

Chapter 5

Rules and Policies

5.1.1 OSC Amendments to Multilateral Instrument 45-105 Trades to Employees, Senior Officers, Directors, and Consultants and OSC Rule 45-801 Implementing Multilateral Instrument 45-105 Trades to Employees, Senior Officers, Directors, and Consultants

ONTARIO SECURITIES COMMISSION AMENDMENTS TO MULTILATERAL INSTRUMENT 45-105 TRADES TO EMPLOYEES, SENIOR OFFICERS, DIRECTORS, AND CONSULTANTS

AND

RULE 45-801 IMPLEMENTING MULTILATERAL INSTRUMENT 45-105 TRADES TO EMPLOYEES, SENIOR OFFICERS, DIRECTORS, AND CONSULTANTS

On August 15, 2003, Multilateral Instrument 45-105 *Trades to Employees, Senior Officers, Directors, and Consultants* (the "Instrument") came into force in every jurisdiction in Canada, other than Quebec (the "Jurisdictions"). At the same time, Rule 45-801 *Implementing Multilateral Instrument 45-105 Trades to Employees, Senior Officers, Directors, and Consultants* (the "Implementing Rule") came into force in Ontario. On September 2, 2003, we, the Ontario Securities Commission, amended the Instrument and the Implementing Rule (the "Amendments"). The Amendments address certain technical problems that have arisen with the Instrument and the Implementing Rule. However, the Amendments will not materially change the Instrument or the Implementing Rule.

The Amendments were delivered to the Minister of Finance on September 3, 2003. If the Minister approves the Amendments, they will come into force 15 days after the Amendments are approved. If the Minister does not approve or reject the Amendments by November 3, 2003, they will come into force on November 18, 2003.

The Amendments will amend the Instrument in Ontario only. We expect the securities regulatory authorities in the other Jurisdictions will publish similar amendments for comment in their Jurisdictions. In the meantime, the securities regulatory authorities in the other Jurisdictions may adopt blanket rulings or similar instruments to address the existing technical problems with the Instrument.

Background

The securities legislation in each Jurisdiction contains exemptions from the dealer registration requirement and the prospectus requirement for trades in securities of an issuer's own issue to the issuer's employees. In addition, prior to August 15, 2003, certain securities regulatory authorities had additional instruments that either modified, restricted or expanded the statutory employee exemptions, including:

- OSC Rule 45-503 *Trades to Employees, Executives and Consultants* ("OSC Rule 45-503")
- British Columbia Instrument 45-507 *Trades to Employees, Executives and Consultants* (the "BC Instrument")
- Alberta Securities Commission Blanket Order 45-506 (the "ASC Order")
- Nova Scotia Securities Commission Blanket Order No. 45-501 *Trades to Employees, Executives and Consultants* (the "Nova Scotia Order")
- Saskatchewan Securities Commission General Ruling/Order 45-907 *Trades to Employees, Executives and Consultants* (the "Saskatchewan Order")

These instruments provided exemptions from the dealer registration requirement and the prospectus requirement for trades to an issuer's non-employee directors and certain consultants, as well as other related relief. The Instrument consolidates and, as much as possible, harmonizes the requirements in each of OSC Rule 45-503, the BC Instrument, the ASC Order, the Nova Scotia Order and the Saskatchewan Order (collectively, the "Former Instruments"). Each of the Former Instruments were revoked when the Instrument came into force.

The Implementing Rule revoked OSC Rule 45-503. It also maintains certain prohibitions previously contained in OSC Rule 45-503.

Substance and Purpose and the Amendments

The purpose of the Amendments is to address certain technical problems with the Instrument and the Implementing Rule.

Although the stated purpose of the Instrument was to consolidate and, as much as possible, harmonize the Former Instruments, we are now aware that certain exemptions from the dealer registration requirement and the prospectus requirement may not be available under the Instrument. In particular,

- an exemption from the dealer registration requirement and the prospectus requirement may not be available for a trade in an issuer's security to an employee, senior officer, director, or consultant by a trustee, custodian or administrator (a "plan administrator") acting on behalf of that employee, senior officer, director, or consultant if the plan administrator acquired the security on the secondary market; and
- an exemption from the dealer registration requirement and the prospectus requirement may not be available for "cross-trades" by plan administrators.¹

In addition, the Amendments will also:

- provide an exemption from the dealer registration requirement for the first trade of an underlying security by a former employee, senior officer, director, or consultant where the convertible security was exercised after the party ceased to be an employee, senior officer, director, or consultant;
- provide an exemption from the dealer registration requirement and the prospectus requirement for a trade of a security of a non-reporting issuer by a permitted assign of a current or former employee, senior officer, director, or consultant of the issuer to an employee, senior officer, director, or consultant of the issuer or their permitted assigns; and
- correct a typographical error in the Implementing Rule.

In our view, the Amendments do not constitute a material change to the Instrument or the Implementing Rule.

Summary of the Amendments

Section 1.1 amends Part 2 of the Instrument.

- Paragraph 1.1(a) amends subsection 2.2(1) of the Instrument by replacing the words "trustee, custodian or administrator acting on behalf of an employee, senior officer, director, or consultant" with the words "permitted assign". This expands the exemption in subsection 2.2(1) to include trades to and by not only a trustee, custodian or administrator of the employee, senior officer, director, or consultant, but also to all other permitted assigns of the employee, senior officer, director, or consultant.
- Paragraph 1.1(b) inserts the words "on a secondary market in accordance with the plan or" in subsection 2.4(1) of the Instrument. This expands the exemption in subsection 2.4(1) to include trades by a plan administrator to plan participants where the securities in question are acquired by the plan administrator on the secondary market.
- Paragraph 1.1(c) deletes subsections 2.4(2) and (3) and replaces them with new subsections 2.4(2), (3) and (4). This permits a plan administrator to effect "cross-trades" on a registration and prospectus exempt basis.

Section 1.2 amends section 3.2 of the Instrument by inserting the words "under Part 2 or" immediately before the words "by a person or company described in subsection 2.1(1)". This provides an exemption from the dealer registration requirement for the first trade of an underlying security by a former employee, senior office, director, or consultant where the party acquired the underlying security upon the exercise of a convertible security after ceasing to be an employee, senior officer, director, or consultant.

Section 1.3 of the Amendments amends section 1.3 of the Implementing Rule by replacing the reference to section 9.1 of Rule 45-501 *Exempt Distributions* with a reference to section 3.1 of the Instrument.

¹ A "cross-trade" occurs when a plan administrator receives an order to buy securities from one participant and an order to sell securities from another participant. Instead of purchasing securities for the first participant on the secondary market, then selling securities for the second participant on the secondary market, the plan administrator can simply "cross" the trades, and provide the first participant with the securities supplied by the second participant.

Authority for the Amendments

The following provisions of the *Securities Act* (Ontario) (the "Act") provide us with authority to make the Amendments:

- paragraph 143(1)8 authorizes us to provide for exemptions from the registration requirements under the Act or for the removal of exemptions from those requirements; and
- paragraph 143(1)20 authorizes us to provide for exemptions from the prospectus requirements under the Act and for the removal of exemptions from those requirements.

In addition, paragraph 143.2(5)(c) of the Act permits us to make the Amendments without publishing the Amendments for comment.

Alternatives Considered

No alternatives were considered.

Unpublished Materials

In developing the Amendments, we did not rely upon any significant unpublished study, report or other written materials.

Anticipated Costs and Benefits

The Amendments will restore certain exemptions from the dealer registration requirement and the prospectus requirement that were previously available under OSC Rule 45-503. In addition, the Amendments address certain other technical problems resulting from the adoption of the Instrument and the Implementing Rule. The Amendments will not result in any additional costs.

Related Amendments

We have proposed no related amendments.

Questions

Please refer your questions to:

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The text of the Amendments follow.

September 2, 2003.

**MULTILATERAL INSTRUMENT 45-105
TRADES TO EMPLOYEES, SENIOR OFFICERS, DIRECTORS, AND CONSULTANTS
(THE "INSTURMENT")**

AND

**RULE 45-801 IMPLEMENTING MULTILATERAL INSTRUMENT
45-105 TRADES TO EMPLOYEES, SENIOR OFFICERS,
DIRECTORS, AND CONSULTANTS**

1.1 Amendments to Part 2 of the Instrument– Part 2 of the Instrument is amended by

- (a) in subsection 2.2(1), deleting paragraph (b) and substituting the following

“(b) permitted assign of a person or company referred to in paragraph (a)”

and by deleting the words “a trustee, custodian, or administrator acting on behalf of an employee, senior officer, director, or consultant of the issuer or affiliated entity of the issuer” as they appear at the end of that subsection and substituting the following

“ a permitted assign of the employee, senior officer, director, or consultant.”

- (b) in subsection 2.4(1), adding immediately after the words “trade of a security that was acquired” the following

“on the secondary market in accordance with a plan or”

- (c) in section 2.4, deleting subsections (2) and (3) and substituting the following:

“(2) The dealer registration requirement does not apply to a trade by a trustee, custodian, or administrator acting on behalf of, or for the benefit of, employees, senior officers, directors, or consultants of the issuer or an affiliated entity of the issuer, in a security of the issuer’s own issue, to

(a) an employee, senior officer, director, or consultant of the issuer or an affiliated entity of the issuer, or

(b) a permitted assign of a person or company referred to in paragraph (a),

if the security was acquired from

(c) an employee, senior officer, director, or consultant of the issuer or an affiliated entity of the issuer, or

(d) the permitted assign of a person referred to in paragraph (c).

(3) The prospectus requirement does not apply to a distribution in the circumstances described in subsections (1) and (2).

(4) For the purposes of the exemptions referred to in subsection (1), (2) and (3), all references to employee, senior officer, director, or consultant include a former employee, senior officer, director, or consultant.”

1.2 Amendment to Part 3 of the Instrument – Part 3 of the Instrument is amended by, in section 3.2, adding the words “under Part 2 or” immediately before the words “by a person or company described in subsection 2.1(1)”.

1.3 Amendment to Implementing Rule – The Implementing Rule is amended by, in section 1.3, deleting the words “section 9.1 of Rule 45-501” and substituting the following:

“section 3.1 of Multilateral Instrument 45-105.”