

**ALBERTA SECURITIES COMMISSION
NOTICE AND PUBLICATION FOR COMMENT**

***PROPOSED AMENDMENTS TO ASC RULES AND OTHER INSTRUMENTS IN
RESPONSE TO PROPOSED STATUTORY AMENDMENTS RELATING TO
PROSPECTUS AND REGISTRATION EXEMPTIONS***

and

PROPOSED REPEAL OF ASC FORM 20 AND ASC RULE 45-802

March 28, 2003

Publication for Comment

The Alberta Securities Commission (“ASC”) is publishing for comment for 30 days, the following proposed amendments to the ASC Rules:

- *Consequential Rule Amendments in Response to Statutory Amendments in the Securities Amendment Act, 2003, Relating to Prospectus and Registration Exemptions* (the “Consequential Rule Amendments”); and
- *Repeal of Form ASC 20 and ASC Rule 45-802* (“MI 45-103 Related Amendments”).

Publication for Notice

The ASC is also providing notice of its intent to:

- revoke Blanket Order 87/05/21 - *Certain Statutory Exemptions at Sections 65(1)(v)(v.1) and 107(1)(p) and (q) of The Act*;
- revoke Blanket Order 87/06/04 - *Offering Memoranda and Form 43 of The Securities Regulations*;
- repeal ASC Policy 5.1 - *Statutory Exemptions*;
- repeal ASC Notice 13 - *Guide to Raising Capital Without the Need of a Prospectus*; and
- amend Blanket Order 45-506 *Trades to Employees, Senior Officers, Directors and Consultants*.

Background

On February 25, 2003, Bill 14, the *Securities Amendment Act, 2003*, was introduced for first reading in the Alberta Legislature and, on March 12, 2003, Bill 14 passed second reading. If Bill 14 obtains third reading and ultimately becomes effective, it will amend various provisions of the *Securities Act* (Alberta) (the “Act”) including a number of provisions that relate to prospectus and dealer registration exemptions. The ASC requested the amendments that relate to the

prospectus and dealer registration exemptions in connection with adoption of Multilateral Instrument 45-103 *Capital Raising Exemptions* in March 2002. **A summary of the proposed statutory amendments in Bill 14 that relate to prospectus and registration exemptions can be found in the attached schedule.**

The proposed Consequential Rule Amendments are amendments to the ASC General Rules that will be necessary if those proposed statutory amendments become effective. The most significant aspect of the proposed Consequential Rule Amendments is a proposal to create a new \$97,000 exemption. Also of note is the proposal to allow mutual funds and non-redeemable investment funds to report distributions under the \$97,000 exemption on an annual basis.

On March 30, 2002, Multilateral Instrument 45-103 *Capital Raising Exemptions* (“Current MI 45-103”) was adopted in Alberta. On September 20, 2002, the ASC, together with a number of other Canadian securities regulatory authorities, published for comment a slightly revised version of Multilateral Instrument 45-103 *Capital Raising Exemptions* (“Proposed MI 45-103”). If Proposed MI 45-103 is implemented, certain consequential amendments to other provisions of Alberta securities law will be necessary. The MI 45-103 Related Amendments are those consequential amendments. The most significant aspect of the MI 45-103 Related Amendments is the proposal to repeal Form 20 and replace it with a new form, Form 45-103F4 *Report of Exempt Distribution*.

Proposed Amendments to the ASC General Rules

	Changes	Reason for Changes
1.	Repeal s.1(j)	The section provides a definition of “sophisticated purchaser”. The term is only used in the old offering memorandum exemptions (sections 131(1)(q) and (r) of the Act) that are expected to be repealed by the Alberta Legislature.
2.	Amend s. 66 and s.122(d)	The sections currently provide a “top-up” exemption from the registration and prospectus requirements so that a purchaser who previously acquired more than \$97,000 worth of mutual fund securities is permitted to buy more of the same securities (in increments of less than \$97,000) provided the purchaser still owns at least \$97,000 worth of the mutual fund securities. The amendment will provide a new cross-reference to the proposed replacement \$97,000 exemption (described below in row #4).
3.	Amend s.66.1 and 122.1	We propose to repeal subsections (1), (3), (4) and (5) from sections 66.1 and 122.1. These sections specify various limits (dollar amounts and numbers of purchasers) on certain of the statutory exemptions. All of the limits to be repealed relate to statutory exemptions that we expect will be repealed. Accordingly, the sections will become unnecessary.
4.	New s.66.2 and s.122.2	<p>These new sections propose to create both a replacement \$97,000 registration exemption and a replacement \$97,000 prospectus exemption. We previously advised that we intend to retain the \$97,000 exemption for a period of time to consider who is using it. (With this notice, we are seeking comment on who is using the \$97,000 exemption and why it, rather than the accredited investor exemption, is being used.) However, to permit the Commission the flexibility to promptly repeal or amend the exemption at a future date (if considered necessary), the statutory prospectus and registration \$97,000 exemptions will be repealed and a replacement prospectus and registration exemption will be reinstated in the ASC General Rules.</p> <p>Currently, pieces of the \$97,000 exemptions are scattered through various instruments. The exemptions are contained in the statute, a number of additional terms are imposed by the ASC General Rules and then certain of those terms are removed on other conditions pursuant to Blanket Order 87/06/04. The proposed new replacement \$97,000 exemption will consolidate and rationalize these various pieces of the exemption, setting forth all of the conditions in one section of the ASC General Rules.</p>

	Changes	Reason for Changes
		<p>However, the proposed replacement \$97,000 exemption differs from the current \$97,000 exemption in two ways.</p> <ol style="list-style-type: none"> 1. Under the current \$97,000 exemption, if any offering material is provided to an investor, the issuer must give to an investor either (a) an offering memorandum prepared in accordance with ASC Form 43, or (b) under Blanket Order 87/06/04, it may be possible to give the investor only (i) a statement that there is no misrepresentation in the offering document and (ii) a statement of contractual rights of action against the issuer if there is a misrepresentation. Rather than referring to ASC Form 43, the new replacement \$97,000 exemption will refer to the new offering memorandum forms adopted in MI 45-103. Reference to the new offering memorandum forms should make it easier for issuers to use the \$97,000 exemption in conjunction with the other new exemptions in MI 45-103. The issuer will continue to have the option of providing an offering memorandum consisting of a statement that there has been no misrepresentation and a statement of the rights of action. 2. Under the current \$97,000 exemption, if an issuer advertises, it triggers a requirement to provide an offering memorandum in the prescribed form (described above) to a prospective purchaser. We recommend that this condition be excluded from the proposed replacement \$97,000 exemption as it is inconsistent with the recent approach taken by the Commission in MI 45-103. MI 45-103 does not impose any restrictions on advertising and, in particular, the accredited investor exemption (which is the most philosophically similar exemption to the \$97,000 exemption) does not trigger a requirement for an offering memorandum in a prescribed form if the issuer advertises. <p>Note that the other conditions to use of the \$97,000 exemption will remain unchanged, e.g., if offering material is provided to a purchaser under the \$97,000 exemption, it must meet certain form requirements (i.e., Form 45-103F1 or F2 or the required certificate and statement of rights of action) and it is intended to trigger statutory rights of action. Although these conditions are not imposed on the accredited investor exemption, we propose to retain them for the \$97,000 exemption. There are three reasons for maintaining these conditions. First, although both the \$97,000 exemption and the accredited investor exemption are intended to be proxies for testing whether someone is rich enough to withstand the loss of an investment, the \$97,000 exemption may be a more imperfect proxy. Accordingly, it may be necessary to continue to provide greater investor protection to these investors than to accredited investors. Second, the replacement \$97,000 exemption may be only a temporary measure. If it is determined that the exemption will be permanent, the philosophical differences between it and the accredited investor exemption likely will be reconsidered. Third, the Uniform Securities Legislation (“USL”) Concept Proposal recommends that all prospectus exemptions should trigger statutory rights of action if offering material is given to an investor. Accordingly, the remaining inconsistencies between the \$97,000 exemption and the accredited investor exemption may be resolved in the USL project by adding new conditions to the accredited investor exemption rather than removing conditions from the \$97,000 exemption.</p>
5.	Repeal s.122(b)	This section provides a prospectus exemption for trades by an issuer or registered dealer to a registered dealer. The exemption is no longer necessary as the accredited investor exemption provides a broader exemption permitting anyone to trade securities to a registered dealer.
6.	Repeal s.125	This is the section that imposes a requirement to provide an offering memorandum to a purchaser under the \$97,000 exemption if the issuer advertises the offering. For the reasons given in row #4 above, we recommend that the section be repealed.
7.	Amend s.126	<p>This section imposes the resale restrictions (hold periods) on the prospectus exemption at section 122(b) of the Rules, referred to in row #5 above. Reference to that exemption is being removed since we are recommending repeal of section 122(b).</p> <p>Section 126 is also being amended to impose the resale restrictions on the new replacement</p>

	Changes	Reason for Changes
		\$97,000 exemption described in row #4 above.
8.	Repeal s.127	The section imposes conditions regarding the filing of offering memoranda under statutory exemptions that are to be repealed. The section will therefore become unnecessary.
9.	New s.127.1	The ASC General Rules currently require that if offering materials are given to an exempt purchaser, an offering memorandum in Form 43 must be provided to the investor. The new section restates that requirement; however, it proposes two changes. First, under the new conditions, the prescribed form of offering memorandum will not be ASC Form 43, but instead, the forms under MI 45-103. Second, it will permit an issuer selling to an exempt purchaser the option of delivering an offering memorandum prepared in accordance with one of the forms in MI 45-103 or stating that there is no misrepresentation in the material provided and setting forth the rights of action given to the purchaser. This would treat exempt purchasers similarly to purchasers under the \$97,000 exemption.
10.	New s.127.2	The new section imposes the filing requirements for the offering memoranda filed under the statutory exemptions and the new replacement \$97,000 exemption.
11.	Amend s.128	The section prohibits anyone from stating that the Commission has reviewed or approved an offering memorandum. However, the current prohibition is limited to offering memoranda provided under certain of the statutory exemptions. The amendment makes the section apply to all offering memoranda.
12.	New ss.129.1 & 129.2	<p>Currently, the Act requires that a report of trade be filed within 10 days of using certain of the statutory prospectus exemptions. The Act is being amended to remove reference to the exemptions requiring a report and will instead indicate that the exemptions for which a report is required are specified by rule. This new section of the rules will provide this specification.</p> <p>The section will also provide an alternative reporting regime for mutual funds and non-redeemable investment funds relying on the \$97,000 exemption. Those funds will be permitted to report annually rather than within 10 days of the trade. This alternative reporting regime will only be applicable to trades under the \$97,000 exemption. The Commission is also considering including a provision in Proposed MI 45-103 which would permit alternative reporting for funds that use the accredited investor exemption.</p>
13.	Repeal Form 20	We propose to replace Form 20 with a new form, Form 45-103F4 <i>Report of Exempt Distribution</i> . Form 45-103F4 is the report of distribution expected to be introduced by Proposed MI 45-103. That form will be available for filing in any jurisdiction of Canada other than Ontario and Quebec.
13.	Repeal Form 43	We propose to repeal Form 43 - <i>Offering Memorandum</i> . That form is the old form of offering memorandum required under the statutory exemptions. Most of the statutory exemptions requiring an offering memorandum will be repealed. For those limited circumstances where a statutory exemption requires an offering memorandum, we propose to indicate that the prescribed form is one of the new forms of offering memorandum under MI 45-103.
14.	Repeal ASC Rule 45-802	This rule was introduced in March 2002 when Current MI 45-103 was implemented. It was necessary because, among other things, Current MI 45-103 does not specify the required forms under that instrument. However, Proposed MI 45-103 will specify the required forms. Consequently, the rule will be unnecessary.

Proposed Amendments Relating to Other Instruments

	Change	Reason for Change
1.	Revoke Blanket Order 87/05/21 <i>Certain Statutory Exemptions at Sections 65(1)(v)(v.1) and 107(1)(p) and (q) of The Act</i>	The Blanket Order provides an exemption from the requirement to obtain a notarial certificate from a "sophisticated purchaser". The Blanket Order is unnecessary as the condition was previously removed from the Act.
2.	Revoke Blanket Order 87/06/04 - <i>Offering Memoranda and Form 43 of The Securities</i>	The Blanket Order provides certain exemptions relating to the disclosure in a Form 43 offering memorandum and the

	Change	Reason for Change
	<i>Regulations</i>	disclosure that must be provided to an investor under the \$97,000 exemption. We propose to repeal Form 43 and to consolidate all of the conditions to the \$97,000 exemption in one location. Consequently, this Blanket Order will no longer be necessary.
3.	Repeal ASC Policy 5.1 - <i>Statutory Exemptions</i> and ASC Notice 13 - <i>Guide to Raising Capital Without the Need of a Prospectus</i>	This policy and notice provide guidance on use of the statutory exemptions. Most of the exemptions to which the guidance relates are to be repealed rendering the policy and notice no longer necessary.
4.	Amend Blanket Order 45-506 <i>Trades to Employees, Senior Officers, Directors and Consultants</i>	One of the statutory exemptions expected to be repealed by the Act amendments is the exemption that permits trades to employees. However, an exemption for trades to employees will continue to exist through Blanket Order 45-506 <i>Trades to Employees, Senior Officers, Directors and Consultants</i> . Under the statutory exemption, there is no requirement to report trades made to employees. Under the exemption in the Blanket Order, a report of trade to employees is required. Currently, issuers have a choice of which exemption to rely upon and, if they do not wish to file a report of trade, can use the statutory exemption rather than the exemption in the Blanket Order. However, upon repeal of the statutory exemption, this choice will no longer be available. Consequently, we propose to amend the Blanket Order to remove the requirement to report trades to employees. However, in the event that Multilateral Instrument 45-105 <i>Trades to Employees, Senior Officers, Directors and Consultants</i> ("MI 45-105") is implemented by June 16, 2003, the amendment to the Blanket Order will not be necessary as MI 45-105 will replace the Blanket Order and will address this issue.

Effective Date

Staff hopes to make all of the proposed amendments effective **June 16, 2003** (except for certain identified transitional provisions that are intended to take effect 30 days later). However, the timing of the amendments is not entirely within staff's control. We are attempting to coordinate the effective date of these amendments with the proposed date of implementation of Proposed MI 45-103 and the Act amendments relating to prospectus and registration exemptions.

The Consequential Rule Amendments, the MI 45-103 Related Amendments and Proposed MI 45-103 will not become effective unless and until the Commission gives final approval to them and they are published in the Alberta Gazette. Further, since Proposed MI 45-103 is to be adopted in a number of jurisdictions of Canada, timing may be delayed as a result of events in those other jurisdictions. As discussed in the attached schedule, although we have requested that the Act amendments relating to prospectus and registration exemptions be proclaimed effective June 16, 2003, we do not control that process.

Request for Comment

We are interested in your comments on the Consequential Rule Amendments and the MI 45-103 Related Amendments.

In particular, we invite comment on the proposed replacement \$97,000 exemption. We recognize that the \$97,000 exemption is still frequently used and that it is used especially by mutual funds. However, concerns have been raised that there may be investors investing under the \$97,000 exemption that are not wealthy enough to withstand the loss of their investment. We are attempting to assess who is using the \$97,000 exemption and why they are using it rather than the accredited investor exemption. We encourage any comments that would help to better define who uses this exemption and to determine what, if any, modifications might be made to this exemption or to the accredited investor exemption in order that we might continue to facilitate capital raising while addressing these investor protection concerns.

Submissions

Comment letters received on or before April 28, 2003 will be considered. Comment letters can be delivered in hard copy, by fax or by e-mail. Please address your submission to:

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We will place your comment letter on the public file and it will form part of the public record, unless you request confidentiality. If you request confidentiality, we will not place your comment letter on the public file; however, freedom of information legislation may require that the Commission make these comment letters available. As a result, the press and members of the public may be able to obtain access to your comment letter.

Schedule to Notice
Summary of Proposed Statutory Amendments Relating to
Prospectus and Dealer Registration Exemptions

The proposed amendments to the Act contained in Bill 14 are not yet effective. The Alberta Legislature and the Government of Alberta, not the ASC, determine whether Bill 14 becomes law and, if so, the effective date of those amendments. However, staff of the ASC have requested that the amendments that relate to prospectus and registration exemptions be proclaimed effective **June 16, 2003**. (Other amendments contemplated in Bill 14 will likely be proclaimed effective on other dates.)

Bill 14 contemplates a 30 day transitional provision whereby distributions commenced under one of the prospectus and registration exemptions being repealed can be concluded.

The amendments that relate to prospectus and registration exemptions can be summarized as follows:

- Amend the definition of **offering memorandum** in section 1 so that it refers to an offering memorandum required to be delivered under Alberta securities law but not other offering materials that may be delivered voluntarily.
- Repeal the definition of **private issuer** in section 1 as it is defined in Current MI 45-103.
- Repeal sections **86(1)(c)** and **131(1)(a)** which permit trades to financial institutions, insurance companies, governments, etc. because they have been superseded by the accredited investor exemption in Current MI 45-103.
- Repeal sections **86(1)(e)** and **131(1)(d)** which permit trades where the aggregate acquisition cost is at least \$97,000. Concurrently with the repeal of these sections from the Act, we anticipate that the \$97,000 exemption will be reinstated in sections 66.2 and 122.2 of the ASC General Rules.
- Repeal sections **86(1)(i)** and **131(1)(v)** which permit trades to underwriters because they have been superseded by the accredited investor exemption.
- Amend section **86(1)(j)** and repeal section **131(1)(u)** to remove reference to trades between registered dealers as the exemptions have been superseded by the broader accredited investor exemption in Current MI 45-103.
- Repeal section **86(1)(u)** and section **131(1)(o)** permitting trades to employees because they have been superseded by the exemption in Blanket Order 45-506 *Trades to Employees, Senior Officers, Directors and Consultants*.
- Repeal sections **86(1)(v)** and **131(1)(w)** permitting trades between control persons because they have been superseded by the broader family, friends and business associates exemption in Current MI 45-103.

- Repeal sections **86(1)(w)** and **131(1)(p)** regarding trades to facilitate incorporation because they are obsolete and not used.
- Repeal sections **86(1)(y)**, **86(1)(z)**, **131(1)(q)** and **131(1)(r)** permitting seed capital or offering memorandum trades as they are superseded by the broader offering memorandum exemption in Current MI 45-103.
- Repeal sections **86(1)(aa)**, **86(1)(bb)**, **131(1)(s)** and **131(1)(t)** permitting purchasers under an offering made under the exemptions in section 86(1)(y) and 131(1)(q) or 86(1)(z) and 131(1)(r) to trade to each other. The exemptions will no longer be relevant as the exemptions under which the purchasers must have acquired the securities are being repealed. However, the Act will provide transitional provisions for purchasers holding securities previously acquired under those repealed exemptions.
- Repeal sections **86(1)(ff)** and **131(1)(bb)** permitting trades to directors, senior officers, their family, promoters and the close friends and business associates of promoters because they have been superseded by the broader family, friends and business associates exemption in Current MI 45-103.
- Repeal section **87(i)** providing the private issuer exemption as it is superseded by the private issuer exemption in Current MI 45-103.
- Amend section **92** to prohibit unfair practices. This amendment was requested in connection with Current MI 45-103; however, the provision will apply to all trades not just trades under prospectus and registration exemptions.
- Amend section **132** that requires the filing of a report of trade (Form 20 or the proposed new Form 45-103F4) in connection with certain exemptions so that the applicable exemptions can instead be stated in the rules. The amendment also eliminates the requirement for a vendor who is not the issuer to file the report.
- Repeal section **133** which mandates the filing of offering memorandum in certain circumstances. The circumstances in which offering memoranda must be filed are or will be specified in the applicable rules, e.g. Current MI 45-103 or Part 10 of the ASC General Rules. See the Consequential Rule Amendments.
- Repeal sections **134 to 139** which provide resale restrictions on securities acquired under a prospectus exemption and repeal section **140** which provides exemptions for distributions by control persons. These provisions have been superseded by Multilateral Instrument 45-102 *Resale of Securities*.
- Amend section **204** which provides statutory civil liability under an offering memorandum against the issuer. The amendments will extend liability to every director and every other person who signs the offering memorandum (i.e., CEO, CFO and promoters). The amendment will provide for all of the same defences as afforded under

the prospectus civil liability provisions. In addition, the amendments allow a defendant who is found liable to recover a contribution from a person who is jointly and severally liable. Further, the amendments clarify that a misrepresentation in a document incorporated by reference into an offering memorandum constitutes a misrepresentation in the offering memorandum. (These latter two amendments are also expected to be made to the prospectus and take-over bid civil liability provisions).

- Amend section **206** which currently gives purchasers under a prospectus, take-over bid or issuer bid a right of action if they do not receive the disclosure document to provide a similar right to a purchaser who should have been provided with an offering memorandum.
- Create a new section **209.1** which will give purchasers under an offering memorandum a two day right to cancel their investment.
- Amend section **211** to extend the limitation period for an action (other than rescission). Currently, the Act provides a limitation period of the earlier of 180 days from the plaintiff having knowledge of the cause of action and one year from the transaction giving rise to the cause of action. The amendment will provide a limitation period of 180 days from the plaintiff having knowledge of the cause of action and three years from the transaction giving rise to the cause of action. (Section 211 is the general limitation period in the Act; consequently, the change affects more than just limitation periods under an offering memorandum. For example, it would apply to prospectuses.)