

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

May 10, 2012

Introduction

Multilateral Instrument 51-105 *Issuers Quoted in the U.S. Over-the-Counter Markets* is an initiative of the Canadian Securities Administrators (CSA or we), except the Ontario Securities Commission. The instrument designates as reporting issuers in the local jurisdiction, any issuer whose securities are quoted only on a US OTC market and that have a significant connection to that local jurisdiction.

We, except the Ontario Securities Commission, are adopting:

- Multilateral Instrument 51-105 *Issuers Quoted in the U.S. Over-the-Counter Markets* (the Instrument)
- Form 51-105F1 *Notice – OTC Issuer Ceases to be an OTC Reporting Issuer*
- Form 51-105F2 *Notice of Promotional Activities*
- Form 51-105F3A *Personal Information Form and Authorization of Indirect Collection, Use and Disclosure of Personal Information*
- Form 51-105F3B *Personal Information Form and Authorization of Indirect Collection, Use and Disclosure of Personal Information*
- Form 51-105F4 *Notice – Issuer Ceases to be an OTC Reporting Issuer*

(collectively, the Forms)

- Companion Policy 51-105CP (the Companion Policy)

(together, the OTC Rule).

We are also making consequential changes to:

- National Policy 11-203 *Process for Exemptive Relief Applications in Multiple Jurisdictions* (NP 11-203)
- CSA Staff Notice 12-307 *Applications for a Decision that an Issuer is not a Reporting Issuer* (Staff Notice)

The OTC Rule and the consequential changes are initiatives of all CSA members except Ontario. Provided all necessary ministerial approvals are obtained, the OTC Rule will come into force on **July 31, 2012**. We are publishing the text of the OTC Rule and a blackline copy of NP 11-203 that identifies the consequential changes to that policy concurrently with this notice. Prior to the expected implementation date of the OTC Rule, CSA staff intend to issue a revised version of the Staff Notice.

Substance and Purpose

The OTC Rule will:

- improve disclosure by issuers with a significant connection to a Canadian jurisdiction whose securities are quoted in the U.S. over-the-counter markets
- discourage the manufacture and sale in a Canadian jurisdiction of U.S. over-the-counter quoted shell companies that can be used for abusive purposes

Background

Background to the OTC Rule

On September 15, 2008, BC Instrument 51-509 Issuers Quoted in the U.S. Over-the-Counter Markets and related amendments (the BC OTC Rule) came into force as a local rule in British Columbia. The BC OTC Rule regulates issuers that are quoted in the U.S. over-the-counter markets but not on another North American exchange listed in the rule and that have a significant connection to British Columbia.

The BC OTC Rule was an initiative to address the harm caused to the reputation of British Columbia's capital markets by market participants with a significant connection to British Columbia that engage in abusive activities through the over-the-counter markets in the United States. These markets consist of the OTC Bulletin Board and OTC Markets quotation systems. Damage to British Columbia's market reputation, in turn, was harming legitimate issuers, investment dealers, and other British Columbia market participants.

Since then, some of the OTC reporting issuers migrated to other Canadian jurisdictions. As a result, we are adopting the OTC Rule.

Application of the OTC Rule

The OTC Rule applies to any OTC issuer that has a significant connection to a local Canadian jurisdiction that has adopted the OTC Rule.

Under the OTC Rule, an OTC issuer is an issuer whose securities are quoted on any U.S. over-the-counter markets unless the issuer is also listed or quoted on the TSX Venture Exchange, the TSX, the Canadian National Stock Exchange, the Alpha Exchange, the New York Stock Exchange, the NYSE Amex, or the NASDAQ Stock Market. Those exchanges impose requirements on issuers that make it unnecessary for them to be subject to the OTC Rule. An OTC reporting issuer also includes an issuer if trades in its securities are reported in the grey market.

Under the OTC Rule, an OTC issuer has a significant connection to a Canadian jurisdiction if

1. it is directed or administered or promotional activities are conducted in or from the jurisdiction, in whole or in part, or
2. it distributed securities in a Canadian jurisdiction prior to obtaining a ticker-symbol for the purpose of having its securities quoted on an over-the-counter market in the U.S. and those securities became the issuer's OTC-quoted securities.

The OTC Rule applies to an OTC issuer when the U.S. Financial Industry Regulatory Authority (FINRA) assigns a ticker symbol to a class of its securities so that trades in those securities may

be reported. Once an OTC issuer becomes an OTC reporting issuer under the OTC Rule, the OTC Rule will continue to apply to it for at least one year. After that, the OTC Rule applies only if the issuer is directed or administered or carries out promotional activities in or from a jurisdiction of Canada. In Québec, an OTC reporting issuer will have to apply for a decision to revoke its reporting issuer status.

The OTC Rule applies to an OTC issuer that is already a reporting issuer in a Canadian jurisdiction at the time the rule comes into force. We considered excluding the application of the OTC Rule to this class of OTC issuers but concluded, given the objectives of the OTC Rule, that there is no persuasive policy reason to exclude its application to this class of OTC issuers.

Disclosure requirements

Issuers

The OTC Rule improves continuous disclosure by imposing disclosure requirements on OTC reporting issuers. We will monitor and enforce compliance with the new requirements through continuous disclosure reviews and the use of compliance and enforcement tools when appropriate.

Under the OTC Rule, OTC reporting issuers must:

- meet the same periodic disclosure requirements imposed on other domestic reporting issuers under National Instrument 51-102 *Continuous Disclosure Obligations*, including an annual information form (AIF), management's discussion and analysis (MD&A), and audited financial statements
- comply with Canadian timely disclosure requirements
- file their public disclosure on SEDAR

Other than the requirement to file an AIF, OTC reporting issuers are treated as venture issuers, as defined in National Instrument 51-102 *Continuous Disclosure Obligations*.

OTC reporting issuers that are SEC filers – issuers that file disclosure with the United States Securities and Exchange Commission – can comply with the OTC Rule's requirements to file financial statements, material change reports, MD&A and AIFs using documents they file with the SEC.

The OTC Rule also requires an OTC reporting issuer to file

- in certain circumstances, the most recent registration statement it filed with the SEC, and
- information about persons it retains for promotional activities, the nature and scope of the engagement, compensation, and other material terms of the agreements entered into with those persons.

The OTC Rule also requires OTC reporting issuers in the oil and gas business to comply with National Instrument 51-101 *Standards of Disclosure for Oil and Gas Activities*. The OTC Rule does not impose additional requirements with respect to National Instrument 43-101 *Standards of Disclosure for Mineral Projects* because that instrument currently applies to OTC issuers.

Insider reports

The OTC Rule requires an insider of an OTC reporting issuer to file an insider report on SEDI unless the insider is exempted from those requirements because it has filed its insider report in compliance with U.S. federal securities law. If an insider of an OTC reporting issuer is exempted from reporting requirements under U.S. federal securities law, the OTC Rule requires that it file an insider report under Canadian law.

Personal Information Forms

Under the OTC Rule, each director, officer, promoter or control person of an OTC reporting issuer is required to deliver to the securities regulatory authorities a personal information form (PIF). This form would include the person's consent to a criminal record search. Directors and officers of issuers listed on the TSX Venture Exchange and the TSX must file a similar form with those exchanges. If a person has submitted a PIF to the TSX Venture Exchange or the TSX and the information contained in it has not changed, the person may deliver it to satisfy the requirements of the OTC Rule.

Foreign Issuer and MJDS Exemptions

Under the OTC Rule, an OTC reporting issuer may rely on exemptions from continuous disclosure requirements that are available to other reporting issuers that have a class of securities registered under section 12 of the United States *Securities Exchange Act of 1934* or are required to file reports under paragraph 15(d) of that Act, except for the exemption regarding material change reporting. An OTC reporting issuer must comply with the same timely disclosure requirements for material change reporting as domestic reporting issuers, except that it may use SEC Form 8-K *Current Report* as a material change report. The continuous disclosure and other exemptions for a designated foreign issuer under National Instrument 71-102 *Continuous Disclosure and Other Exemptions Relating to Foreign Issuers* are available to an OTC reporting issuer that is a designated foreign issuer.

Restriction of exemptions

The OTC Rule deters manufacturers of shell companies from delivering to buyers of shell companies, for abusive purposes, the "public float" that is created from shares sold in private placements to Canadian residents and registered in a US registration statement that an issuer files with the SEC prior to obtaining a ticker-symbol.

To effect this, the OTC Rule:

- denies the use of the private agreement take-over bid exemption that could be used for this purpose
- requires a Canadian resident who acquired shares from an OTC issuer before it obtained a ticker-symbol to sell the shares only through a registrant, from an account in the person's own name, into the market or into a formal take-over bid, amalgamation, merger, reorganization or other similar statutory procedure, and
- requires a legend on the certificates or a legend restriction notation on the ownership statements representing the seed stock held by Canadian residents to that effect.

The OTC Rule will also deter insiders and persons who have close ties to issuers from dumping shares into a market that has been prepared with promotional disclosure. Therefore, the OTC

Rule provides security holders of OTC reporting issuers with a transparent, open-market resale regime for securities acquired in a private placement.

All of the usual capital raising exemptions would be available to an OTC issuer during both its private and public stages. However, the OTC Rule would place restrictions on the use of prospectus exemptions when an OTC reporting issuer is issuing securities for services.

Transition Provisions

The transition provisions are not applicable in British Columbia.

When the OTC Rule comes into force, an OTC reporting issuer will have to begin making disclosure immediately. The first quarterly and annual filings would require reporting on periods prior to the effective date of the OTC Rule.

Issuers that are not SEC filers may not have an auditor or the resources and experience to meet the OTC Rule's new disclosure requirements. To give these issuers more time to prepare for compliance with the new rule, we are providing a transition period following the adoption of the OTC Rule. This would give OTC reporting issuers more time to comply with their requirements to file annual financial statements and interim financial reports, related MD&A, AIFs, and, if applicable, their oil and gas disclosure documents.

Proposed Fees

The securities regulatory authorities will impose the same filing fees that reporting issuers, and insiders of reporting issuers, pay to the applicable securities regulatory authority. These fees are set out in the applicable securities legislation. OTC reporting issuers will also have to pay SEDAR fees as well as late fees for failure to meet filing deadlines.

Costs

The disclosure requirements should not be onerous for OTC reporting issuers who are SEC filers, because they can use the documents they file with the SEC in lieu of the Canadian forms for material change reports, financial statements, MD&A and AIF.

OTC reporting issuers who are not SEC filers and who do not have audited financial statements may incur significant new costs to comply with the OTC Rule.

OTC reporting issuers in the oil and gas sector, like other reporting issuers, must comply with National Instrument 51-101 *Standards of Disclosure for Oil and Gas Activities*. Compliance with this rule may result in significant new costs to OTC reporting issuers.

Since an OTC reporting issuer has a significant connection with a jurisdiction of Canada, we think it is appropriate that those issuers make disclosure to the same standard as other Canadian reporting issuers.

Consequential changes

We are amending NP 11-203 to direct filers to the Companion Policy for the factors a filer should consider in identifying the principal regulator for an application for exemptive relief from

the requirements of the Instrument or the Forms.

We are also amending the Staff Notice to state that the simplified procedure for ceasing to be a reporting issuer detailed in that staff notice is not available for an OTC reporting issuer. The revised Staff Notice will indicate that the simplified procedure and the modified approach described in the Staff Notice are not available to a reporting issuer that is an OTC reporting issuer under Multilateral Instrument 51-105.

Summary of Written Comments Received by the CSA

We published the OTC Rule for comment on June 10, 2011. During the comment period, we received submissions from 3 commenters. We have considered the comments received and thank all of the commenters for their input. The names of commenters are contained in Annex A of this notice and a summary of their comments, together with our responses, are contained in Annex B of this notice.

Summary of Changes to the OTC Rule

After considering the comments received, we have made some revisions to the materials that were published for comment. Those revisions are reflected in the OTC Rule we are publishing concurrently with this notice. As these changes are not material, we are not republishing the Instrument for a further comment period.

In particular, we added Alpha Exchange Inc. to the list of exchanges in the definition of OTC issuer in the Instrument. We also updated the Companion Policy to provide additional guidance to market participants based on the comments we received on the OTC Rule.

Local Matters

Annex C is being published in any local jurisdiction that is making related changes to local securities laws, including local notices or other policy instruments in that jurisdiction. It also includes any additional information that is relevant to that jurisdiction only.

Questions

Please refer your questions to any of the following:

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