legislation, and
- provides that if a reporting issuer no longer wants those provisions to apply to it, it must obtain an order from the Decision Maker that it is no longer a public company for the purposes of the business corporations legislation.

Issuers should review their business corporations legislation to determine if they need to make a separate application to the relevant Decision Maker for an order under the business corporations legislation. A decision obtained under the simplified procedure in this Notice or a coordinated review application under NP 11-203 is only for the purposes of securities legislation.

Foreign issuers
Foreign-incorporated issuers often seek decisions that they are not reporting issuers under applicable securities legislation when they have a declining numbers of securityholders in

Canada. In general, these issuers do not meet the criteria for the simplified procedure in this Notice because they typically have many beneficial securityholders in jurisdictions in Canada, and their securities are listed on one or more exchanges outside of Canada. However, they wish to cease being reporting issuers in Canada because their securities are not listed on an exchange in Canada and they do not intend to make any further distributions of securities in Canada.

Past approach

In the past, CSA staff have recommended a decision that a foreign issuer is not a reporting issuer where the issuer could demonstrate that Canadian ownership of its securities is *de minimis* compared to the total ownership by non-Canadian securityholders. In past decisions, this has been demonstrated when an issuer had:

- fewer than 300 beneficial securityholders in Canada, and
- a small percentage of total securityholdings beneficially owned by Canadian residents.

Modified approach

We have adopted a modified approach for applications by issuers that report in the U.S. and are listed on a U.S. exchange. If such an issuer meets the following criteria, CSA staff will generally recommend a decision that the issuer is not a reporting issuer:

1. The issuer makes a representation that residents of Canada do not:

   (a) directly or indirectly beneficially own more than 2% of each class or series of outstanding securities (including debt securities) of the issuer worldwide, and

   (b) directly or indirectly comprise more than 2% of the total number of securityholders of the issuer worldwide.

   CSA staff realize that some filers have difficulty making representations on the beneficial ownership of securities by residents of Canada. CSA staff will not generally recommend granting the relief without the issuer satisfying the "2% test". In addition, staff will not generally recommend granting the relief where a representation is qualified or limited to the knowledge of the issuer, unless the issuer can fully demonstrate that it has made diligent enquiry to support the representation and why it cannot give an unqualified representation.

2. The issuer files continuous disclosure reports under U.S. securities laws and is listed on a U.S. exchange.

3. In the 12 months before applying for the decision, the issuer has not taken any steps that indicate there is a market for its securities in Canada. Steps that would indicate there is a market in Canada include conducting a prospectus offering in Canada, or establishing or maintaining a listing on a Canadian marketplace or exchange.

4. The issuer provides advance notice to Canadian resident securityholders in a news release that it has applied to securities regulatory authorities for a decision that it is not a reporting issuer in Canada and, if that decision is made, the issuer will no longer be a reporting issuer in any jurisdiction of Canada.

5. The issuer undertakes to concurrently deliver to its Canadian securityholders, all disclosure the issuer would be required under U.S. securities law or exchange requirements to deliver to U.S. resident securityholders.

Non-U.S. issuers that are listed on a major foreign exchange and meet the 2% test may also apply using the modified approach, provided that the issuer demonstrates that Canadian securityholders will receive adequate disclosure under the foreign securities law or exchange requirements.

Reporting issuer that has been dissolved or terminated
A reporting issuer does not need to apply for a decision that it is not a reporting issuer if it is:

- a corporation that was dissolved under applicable corporate legislation,
- a limited partnership that was dissolved under applicable limited partnership legislation,
- a trust that was terminated under its declaration of trust, or
- another form of business organization that was dissolved or terminated under its applicable governing legislation or constating or establishing document.

In each case, it will be sufficient if an agent files evidence of the dissolution or termination with the securities regulatory authority in each jurisdiction where the issuer was a reporting issuer.

For a corporation, sufficient evidence includes a copy of the certificate and articles of dissolution.

For a limited partnership, sufficient evidence typically includes:

- a copy of the declaration of dissolution or similar document filed under applicable limited partnership legislation, and
- a written representation from the general partner about the effective date of dissolution under applicable limited partnership legislation.

For a trust, sufficient evidence typically includes:

- a copy of the resolution authorizing the termination of the trust,
- a report on voting results indicating that the resolution was passed,
- a written representation that the trust no longer exists (it is sufficient if this representation is provided by filing counsel or former trustees or officers),
- a copy of the change in corporate structure notice filed under section 4.9 of National Instrument 51-102 *Continuous Disclosure Obligations*, and
- evidence such as a copy of a news release or written submission from filing counsel that the trust has no securities outstanding and none listed on an exchange.

If an issuer has commenced dissolution proceedings but still exists, it will remain a reporting issuer in the absence of a decision that it is not a reporting issuer.

Questions
Please refer your questions to any of the following people:

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