

Chapter 5

Rules and Policies

5.1.1 Notice of Commission Approval - Ontario Amendment Instrument Amending NI 44-101 Short Form Prospectus Distributions

NOTICE OF COMMISSION APPROVAL
ONTARIO AMENDMENT INSTRUMENT
AMENDING
NATIONAL INSTRUMENT 44-101
SHORT FORM PROSPECTUS DISTRIBUTIONS

Making of Amendment Instrument

National Instrument 44-101 *Short Form Prospectus Distributions* (**NI 44-101**) is in force in Ontario and all other Canadian Securities Administrators (**CSA**) jurisdictions. On June 29, 2006, the Commission made as a rule under the *Securities Act* (Ontario) (the **Act**) an amendment instrument (the **Amendment Instrument**) that will amend NI 44-101 in Ontario only.

The Commission understands that the securities regulatory authorities in other CSA jurisdictions have adopted, or will adopt in due course, blanket orders to address the subject matter of the Amendment Instrument.

Delivery of Amendment Instrument to Minister

The Commission delivered the Amendment Instrument to the Minister responsible for the oversight of the Commission on July 7, 2006. If the Minister approves the Amendment Instrument, it will come into force 15 days after the Amendment Instrument is approved. If the Minister does not approve or reject the Amendment Instrument, or return it to the Commission for further consideration, by September 5, 2006, it will come into force on September 20, 2006.

Substance and purpose of Amendment Instrument

The Amendment Instrument supplements the exemption from the prospectus requirements in section 7.1 of NI 44-101 in Ontario (the **Bought Deal Exemption**).

Section 7.1 of NI 44-101 provides that the prospectus requirement does not apply to solicitations of expressions of interest before the filing of a preliminary short form prospectus if certain conditions are satisfied. One of these conditions is that the issuer has entered into an enforceable agreement with an underwriter who has, or underwriters who have, agreed to purchase the securities to be qualified under a short form prospectus.

On April 21, 2006, CSA staff published CSA Staff Notice 47-302 *Pre-marketing of underwriters' options on bought deals* (the **CSA Notice**). The CSA Notice states that CSA staff recognizes that the Bought Deal Exemption does not extend to pre-marketing of securities underlying a post-closing over-allotment option (**greenshoe option**) to purchase up to 15% of the securities offered under the short form prospectus. CSA staff also stated that they would consider recommending exemptive relief for any pre-marketing of securities underlying a greenshoe option on a case-by-case basis.

The Commission acknowledges that granting such relief on a case-by-case basis for an extended period of time would be impractical. The Commission also understands that the other CSA jurisdictions have granted or will be granting exemptive relief through blanket orders. Accordingly, the Commission has adopted the Amendment Instrument as an Ontario-only amendment to the Bought Deal Exemption.

Authority for Amendment Instrument

The Commission has authority to make the Amendment Instrument pursuant to paragraph 143(1)20 of the Act. Paragraph 143(1)20 of the Act authorizes the Commission to provide for exemptions from the prospectus requirement under the Act and for the removal of exemptions from those requirements.

In addition, clause 143.2(5)(b) of the Act permits the Commission to make the Amendment Instrument without publishing the Amendment Instrument for comment.

Questions

Please refer your questions to:

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Text of Amendment Instrument

The Amendment Instrument is published in Chapter 5 of the Bulletin.

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**NATIONAL INSTRUMENT 44-101
SHORT FORM PROSPECTUS DISTRIBUTIONS
ONTARIO AMENDMENT INSTRUMENT**

1. The table of contents of National Instrument 44-101 *Short Form Prospectus Distributions* is amended by adding the following after "7.1 Solicitations of Expressions of Interest":

"7.2 Solicitations of Expressions of Interest - Over-allotment Options – Ontario."
2. Part 7 of the Instrument is amended by adding the following as a new section after section 7.1:

"7.2 Solicitations of Expressions of Interest - Over-allotment Options – Ontario

 - (1) In Ontario, the prospectus requirement does not apply to solicitations of expressions of interest before the filing of a preliminary short form prospectus for securities to be issued pursuant to an over-allotment option that are qualified for distribution under a short form prospectus in accordance with this Instrument, if
 - (a) the issuer has entered into an enforceable agreement with the underwriters, who have agreed to purchase the securities offered under a short form prospectus, other than the securities issuable on the exercise of an over-allotment option,
 - (b) the agreement referred to in paragraph (a) has fixed the terms of the distribution and requires that the issuer file a preliminary short form prospectus for the securities and obtain from the regulator a receipt, dated as of a date that is not more than four business days after the date that the agreement is entered into, for the preliminary short form prospectus,
 - (c) the issuer has issued and filed a news release announcing the agreement immediately upon entering into the agreement,
 - (d) upon issuance of a receipt for the preliminary short form prospectus, a copy of the preliminary short form prospectus is sent to each person or company who has expressed an interest in acquiring the securities, and
 - (e) except as provided in paragraph (a), no agreement of purchase and sale for the securities is entered into until the short form prospectus has been filed and a receipt obtained.
 - (2) In this section,
 - (a) "over-allotment option" means a right granted to the underwriter(s) by an issuer or a selling securityholder of the issuer in connection with the distribution of securities under a short form prospectus to acquire, for the purposes of covering the underwriters' over-allocation position, a security of an issuer that has the same designation and attributes as a security that is distributed under such short form prospectus, and that
 - (i) expires not later than the 60th day after the date of the closing of the distribution, and
 - (ii) is limited to the lesser of
 - (A) the over-allocation position determined as at the closing of the distribution, and
 - (B) 15% of the number or principal amount of the securities qualified for the distribution, without taking into account the securities issuable on the exercise of the over-allotment option; and
 - (b) "over-allocation position" means the amount by which the aggregate number or principal amount of securities that are the subject of offers to purchase received by all underwriters of a distribution exceeds the aggregate number or principal amount of securities distributed by an issuer or selling securityholder under the prospectus, without taking into account the securities issuable on the exercise of an over-allotment option granted to the underwriters."